


LIBRARY
UNIVERSITY OF MIAMI

L I B R A R Y



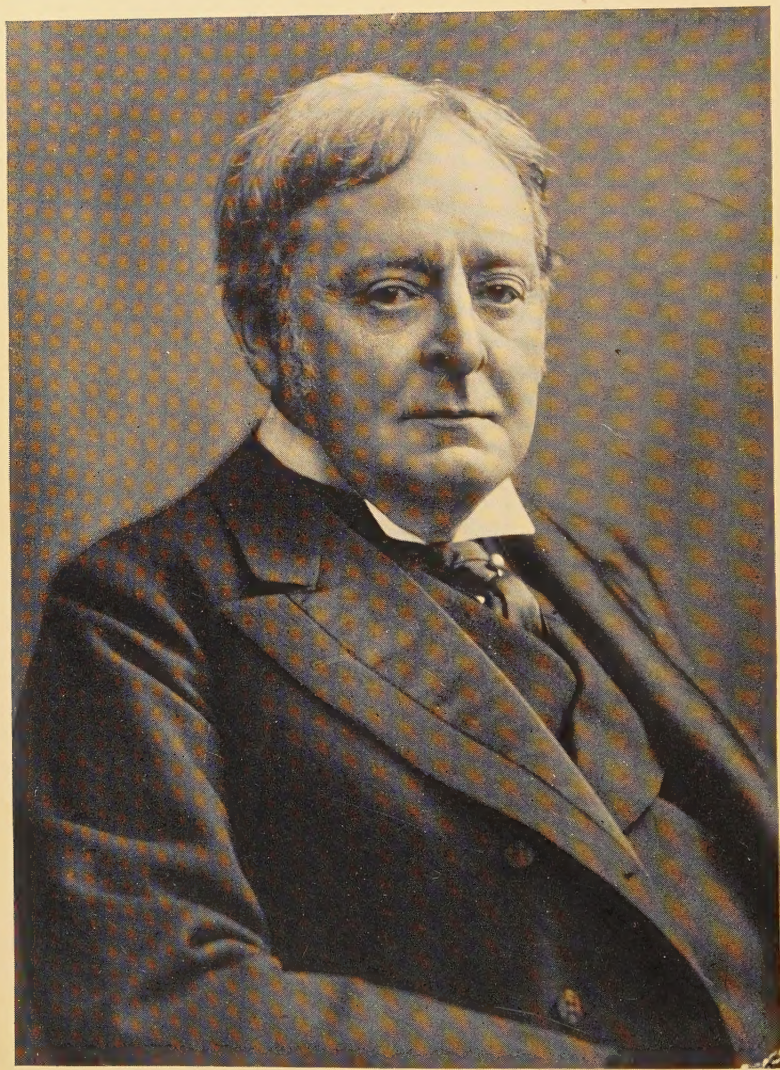
PRESENTED BY
Patterson

LIBRARY
UNIVERSITY OF MIAMI



Digitized by the Internet Archive
in 2025

https://archive.org/details/bwb_Y0-ABS-706



*Mr. Choate at 73
Ambassador to Great Britain
1905*

ARGUMENTS
AND ADDRESSES OF
JOSEPH HODGES CHOATE

COLLECTED AND EDITED BY
FREDERICK C. HICKS, LL. B., LITT. D.

WITH A MEMORIAL
By ELIHU ROOT

ST. PAUL
WEST PUBLISHING COMPANY
1926

7/24/53

2
660

C54

COPYRIGHT, 1926
BY
WEST PUBLISHING COMPANY

CHOATE

LIBRARY
UNIVERSITY OF MIAMI

"We all feel that a great oak has fallen in the forest of our public life, and of our private friendships. That great oak fell, not when its leaves had gone and its branches were bare and it had lost its beauty, but it fell at the very height of its perfection, of its usefulness, and of its charm. It was still putting out new branches; its leaves were yet green; its roots struck daily deeper into the soil of our affections; then suddenly, in obedience to the inexorable law of life, which is death, it came to its beautiful end."—*Nicholas Murray Butler*. (Extract from an address in memory of Mr. Choate, delivered before the Chamber of Commerce of the State of New York, June 7, 1917.)

CHOATE

(iii)*

est were, first, the human beings whom he encountered in the prosecution of his profession—his brother lawyers; second, the trial and argument of cases; third, international affairs; fourth, political and governmental affairs; fifth, successive events and occasions which challenged his interest as a public-spirited citizen; and, sixth, human relations as represented by gatherings of men and women who came together to dine and to talk, either for serious causes, or for sentimental reasons, or for nothing more than good fellowship. In each of these groups, there are addresses which represent interests vital to Mr. Choate; for example, for the first, respect for Rufus Choate, and for James C. Carter; for the second, justice for General Porter and resistance to unconstitutional taxation; for the third, substitution of arbitration for war, and resistance to German aggression; for the fourth, opposition to boss rule by Tweed and Croker, and provision for good government by the New York Constitutional Convention; for the fifth, the founding of the Metropolitan Museum of Art and of the Museum of Natural History in New York; and for the sixth, devotion to Harvard College, to the New England Society, to the Pilgrims, to the Union League Club, and numerous other organizations.

By mental processes stimulated by the above reflections the material of this book was classified, producing in the main the six groups retained. But the categories are not mutually exclusive. To those concerning lawyers (Part I) must be added a number which appear among After-Dinner Speeches (Part VI); to Forensic Speeches and Arguments (Part II) must be added the Hague Court Addresses and those made from the floor in the New York State Constitutional Convention; to Addresses on International Affairs (Part III) must be added the European war addresses found in Part V; to the Addresses on Occasions (Part V) must be added some of the After-Dinner Speeches, which were delivered on occasions of great significance. These cross-sections of groupings are brought out in detail in the index.

The collection and selection of the Forensic Speeches and Arguments was the editor's most difficult task. It will be seen from Mr. Rowe's article, which introduces Part II, that even the most notable forensic efforts of Mr. Choate were very numerous, and often of great length. An address to a jury may fill two days, be punctuated with witty and effective sallies, and become a tradition among lawyers, and yet, after twenty years, be completely lost, except for abbreviated newspaper accounts. Such apparently is the fate of the jury speeches in the Laidlaw-Sage Case. But even of those that are still extant, not all could be printed without filling several volumes. After consultation with some

of Mr. Choate's former professional associates, the selection of eight addresses and arguments* was made as fairly representative of the different types of his forensic efforts—two famous jury speeches, an argument in equity, a summing up before a military tribunal, an argument in a contempt proceeding, and three arguments before the United States Supreme Court. Of these, the three most notable are the argument in the Porter Case and the two in the Income Tax Cases, in all three of which he was wholly successful. Whether he won or failed is not, however, the important point, for, although he was successful in the majority of the cases in which he appeared, his reputed skill in snatching victory out of defeat led him to be called into cases in which success could scarcely be hoped for. What is important is to observe his handling of the problems which confronted him.

For the other sections of the book, selection was more difficult than collection, on account of the great bulk of material. All of his addresses at the Second Hague Conference and at the New York State Constitutional Convention of 1894 are included, while a generous selection has been made of his speeches on occasions to show the wide range of his interests, and from his after-dinner addresses to show his human qualities, his sympathy and the pretty play of his wit, for which he was justly famous. It has been truly said that he was not primarily a politician, and this fact is borne out by the few controversial political speeches printed, in which he is shown not to have had an eye to vote-getting merely, but to be crusading as a reformer, taunting his opponents and happy in the exercise of his wits to ridicule and overthrow them for the public good. His war speeches are among the most notable in the book, although, if Mr. Choate were living, he probably would not select them as examples of public addresses worthy of preservation. They were all delivered after his eightieth year, when the physical effort which they involved was itself a personal danger, yet they were vigorous—youthful almost—and to the audiences who heard them, stimulating, influential and effective. He was a leader to his last hour, and he died in the service of his country.

The arguments and addresses of Mr. Choate have value to lawyer and layman alike, because they are examples of effective public speaking of varied types; because they reveal a real personality of historical significance; because the long period of his life, the wide range of subjects dealt with, and the diverse occasions of his speeches, give to

* See also, *Famous American Jury Speeches*, edited by Frederick C. Hicks, 1925, in which are printed Choate's arguments in the Union Club Case and in the Republic (Steamship) Case.

the whole content of the book, by the use of the index, the character of a reference work; and because they throw illuminating shafts of light on state, national and international episodes, on the development of the law, on courts, judges and lawyers, on notable personages at home and abroad, and on life in many of its kaleidoscopic aspects, all of which are materials of history.

Of Mr. Choate as a public speaker, much has been written, and the memory of him by those who heard him is still vivid. All speak of a personality which added to the mere words of his addresses an atmosphere and a magnetic quality which cannot be conveyed by the printed page. "Whatever the printed brief or the prepared address, the oral presentation was bound to be filled with new ideas, a new point of view, a personal emphasis," says Mr. Rowe. Physically tall, with a relatively large head, plentiful hair, often somewhat tousled, handsome in features, but manly of line and giving an impression of health and physical strength, carefully but not obtrusively dressed, apt to assume careless attitudes, standing with one hand in a trousers' pocket as he spoke, and with a musical voice of tenor quality, flexible, well-controlled, not loud, but of great carrying power, he is universally described as a pleasing and arresting person.

All of the above we miss from the recorded address, but other qualities of the man have not been obscured by cold type. From the printed pages of this book stand out qualities of character which are confirmed by those who knew him best. The names of these qualities make a pleasant catalogue: Boyishness even in manhood and old age, readiness of wit, love of persiflage, sympathetic humor, happiness of disposition, command of sarcasm without himself being out of temper, liberality of thought, industry, catholicity, courage, professional enthusiasm, public spiritedness, tenacity of purpose, friendliness, and lack of assumption without being afraid. Knowing full well that a reputation for wit is the worst forerunner of an orator, he possessed the qualities needed to overcome that disadvantage on occasion. It is evident from his speeches that postprandial oratory was for him a recreation; but confirmation of this conclusion was given by Mr. Chauncey Depew, after Mr. Choate's death, when he said: "Mr. Choate believed, with me, that the mind is fresher and more capable of grasping the questions arising in one's vocation or profession, if there is relief in some other direction. We both found that in after-dinner speaking."

The editorial features of this book need little comment. The forensic addresses and some others are supplied with explanatory statements and footnotes, when they are needed to put Mr. Choate's words into a

proper setting. As far as possible, this has been done in the words of others, rather than in those of the editor. Interruptions by judges, counsel and audiences are retained when the record gave them. The index is intended to bring out in considerable detail the content of the addresses.

Grateful acknowledgment is made to Miss Mabel Choate and to Mr. Joseph H. Choate for the use of material in their possession and for advice, direct help and sympathetic interest; to Mr. William V. Rowe for furnishing one of the speeches, for advice and encouragement, and for the use of part of his article on Mr. Choate; to Mr. Elihu Root for permission to reprint his Memorial of Mr. Choate; to the Princeton University Press for permission to reprint the Stafford Little Lectures; to the Century Company for use of addresses of Mr. Choate formerly published by them; to the Association of the Bar of the City of New York for courtesies in connection with the project to prepare this work; and to Miss Elsie Basset, of the Columbia University Law Library, for much assistance in editorial work.

FREDERICK C. HICKS.

COLUMBIA UNIVERSITY LAW SCHOOL.

*

TABLE OF CONTENTS

	Page
Preface	v
Memorial of Joseph Hodges Choate, by Elihu Root.....	1

I. ADDRESSES ABOUT LAWYERS

James C. Carter. Memorial read before the Association of the Bar of the City of New York, March 13, 1906.....	22
Rufus Choate. Address delivered at the unveiling of his statue in the Court House in Boston, October 15, 1898.....	35
Richard Henry Dana. Address delivered at the exercises in Sanders Theatre, Cambridge, Mass., under the auspices of the Cambridge Historical Society, celebrating the one hundredth anniversary of his birth, October 20, 1915.....	47
John F. Dillon. Memorial read before the Association of the Bar of the City of New York, December 8, 1914.....	62
William Crowninshield Endicott. Memoir reprinted from the Publications of the Colonial Society of Massachusetts, 1907.:.....	78
John E. Parsons. Memorial read before the Association of the Bar of the City of New York, March 14, 1916.....	96
Leverett Saltonstall. Memoir reprinted from the Publications of the Colonial Society of Massachusetts, 1899.....	113
Charles F. Southmayd. Memorial read before the Association of the Bar of the City of New York, 1912.....	139

II. FORENSIC SPEECHES AND ARGUMENTS

Introduction. By William V. Rowe.....	158
Martinez v. Del Valle. Closing address for the defendant, New York Supreme Court, New York, November 23, 1876.....	166
Paran Stevens Case. Closing address for the plaintiff in the case of Richard M. Hunt v. Marietta R. Stevens, New York Superior Court, New York, January 17, 1878.....	178
Fitz John Porter Case. Closing argument for the petitioner before the Advisory Board of Officers at West Point, January 10 and 11, 1879..	198
Burden v. Burden. Argument in equity for the petitioner, in the New York Supreme Court, Troy, New York, December 20, 1890.....	324
Massachusetts Fisheries Case. Argument for the plaintiff in error in the case of Manchester v. Massachusetts, before the United States Supreme Court, January 17, 1891.....	372
Goff Contempt Proceedings. Address at the hearing "In the Matter of the Alleged Contempt of John W. Goff and William Travers Jerome," before Hon. Frederick Smyth, Recorder, Court of General Sessions, Part II, New York, February 20, 1893.....	397
Income Tax Cases. Closing argument on behalf of the complainants, in support of the contention that the Income Tax Law of 1894 was unconstitutional, United States Supreme Court, March 12 and 13, 1895..	419

	Page
Income Tax Cases. Closing argument on rehearing, United States Supreme Court, May 7 and 8, 1895.....	473

III. ADDRESSES ON INTERNATIONAL AFFAIRS

Addresses at the Second Hague Conference, 1907.	
Immunity of Private Property at Sea, June 28.....	528
International Prize Court, July 11.....	549
American Project for International Arbitration, July 18.....	555
Proposed Judicial Arbitration Court, August 1.....	560
Selection of Judges for the Court, September 5 and 18.....	566
Anglo-American Project for International Arbitration, October 5 and 10.....	574
Tribute to M. Léon Bourgeois, October 11.....	586
Washington To-day—Abroad and at Home. Oration delivered on University Day, University of Pennsylvania, February 22, 1908.....	589
The Two Hague Conferences. The Stafford Little lectures delivered in Alexander Hall, Princeton University, April 13 and 15, 1912.	
The First Hague Conference.....	605
The Second Hague Conference.....	624

IV. POLITICAL SPEECHES

The Tweed Ring. Speech at the public meeting called by the Committee of Seventy, Cooper Union, New York, November 3, 1871.....	648
Bad Laws Badly Administered. Address at a special meeting of the Chamber of Commerce of the State of New York, Steinway Hall, New York, March 25, 1874.....	659
Tammany Rule. Speech at a Republican mass meeting in Cooper Union, New York, under the auspices of the Committee of Thirty, March 28, 1894.....	668
Addresses at the New York State Constitutional Convention, Albany, New York, 1894.	
Presidential Address, May 8.....	675
Pensions for Judges, August 22.....	678
Sectarian Schools, August 31.....	682
Presidential Farewell, September 29.....	687
New York State Constitution, 1894. Speech at a mass meeting in Cooper Union, New York, on October 27, 1894, in support of the revised constitution	691
Roosevelt for Governor. Speech at Carnegie Hall, New York, in support of the candidacy of Theodore Roosevelt for governor of New York State, October 5, 1898.....	700
Croker, Hill and Van Wyck. Speech at Chickering Hall, New York, under the auspices of the Blaine Club, October 26, 1898.....	709
Richard Croker and an Unsullied Ermine. Speech at a mass meeting in the Grand Central Palace, New York, in support of the nomination of Justices Daly and Cohen for re-election to the New York Supreme Court, November 3, 1898.....	715

V. ADDRESSES ON OCCASIONS

The American Unitarian Association. Address delivered at a meeting of the Association in Boston, May 29, 1869.....	730
--	-----

	Page
Women in Medicine. Address delivered at the Commencement exercises of the Woman's Medical College of the New York Infirmary for Women and Children, 1873.....	737
Lord Houghton. Address delivered at the reception given to Lord Houghton by the Union League Club, New York, November 23, 1875.....	750
The Legal Profession. Address delivered at the Nineteenth Annual Commencement of the Columbia Law School, New York, May 16, 1878...	754
Metropolitan Museum of Art. Address delivered at the opening of the Metropolitan Museum Building, New York City, March 30, 1880....	761
Admiral Farragut. Address delivered at the request of the Farragut Monument Association, at the unveiling of the St. Gaudens statue of Farragut, Madison Square, New York, May 25, 1881.....	769
President Eliot. Address at the presentation of a gold medal by the Harvard alumni to Charles W. Eliot, on the twenty-fifth anniversary of his election to the presidency of Harvard College, Boston, June 28, 1894	781
American Society of Civil Engineers. Address delivered at the opening of the new society house, New York City, November 24, 1897.....	786
Our Profession. Address delivered before the Chicago Bar Association, February 4, 1898.....	793
Trial by Jury. Annual address before the American Bar Association, Saratoga, August 18, 1898.....	804
Sir Walter Scott. Address before the Edinburgh Sir Walter Scott Club, November 11, 1899.....	828
Abraham Lincoln. Address delivered before the Edinburgh Philosophical Institution, November 13, 1900.....	834
City of London College. Address to the students of the City of London College, at the annual meeting for the distribution of prizes, December 7, 1900.....	857
The Supreme Court of the United States. Presidential address before the Social and Political Education League, London, May 13, 1903.....	864
Ralph Waldo Emerson. Address delivered at the Passmore Edwards Institute, London, June 15, 1903.....	886
Education in America. Inaugural address at the opening of the Oxford University Extension Course of Summer Lectures, August 1, 1903..	894
Benjamin Franklin. Inaugural address, as president of the Birmingham and Midland Institute, October 23, 1903.....	911
Alexander Hamilton. Inaugural address, as president of the Associated Societies of the University of Edinburgh, March 19, 1904.....	938
The English Bible. Address at the Centenary of the British and Foreign Bible Society, London, May, 1904.....	961
John Harvard. Address at the unveiling of the Harvard Memorial Window presented by Mr. Choate to the Dean and Chapter of St. Saviour's Church, Southwark Cathedral, May 23, 1905.....	967
The English Bar. Address delivered at the Thirtieth Annual Meeting of the New York State Bar Association, Albany, New York, January 16, 1907.....	970
Henry Codman Potter. Remarks in memory of Bishop Potter at a special meeting of the Century Association, New York, December 12, 1908..	980
Charles Follen McKim. Address at the McKim memorial meeting held in the New Theatre, New York, November 23, 1909.....	985
American Museum of Natural History. Address at the unveiling of a statue of Morris K. Jesup, at a meeting in commemoration of the founding of the Museum (1869), New York, February 9, 1910.....	993

	Page
What Florence Nightingale Did for Mankind. Address delivered on the fiftieth anniversary of the founding of the first training school for nurses, at the Convention of the Associated Nurses of the United States, New York, May 18, 1910.....	1003
Panama Canal Tolls. Address delivered before the Chamber of Commerce of the State of New York, February 13, 1913, in opposition to a clause of the pending Panama Canal Bill exempting American coast-wise shipping from the payment of tolls.....	1014
National Security. Address delivered at a mass meeting of the National Security League, Carnegie Hall, New York, February 29, 1916.....	1019
National Preparedness for Defense. Address delivered at a special meeting of the Chamber of Commerce of the State of New York, New York City, March 22, 1916.....	1024
Defense and National Service. Address delivered at a special meeting of the Union League Club of New York, March 20, 1917.....	1029
A War for Free Government. Address delivered at the annual luncheon of the Associated Press, New York City, April 24, 1917.....	1033
Impetuous Youth. Address at the official dinner given by the City of New York in the Waldorf-Astoria, May 11, 1917, to the British and French Commissions	1036

VI. AFTER-DINNER SPEECHES

The Englishman's Dinner. Speech at a dinner of the St. George's Society, New York, May 6, 1871.....	1040
St. Patrick and the Irish. Speech at the anniversary dinner of the Society of the Friendly Sons of St. Patrick, Delmonico's, New York, March 17, 1873.....	1043
The Irish in New York. Speech at the anniversary dinner of the Society of the Friendly Sons of St. Patrick, Delmonico's, New York, March 17, 1874.....	1048
Harvard Examinations. Speech at a Harvard alumni dinner, Cambridge, Mass., June 30, 1875.....	1051
The Day We Celebrate. Speech at the seventieth annual dinner of the New England Society in the City of New York, Delmonico's, December 22, 1875.....	1055
The Bench and Bar. Speech at the one hundred and eleventh annual banquet of the Chamber of Commerce of the State of New York, Delmonico's, May 13, 1879.....	1060
The Pilgrim Mothers. Speech at the seventy-fifth anniversary banquet of the New England Society in the City of New York, December 22, 1880	1063
The Horns of a Dilemma. Speech, as presiding officer, at the Harvard alumni dinner, Cambridge, Mass., June 27, 1883.....	1066
Evacuation Day. Speech at the banquet of the Chamber of Commerce of the State of New York, November 26, 1883, in commemoration of the evacuation of New York City by the British, November 25, 1783....	1072
Lowell's Return. Speech, as presiding officer, at the Harvard alumni dinner, Cambridge, Mass., June 24, 1885, on the occasion of the return of Ambassador James Russell Lowell from England.....	1080
John Jay. Speech, as presiding officer, at the dinner given by members of the Union League Club, New York, on the occasion of the seventieth birthday of the Hon. John Jay, June 24, 1887.....	1085
Home Rule. Speech delivered at the one hundred and ninth anniversary dinner of the Society of the Friendly Sons of St. Patrick, Delmonico's, New York, March 17, 1893.....	1089

	Page
Hasty Pudding Club. Speech, as presiding officer, at the centennial banquet of the Harvard Hasty Pudding Club, November 24, 1895.....	1092
The Bar of the State. Speech at a banquet of the New York State Bar Association, Albany, New York, on January 19, 1898, in honor of Charles Andrews and Alton B. Parker, judges of the New York Court of Appeals.....	1096
Anglo-American Relations. Speech at a banquet given in his honor by the Associated Chambers of Commerce, London, March 15, 1899, in response to the toast "Our Guests".....	1102
Farewell to the English Bar. Speech at a dinner given in his honor by the Bench and Bar of England at Lincoln's Inn, London, April 14, 1905.....	1107
Farewell to England. Speech at a banquet in his honor given by the Lord Mayor of London at the Mansion House, May 5, 1905.....	1114
Welcome to America. Speech at a banquet in his honor given by the Pilgrims Society of New York, on the occasion of his return to America, June 9, 1905.....	1121
England and America. Speech at the annual banquet of the Chamber of Commerce of the State of New York, Delmonico's, November 21, 1905.....	1125
Fifty Years Ago. Speech at a dinner of the New England Society, New York City, December 22, 1905.....	1131
Harmony of the Bar. Speech, as incoming president, at a banquet of the New York State Bar Association, Albany, New York, January 17, 1906.....	1140
Earl Grey and Benjamin Franklin. Speech at a dinner of the Pilgrims Society to Earl Grey, governor-general of Canada, Waldorf-Astoria, New York, March 31, 1906.....	1144
Welcome to James Bryce. Speech introducing Ambassador Bryce, at a dinner given by The Pilgrims, New York, March 23, 1907.....	1149
Justice Hughes and the Supreme Court. Speech at a dinner given by the New York County Lawyers' Association in honor of Mr. Justice Charles E. Hughes, February 18, 1911.....	1155
Farewell to James Bryce. Speech, as presiding officer, at a dinner given to Ambassador Bryce by The Pilgrims, New York, April 25, 1913...	1159
Elihu Root and Public Service. Speech at a dinner given by the New York County Lawyers' Association, March 13, 1915, in honor of Elihu Root, retiring U. S. Senator and president-elect of the New York State Constitutional Convention, 1915.....	1164
Harvard Club. Speech at the celebration of the fiftieth anniversary of the Harvard Club of New York, November 3, 1915.....	1168
Retrospect. Speech at a dinner given in his honor by The Pilgrims, at the Union League Club, New York, January 27, 1917.....	1172

INDEX

(Page 1179)

MEMORIAL OF JOSEPH HODGES CHOATE *

By ELIHU ROOT

JOSEPH HODGES CHOATE was born in Salem, Massachusetts, January 24th, 1832, and died at his home in the City of New York, May 14th, 1917, in the fourth month of his 86th year. He was graduated from Harvard College in the class of 1852, and from the Harvard Law School in 1854. He was then for a year a student in the office of Leverett Saltonstall of Boston, and he was admitted to the Bar of Massachusetts in 1855. In September of the same year he removed to New York City; and after passing a few months in the office of Scudder & Carter, he entered the office of Messrs. Butler, Evarts & Southmayd, where he remained for nearly three years. In the meantime, in 1856, he was admitted to the Bar of New York. In August, 1858, he formed a law partnership with Mr. W. H. L. Barnes, subsequently a leader of the Bar of California; but early in the following year he returned to his former associates, and became a partner in the law firm of Evarts, Southmayd & Choate, a relation which continued throughout the entire professional lives of the partners. He was married in October, 1861, to Miss Caroline Dutcher Sterling. There were five children of the marriage, three sons and two daughters, of whom three survive, one daughter and two sons, one of whom bears his father's name and is a member here. Mr. Choate was one of the founders of this Association, a signer of the preliminary articles by which it was created in December, 1869. He was President of the Association in 1888 and 1889, President of the Bar Association of the State of New York in 1906 to 1908, President of the American Bar Association in 1898 and 1899, and President of the New York County Lawyers' Association. He was a member of the Commission of 1890 appointed by the Governor under legislative authority to report a revision of the judicial system of the State of New York. He was President of the Constitutional Convention that in 1894 framed the Constitution under which the people of the State still live. In January, 1899, he was appointed Ambassador from the United States to Great Britain, and he served his Country in that office for six years until May, 1905. On the 10th of April, 1905, the Bar of England claimed him as a fellow of that great com-

* Read at the Choate memorial meeting, Association of the Bar of the City of New York, December 20, 1907.

pany by electing him to be a Bencher of the Middle Temple. Upon his return to his home he resumed his activity at the Bar; but in 1907 he was again made Ambassador, and the head of the Delegation from the United States to the Second Hague Conference, where he contributed an important part to the substantial advance in the establishment and definition of International Law and Procedure accomplished by that Conference. Upon his return from The Hague he again resumed practice, less actively of course than in earlier years.

In the meantime he had come to be a Doctor of Laws of Amherst, Harvard, Yale, Williams, Union, the University of Pennsylvania, of McGill and Toronto, of Cambridge, Edinburgh, St. Andrews and Glasgow, and a Doctor of Civil Law of Oxford.

The forty-three years which elapsed between admission to the Bar in 1856 and the Embassy to Great Britain in 1899 were filled by the work of the pure lawyer. Neither business nor recreation nor politics nor any other interest diverted him from a continual and amazing activity in the trial and argument of causes. He was never an attorney. Circumstances and natural adaptation placed him from the beginning altogether upon the court rather than the office side of that line which exists in the nature of things between the duties of the barrister and the duties of the solicitor, and made him an advocate.

He was wise and resourceful in counsel, continually called into conference for opinion and advice for the direction of conduct and avoidance of litigation; but the main business of his life was conflict at the Bar. In all branches of the law, civil and criminal, common law and equity, military, ecclesiastical, patent, probate, marriage and divorce, constitutional, international, before juries, judges at *Nisi Prius*, arbitrators, courts martial, statutory committees and commissions, in all tribunals where judicial functions were to be exercised, up to the Supreme Court of the United States, his potent voice was heard asserting and maintaining rights for more than sixty years. He achieved the most brilliant and distinguished success. He was the delight of juries who yielded gladly to his charm, and the pride of courts who felt the dignity of their office enhanced by his appearance before them. His discussion of great constitutional questions strengthened the foundations of our free institutions. His shining example was an inspiration to the Bar and the despair of emulation.

The law reports presented continually accumulating evidence of the most substantial basis of a lawyer's reputation, for the reports of causes argued by him supported the judgment of those who heard or read the arguments that they exhibited a wide range of sound learning,

extraordinary discrimination, capacity to divine crucial questions, and power of effective presentation. The reports gave evidence also of an extraordinarily high proportion of success in the causes tried and argued, continuing through so long a period of years as to be conclusive proof of the possession of those solid qualities of advocacy which alone command enduring success. This great preponderance of success in litigation was notwithstanding the fact that for so many years of his life his conspicuous merit as an advocate brought to him great numbers of difficult and doubtful cases, in which the parties sought to overcome a probability of defeat by superiority of counsel. As the generations of the profession passed, traditions gathered about the path he had traversed,—stories of his great achievements, of brilliant attack and desperate defence, of wonderful cross-examination and masterful argument, of wise and witty sayings, of humor and satire, of imperturbable self-possession and poise, of swift insight, of courage and audacity, told by judges and lawyers and jurors and court officers, were repeated wherever lawyers gathered, and became a part of the common professional knowledge of the history of the Bar.

As he grew older in the profession, his attention as a lawyer became less exclusively concentrated upon the interests of particular cases, and was broadened in scope to include the administration of justice as a whole. The public duties of the Bar, the ethics of the profession, the lessons of its history, the inspiration of its great examples, attracted more of his thought as his experience increased. In his addresses as President of the State and National Associations of the Bar, in his speeches to the Bar when from time to time it met upon casual occasions, in the memorials read before this Association, in his speeches to the Constitutional Convention, in many of his formal public addresses, first among which stands the noble address upon the unveiling of the statue of Rufus Choate in the Court House in Boston, he expressed so clearly the underlying spirit and purpose of the American Bar, he represented with such cogency and command the Bar at its best of real devotion to justice and liberty, that the finest thought and feeling of the profession came to follow him, and to look to him as a leader, not merely because he tried causes more skilfully or argued them more powerfully than others; but also, because he put the power and prestige of his great reputation in the courtroom behind the thrust of advocacy for the honor and public service of the Bar as a whole. He has told us what his conception of advocacy was and his whole life helped mightily to establish that high standard. He said:

"I maintain that in no other occupation to which men can devote their

lives is there a nobler intellectual pursuit or a higher moral standard than that which inspires and pervades the ranks of the legal profession. To establish justice, to maintain the rights of man, to defend the helpless and oppressed, to succor innocence, and to punish guilt, to aid in the solution of those great questions legal and constitutional which are constantly being evolved from the ever varying affairs and business of men are duties that may well challenge the best powers of man's intellect and the noblest qualities of the human heart."

Thus, the recognition of power and promise which he commanded from his seniors in the 60's was gradually succeeded by universal admiration, deference, and pride in his leadership among the juniors of his later years. Wherever the class consciousness of the Bar of New York sought expression in the comradeship of social intercourse, in protest against abuse, in repelling assaults upon the administration of justice or demands for its improvement, in concerted action upon any great public question, his came to be the sympathetic leadership, his the clear voice, the commanding authority, the unimpeachable representation of the noblest impulses of the profession. The great leaders and colleagues of his early and middle life passing from the stage left him alone without an equal or a rival, the most eminent, the most admired, and the most revered advocate and counsellor of the Bar not only of New York but of our Country.

In this Country of popular self-government, however, it did not satisfy him to be successful in the trial of causes, or to win the respect and admiration of the Bar alone. To be a great American lawyer in the broadest sense, one must be a great Citizen, and Mr. Choate was that. He realized that our system of law striking its roots far back in the customs and struggles in which the liberties of England were developed, shaped by the fathers of the Republic to suit the conditions of a freer life, adapted from generation to generation to meet the new requirements of National growth, rests always upon the foundation of general public conviction that it is fit and adequate to secure justice and to preserve individual liberty. He knew that public respect for law, public confidence in the judicial system through which the law is administered, public faith in the wisdom and rightfulness of those great rules of conduct which we have written into our Constitutions for the limitation of official power in its relation to the life, the liberty, and the property of the private citizen, are essential to the maintenance of the most vital rights which from day to day we assert in the courts. He welcomed the privilege of the American lawyer not merely to insist upon the application to his client's case of the principles of Amer-

ican law, but to assert and defend the principles themselves before the great governing body of American citizens who make and can unmake the law. He understood that American lawyers cannot rightfully be a separate body cultivating a mystery, that they ought to be an active part of the citizenship of the Country sharing in the formation and expression of its opinion, in its social and political life, and by virtue of their special knowledge and training, leaders of opinion among their fellows in the community. He said to the Chicago Bar in February, 1898:

"But at all times, and especially in this our day, great public duties await us. So long as the Supreme Court exists to be attacked and defended, (that sheet anchor of our liberties and of our Government), so long as the public credit and good faith of this great Nation are in peril, so long as the right of property which lies at the root of all civil government is scouted and the three inalienable rights to life, to liberty and the pursuit of happiness which the Declaration of Independence proclaimed and the Constitution has guaranteed alike against the action of Congress and of the States, are in jeopardy,—so long will great public service be demanded of the Bar.

"Let us magnify our calling. Let us be true to these great occasions, and respond with all our might to these great demands, so that when our work is done, of us at least it may be said that we transmitted our profession to our successors as great, as useful, and as spotless as it came to our hands."

These functions of the American lawyer Mr. Choate performed with unwearying interest and devotion, and with signal distinction. He received from his Massachusetts ancestry and brought with him from his old Salem home a large measure of that amazing formative power, which, proceeding from the few scanty settlements on the Atlantic shore, has moulded this vast Continent with its hundred millions of people according to the course of the common law, and to conceptions of right inspired by the spirit of Magna Charta, and of the immortal Declaration of rights unalienable, to secure which governments are instituted.

The blood in his veins, the influences of early environment of education and training, the foundations of his political belief, all made impossible for him the conception of a free community in whose public affairs it was not the duty of every private citizen to take an active part. He took such a part as a matter of course, and with an effectiveness natural to his exceptional powers. His intense and instinctive patriotism made him keenly alive to the welfare of the Nation, and of

the State and City in which he lived. The strain of labor in the Courts never prevented him from doing his full share both in government and in the public movements and private enterprises, through which a democratic community develops the best side of its nature.

At the age of 35 he was President of the New England Society in New York, the organization which for more than a century has done honor to the history and spirit of his race. At 41 he was President of the Union League Club, that institution created in the darkest days of the Civil War to promote, encourage, and sustain absolute and unqualified loyalty to the Government of the United States. He was President of the Harvard Club, of the Harvard Law School Association, of the Century Association. For forty years before his death he was a Governor of the New York Hospital. He was President of the New York Association for the Blind. He was President of the State Charities Aid Association. He was one of the incorporators of the Metropolitan Museum of Art, and one of its Trustees for the 47 years which followed its organization in 1870; and for many years before his death he was Chairman of its Law Committee, and a member of its Executive Committee, and Vice-President. He was one of the incorporators and during all its existence a Trustee of the American Museum of Natural History. He was an active Trustee and the Vice-President of the Carnegie Endowment for International Peace. He was Vice-President of the Society for the Judicial Settlement of International Disputes. He was a member and Chairman of the Subcommittee on Elections, of the Committee of 70, that Committee which roused the honest citizenship of New York to the rescue of the City from the shame of the Tweed Ring control. He was Honorary President and an active coadjutor in the National Defence League, which did so much to arouse the patriotic people of our Country to realize the deadly peril to their liberty of possible German military domination, and to make them understand that the time had come when American Institutions must be defended again by force of arms, or must perish. He was not a dreamer to reject the natural agency of political parties in popular self-government, and he did not hold himself aloof from the activities of the Party which seemed to him the best agent of government. He never changed or wavered in his political allegiance. He made his first public political speech for Frémont in 1856, and his last for Hughes in 1916; but he conceived of a political Party as an organization by which many citizens agreed upon major questions of principle and policy may give practical effect to their opinions in actual government. His interest was in the public effect of

Party control, not in office or emoluments. His activity was in the leadership of opinion, not in Party management; he took little or no part in that. He sought no office, and he entered into no combinations. He held no Party office. I remember that moving some 40 years ago into a new neighborhood, and attending for the first time the Republican Association of the old 21st Assembly District, I found him there attending to his duties as a citizen; and he was there as one of the rank and file. He was always in the ranks. But, when the time of conflict came between opposing Parties or against misleading leadership in his own Party, when serious decisions were to be made by the instructed judgment and conscience of the people, then he was wont to come as a champion from the ranks with all the weapons in the armory of debate, with clarity of statement and destructive satire, and power of appeal, and charm of persuasion, against things sordid and corrupt, against the follies of ignorance and prejudice, against indifference and decadence and for the cause he deemed just, for the living spirit of American institutions.

He did not reserve himself for great occasions and great efforts; but gave without reserve to the everyday activities which taken together fill so great a part of the life of the community. In the multitude of gatherings half public half social through which the members of a community are welded together in sympathy of good fellowship and of opinion, he played a leading part for almost half a century. It is hard to understand how any man engaged in the exhausting labors of a crowded professional life could find the strength and resiliency of body and mind to make speeches in vast number at public dinners and luncheons and meetings for all sorts of objects, where he delighted and instructed the crowd year after year during his long active life; yet, he did so with undiminished brilliancy until the end. It would have been impossible but for a strong and active interest in the life of the world, in everything that went on in the community, and a genuine liking for the people among whom he lived, sympathy with their feelings, and understanding of their characters. He was never uninteresting. His wit and humor never obscured or belittled his serious thought, and his serious thoughts were never dull. He richly merited the great fame he acquired as an after-dinner speaker. In viewing that phase of his activity as a whole, it is plain that he made it the means of great influence and useful service. He promoted causes and institutions in which he was interested, and inspired in the tens of thousands who listened to him not merely admiration and grateful remembrance, but respect for his authority, and acceptance of his ideas.

The reputation of many great lawyers is confined to their own profession; but the wide range of his activities extended a knowledge of his great abilities and commanding character to the public at large, and brought appreciation from the general body of good citizens. To achieve a commanding position in the public life of this great Country ordinarily requires the holding of high office. The office itself cannot give the holder such a position, but it carries to the minds of the great multitude who have to form their judgments chiefly upon hearsay, a presumption of a right to be heard in public affairs. The presumption may not be justified and may fade out of existence, but it is the door of opportunity, and few men acquire great public consideration without it. Almost entirely without the aid of office, Mr. Choate acquired universal recognition as a great public character, a significant figure in the public life of his time, speaking with authority and entitled to leadership of opinion. This position was fully established before he was appointed Ambassador to Great Britain, and he was appointed to that office because of it. The basis of that great position was achievement at the Bar, and the devotion of powers trained at the Bar to the duties of a private citizen in the service of the community and the Country.

Nature was very kind to him. She gave him a sound body, a constitution capable of enduring without injury the strain of long continued and severe effort, and a temperament which saved him from the exhausting effect of worries and fears and passions and vain regrets, and she gave him a physical presence most impressive and attractive. He was tall, fully six feet in height, slender and erect in his early years, broad shouldered, and carrying an impression of poise and balanced strength; the leonine head was set perfectly in its place, and his face was luminous even in repose with the beauty of intellect and nobility of character, sublimated and manifestly active and dominant. His voice was clear, pleasing to the ear, and far carrying. I do not recall that he ever strained it, or seemed to be forcing it unduly. He was never oratorical even in passages of greatest force and feeling. His manner was dignified and courtly, but perfectly simple and unaffected, and it was the same everywhere and to everybody. Forty odd years ago, when we were in the beginnings of a friendship which has been for me one of the chief satisfactions and joys of life, I used to think that he was the most beautiful and splendid specimen of manhood I had ever seen. I have revised my judgment upon this; for, after the Declaration of War with Germany, when he knew that the manhood and honor of his Country had re-asserted themselves, in the benign and radiant face with its lines of old experience and wisdom, made

purser and gentler by trial and high endeavor, still alert with intelligence and feeling, shining with the joy of unselfish patriotism, and in the massive form bowed under the weight of a noble life, there was a beauty surpassing that of conquering youth; and the memory of it is a benediction.

His mind was strong, well balanced, and wonderfully alert and rapid in action. Its response to the emergencies which so continually arise in court was instantaneous, and apparently intuitive. Extraordinary power of discrimination and a sense of material and crucial questions relieved him of the burden of bothering over immaterial matters, and enabled him to work with great ease. This faculty, combined with his vast experience, led some younger men who were with him as juniors to think that he worked very little; but that was a mistaken idea. He worked very hard and with great intensity, but he was happy in escaping the great mass of unnecessary work which most of us have to do. When he came to New York in 1855 he brought a letter from his father's cousin Rufus Choate to Mr. Evarts. He prized this letter very highly, and I am sure that he would not have exchanged it for any patent of nobility. I will reproduce it here:

"BOSTON, 24 Sept., 1855.

"MY DEAR MR. EVARTS,

"I beg to incur one other obligation to you by introducing the bearer my friend and kinsman to your kindness.

"He is just admitted to our bar, was graduated at Cambridge with a very high reputation for scholarship and all worth, and comes to the practice of the law, I think, with extraordinary promise. He has decided to enroll himself among the brave and magnanimous of your bar, with a courage not unwarranted by his talents, character, ambition and power of labor. There is no young man whom I love better, or from whom I hope more or as much; and if you can do anything to smoothen the way to his first steps the kindness will be most seasonable and will yield all sorts of good fruits.

"Most truly,

"Your servant and friend,

"RUFUS CHOATE."

The particular expression of this letter which he valued most was the reference to his "power of labor", and he never regarded as a compliment the suggestion that he reached his results without the exercise of that power.

This letter points to one of the chief influences in the development of his character and the direction of his life. No one who has watched

his career and has read the address in which he paid his tribute to the majestic and lovable personality of Rufus Choate, can fail to be convinced that widely as they differed in temperament and in their surroundings, admiration and reverence for his great kinsman was one of the controlling influences of the younger life. Much as they differed, there was a striking resemblance in the standards of life, the intensity of application, the tenacity of purpose, the ardor of conflict, combined with the broad and kindly view, the strong sense of humor, the love of literature and reliance upon its broadening and humanizing influence to correct the narrowing effect of exclusively professional interests, the impulse for public service and the intense love of Country: all these were found in both the older and the younger Choate. One was the spiritual successor of the other. Rufus Choate came to the Bar in the year 1823, and he continued for four years after his young relative's admission. Thus, for almost a hundred years these two men of the same name and family, products of the same influences, and inheritors of the same traditions and the same ideals, adorned and ennobled the American Bar, and each in his turn rose to great heights of honor and renown. The younger man was fortunate also in associating during the formative period of his career with really great leaders whose influence tended along the same lines of development. How could there be broader scope or loftier spirit than he found in Mr. Evarts, the advocate and statesman, eloquent, philosophical, delightful companion, the wittiest lawyer of his time, and Mr. Southmayd, the typical solicitor, learned, logical, cautious, independent in judgment, stubborn in opinion, caustic in expression. They were not merely partners, they were friends, and nothing could be more delightful than the intercourse between them.

Our friend was enabled to use his intellectual power to the highest advantage by two qualities of the first importance. One was his clear and instinctive courage. He was wholly free from any impediment of timidity. This quality did not impress one as being the kind of courage which overcomes fear, but, rather, as a courage which excluded fear. With him, no such emotion as fear seemed to exist. The other closely allied quality was a universal and invincible cheerfulness. In all my varied opportunities for observation for many years, he was the same. I never knew him to be sullen, or sour, or bitter, or cross, or fretful. He strongly condemned some things and some men with force and picturesque expression, but never with the least tinge of malevolence. He had his griefs, which sank deep in his heart, but his buoyant spirits and high courage forbade them to control his conduct;

and, through them all, he presented the same bright and cheerful face to the world. He brought to the breakfast table always the same genial and cheery lifting of spirit which made him such a welcome guest at the banquet tables of New York. He was as lively and interesting with a dozen friends, or with one friend, as with 500, because he was entirely free from false pretence, and he was the same man with the public audience that he was with his close and private friends. He had a most serene and imperturbable temper. He never lost his self-possession or entire control of his powers. Safe upon this ground of vantage, he took special delight in making his adversary angry, and in reaping the benefits.

He was a loyal and devoted friend, as he was loyal to every cause he espoused, and to every case he undertook; and he left no debt of friendship unpaid. No trouble was too great, no labor too arduous for him to help a friend. His power of satire and ridicule were terrible weapons, and he used them unsparingly, always most fatally when he was most gentle and childlike in manner. When engaged in battle he used all his weapons without respect of persons, and his thrusts often wounded his friends at the Bar more deeply than he probably knew. Yet, I think he never lost a battle through friendship, or lost a friend through what he said or did in battle. It was impossible to cherish resentment against him. He fought as those gay and debonnaire youths of Dumas, who drew their swords with alacrity, and, rejoicing in their skill, fought joyously upon all suitable occasions without anger or malice, to death or victory or eternal brotherhood. Before a jury he was a master of the art of appearing surprised, and of appearing indifferent; but nothing was further from his habit than personal display. Anyone with his appearance and talents might be pardoned for thinking of so agreeable a subject as his own person; but he never appeared to do so. He was thinking always of his object, and carefully studying the minds and feelings of those to whom he spoke. He studied his juries, his judges and his audiences with sympathetic insight, and his favorite method of capturing their judgment was by boldly invading the field of their personal experience and interest, making himself at home with them, and when he departed leaving his own ideas with his audience as a part of their household goods. He very seldom told a story. His wit and humor did not percolate through him from the gesta Romanorum, or from the pages of American humorists. They were the natural reaction of his own mind from his perception of the persons and events that surrounded him at the time. He was a fountain, not a conduit, of humor. His speeches were in-

teresting because his way of looking at men and life was fresh and original.

It is quite inadequate to say that he was always cheerful and interesting. He had in him something far beyond that, which I cannot describe to myself better than by calling it the eternal boy in him. He rejoiced in life. He spurned dull care. He bubbled over with fun. He dearly loved a little boyish mischief. That was rather a dangerous faculty, but the danger gave it zest. There is an old story (I think it belonged to Mr. Evarts) of an American assuring an Englishman that Washington could throw a dollar across the Potomac because he had thrown a sovereign across the Atlantic. Mr. Choate would never have deigned to tell that ancient joke here, but when he got to England and before an English audience he could not resist the desire to see his English friends contemplating the aerial flight of their sovereign, and he told it I think several times. It befell me to sit near him at a famous St. Patrick's Day Dinner, and he stopped at my chair and made a remark which indicated that he was having huge enjoyment with himself over something he was going to say. When he suggested that the Irish in America should redeem poor unhappy Ireland by going home, he was following the same kind of boyish impulse for mischief which leads school boys to carry their disconcerting pranks to the limit of audacity.

He had great force and nobility and purity of character. He made the world his debtor by great usefulness in many fields. He deserved and received great praise and admiration for his achievements; but, after all, I think it was the delightful "boy" in him that made us love him. It was that which joined to his other qualities made him so different from ordinary men. It was that blithe spirit which gave color and life and light to the whole character.

He had something that superior intellect and character do not always give—he had distinction; and above all, he had charm—that inexplicable quality whose origins are veiled among the mysteries of life.

Mr. Choate owed his selection as a delegate at large to the Constitutional Convention of 1894 largely to the fact that there seemed little probability of a Republican success in the election of 1893. He was so much of a free lance, his shafts of ridicule had wounded so many organization leaders, that in ordinary times there was little chance of his receiving a nomination really desired by any of the faithful. The Democrats were then, however, under the astute management of Senator Hill in control of the machinery of the State Government. They were in possession of the National Government also, and the in-

fluences which had driven the Republicans from power both in the Nation and the State seemed still to be dominant. The Republican ticket for 1893 was accordingly made up rather less than usual under the influence of a desire to distribute Party reward, and rather more than usual with a view to present a list of candidates who would secure all the chances of success possible, and whose defeat might be regarded with philosophy on the part of the Organization. In addition to this, the fact that the work of the Constitutional Convention of 1867 had been rejected by the people, and that the work of the Constitutional Commission of 1890 had not received sufficient popular support to prevent its being ignored by the Legislature, had created an impression that the work of the proposed Convention would have no practical results. There was accordingly little pressure for nominations to the Convention, and Mr. Choate's name readily found a place at the head of the delegates at large as a means of giving distinction to the whole ticket.

When it turned out that there had been a political revolution in the State, and that the Republicans had a majority of the Convention, including all the delegates at large, his selection as President of the Convention followed as a matter of course, and for a period of nearly five months during which the Convention was in session he presided in the most delightful and effective way. He did not trouble himself very much about the technical details of parliamentary procedure. He preserved the substance of it of course; but he was very fond of getting things done, and would sometimes make the most surprising shortcuts to reach results,—always results, however, which would certainly have been reached by the more cumbrous process of slower minds, and never at the sacrifice of the substantial rights of the minority, and he always maintained his positions in such a way as to fill the souls of the majority with joy and command their enthusiastic support. Occasionally, when there was a heated debate, he would take the floor, and his speeches were always of great power and cogency. I always thought of the Olympians joining the fray under the walls of Troy. Two speeches that rest especially in my memory are: one in support of the new judiciary article, and one upon the public schools. There had been an attempt to insert in an article reported by the Committee on Education a clause which would authorize State aid to schools under religious control. This was regarded by some of us as dangerous in the highest degree, tending to break down the separation between Church and State, and to destroy our whole unsectarian public school system. The attempt succeeded in the committee of the whole; but, when the

article was reported to the Convention, there was a counter attack, and Mr. Choate left the chair, and came down to the floor, and made a fine and noble speech. The real nature of the thing that was being done was made plain, and the vote was reversed, and the obnoxious provision was defeated.

It was my good fortune to be by his appointment Chairman of the Judiciary Committee of the Convention, and that position carried by custom the leadership of the majority on the floor of the Convention, so that we were obliged to be in constant conference over the business of the session. Accordingly, we took a house together near the Capitol, and kept house jointly during the entire period, and I had exceptional opportunity to know about the influence which he exercised over the conduct of affairs. We kept open house for the members of the Convention, and almost every important Convention question was considered and discussed there. He was practically a member of every committee, and his clear vision and sound practical sense made themselves felt in every department of the Convention work through those personal conferences and discussions which properly play so great a part in shaping the judgment and directing the action of every deliberative body.

Mr. Choate's service in the foreign affairs of the Country was of the highest value. When he was appointed Ambassador from the United States to Great Britain at the age of 67, there were several very serious and difficult questions between the two countries which required to be treated with great skill and judgment if serious controversy was to be prevented. The very positive defiance of Great Britain in Mr. Cleveland's Venezuela message of December 1895, and the general expression of American feeling in support of that defiance, had created an atmosphere not altogether favorable to mutual concessions. This had been modified, but not wholly dispelled, by Great Britain's discouragement of European intervention during our war with Spain, and by the wisdom and good sense of Mr. Hay and President McKinley on the one side and Lord Salisbury on the other during the first two years of the McKinley Administration. Only a few months before Mr. Choate's appointment a joint High Commission established for the settlement of a formidable array of Canadian questions, sitting alternately in Canada and Washington, with Lord Chancellor Herschel at the head of the British section, and Vice-President Fairbanks at the head of the American section, had reached an impasse, and had dissolved without any settlement. The chief and apparently insuperable obstacle which barred the Commission from settlement upon any ques-

tion was the deadlock over the Alaskan Boundary. That was a serious and critical matter, because at any time a new gold discovery in the disputed territory was liable to bring the miners on either side of the line into actual hostilities, and to set all Canada and Western America aflame. Under the diplomacy of Mr. Choate in London and Mr. Hay in Washington a *modus vivendi* was established; and a treaty was made providing for the submission of the boundary questions to a tribunal composed of an equal number from each country charged to hear the evidence, and decide according to law. The tribunal sat in London in the year 1903, and by its judgment the controversy was finally determined. With that stumbling-block removed, every other question which was before the joint High Commission of 1898 has since been satisfactorily settled and disposed of.

When Mr. Choate was appointed, the United States had just reached a full realization of the necessity of a canal across the Central American Isthmus under American control. We were forced to that realization by the results of the war with Spain, the cession of Porto Rico, and the responsibility for the protection of Cuba, by the growth of population and commerce on the Pacific Coast, by the acquisition of Hawaii and the Philippines, by the appearance on the horizon of grave questions of international policy towards the Far East. It was necessary for our internal commerce and our naval protection that our Atlantic and Pacific coasts should be united by a ship canal under our control; but the way was blocked by the Clayton-Bulwer Treaty of 1850, under which the United States and Great Britain had agreed that any such canal should be practically under a partnership of the two nations. The object could not be attained while that Treaty stood. Under the wise and highly competent diplomacy of Mr. Choate in London and Mr. Hay in Washington the partnership was abandoned, and the obstacle of the Clayton-Bulwer Treaty was removed upon the sole condition of equal treatment to the commerce of the world in the canal to be built and controlled by the United States.

When Mr. Choate went to London, China seemed to be on the verge of partition by the great Powers, who had established naval and military stations and spheres of influence in Chinese territory, and who, mutually suspicious, were reaching out each for more control, in order to prevent other powers from acquiring it. There was no escape from partition except by stopping that process. With partition the door for American trade with China would be closed, and the opportunity of China for liberty and self-government would disappear. America alone was free from suspicion, and from that vantage ground Mr. Hay

undertook to stop the process of partition by proposing a universal agreement upon the principle of the open door. Without the agreement of Great Britain effort would have been useless. It fell to Mr. Choate to secure that agreement from the British Government, and it was given cheerfully and ungrudgingly, and the principle of the open door was established in China. So far it has saved for China her territory and her opportunity to try out her experiment of self-government under Republican institutions. Incidentally, it was the relation of mutual confidence established by that agreement, which made it possible for the troops of America, England, Japan, France, and Russia, to co-operate in the march to Peking, and the rescue of the legations in the Boxer uprising in 1900.

The diplomatic correspondence of that time shows the great part Mr. Choate played in these most important affairs, and how great was the skill and competency he exhibited in the negotiations which they involved. There were many other important things done,—and well done,—during his six years of service. Let no one suppose that results in the negotiation of such affairs come of themselves. They require long and patient labor, quick perception, judgment of character, tact, skill, and wisdom. Incompetency is fatal.

His service in direct relation to the people of Great Britain was perhaps even greater than his service in negotiation with the British Government. The most important thing in the relations between modern democracies is the feeling of two peoples towards each other. If they like each other and trust each other, any question can be settled. He carried to Great Britain the same readiness for service, the same social unselfishness, the same cheerful, brilliant and interesting qualities as a public speaker, which had made him so admired and beloved at home. He accepted countless invitations to attend countless banquets and cornerstone layings, and openings of institutions, and unveilings, and celebrations, and meetings of all kinds, and to make countless speeches. Ambassadorial dignity did not injure him in the slightest degree. He must have been often wearied, but he was never bored, for he really interested himself in the affairs and the characters of the people. He talked to them in a sympathetic way about their affairs, and he told them simply and interestingly about the great men of our history and what Americans were doing, and thinking, and feeling. He was clever and stimulating, and enveloped his serious thought there as he did here with a mantle of humor and fun. He must have kept our British cousins guessing for a while at first, but they soon came to know him, and to understand him with undiluted enjoyment. Upon

formal and serious occasions he delivered carefully prepared addresses, admirable in literary form and in serious thought, on Benjamin Franklin, on Alexander Hamilton, on Lincoln, on Emerson and on John Harvard, on the Supreme Court of the United States, Education in America, and, appealing to the common sympathies of both countries,—on the English Bible. He represented the people of the United States to the people of Great Britain for so long a period on so many occasions in so many ways and so delightfully, as to create an enduring impression of the highest value. We did not see then as fully as we see now that a good understanding between Great Britain and the United States was no ordinary international affair, but that these two nations inspired by the same ideals of individual liberty and free self-government were destined to fight together, and stand or fall together, in defense of their common liberty against the hateful dominion of military autocracy; and that our friend's six years of unwearied labor to unite the two nations in strong ties of good understanding and kindly feeling was a special service to civilization.

The selection of Mr. Choate as an Ambassador Extraordinary at the head of the American Delegation to the Second Hague Conference in 1907 followed naturally upon his career at home and in Great Britain. No other man in the United States had shown himself possessed in so high a degree of so many of the qualities necessary for that service. He had learning without pedantry, power of expression which never sacrificed accuracy to rhetoric, or sense to sound, courage saved from rashness by quick perception and long experience, the lawyer's point of view and the statesman's point of view, the technique of forensic debate, and the technique of diplomatic intercourse. His brilliant success in the Embassy to Great Britain and the high position which he had acquired there had made his great reputation known to the public men of Europe, who at that time ordinarily knew little and cared less about American lawyers, so that he was able to speak at The Hague with great personal prestige and authority. His work at The Hague fully met the expectations of his Government, and fully justified his selection, for he became one of the great leaders of the Conference and held a commanding position in its deliberations, and under him the whole American delegation worked together with admirable team play. If any part of his work were selected for special praise, it should be his addresses upon the immunity of private property at sea, on International Arbitration and on the establishment of an International Court of Justice, all of which show very strikingly how much this Country lost when New York failed to send Mr. Choate to the United States

Senate in 1897. The events of the Great War have tended to obscure in most minds the value of the things done in The Hague Conferences; but that is only because the irresponsible brute force of Germany and her allies has thrown over the whole world the dark shadow of a revolt of barbarism against modern civilization. Notwithstanding the fact that all the rules of international law declared or agreed upon in The Hague Conferences have been flouted and broken and ground to powder, during the past three years, and notwithstanding that the idea of a peaceable settlement for international disputes seems for the moment to have slipped back into the company of idle dreams, yet the declarations and agreements of those Conferences took many fundamental principles and rules of the law of nations out of the obscurity of inaccessible treaties and conflicting text writers, and made them a distinct and known basis on which the world has rendered its judgment of condemnation upon the conduct of Germany and her allies. And when modern civilization re-asserts its control,—as it is sure to do,—the community of nations seeking to regulate its affairs so that peace rather than war may be normal, will inevitably make its starting point from the platform established by Mr. Choate and his colleagues at the Second Hague Conference. A multitude of plans for the re-organization of the world after the war have been appearing continuously ever since the war began. Most of them settle everything except the difficulties; but they are all alike in one respect. Their postulates are identical with the conclusions reached by the Second Hague Conference on questions which had been doubtful and controverted.

But the greatest of all the services which Mr. Choate rendered to his Country in his long and useful life was at the close, when he realized—as he did very soon after the beginning of the war—that the independence and liberty of the United States were threatened less immediately but not less certainly than those of England and France, by the German grasp for military dominion. With all the vigor and strong conviction of youth he abandoned the comfortable leisure to which the ninth decade of his life entitled him, and threw himself with enthusiasm into the task of making his Countrymen see as he saw the certain dangers that lay before them, and the duty that confronted them to rouse themselves and act, for the preservation of their own liberties and the liberties of the world. With voice and pen he pressed his appeal with all the authority of his great reputation, with the wisdom of his experience, the power of an intellect undimmed, of a heart still warm, with the intensity of a great and living patriotism. When that appeal and the appeal of others who thought and felt with him

were answered, and the great decision was made that committed a slowly awakening people to struggle and sacrifice for the preservation of the institutions which he had defended all his life, a great relief and joy possessed him. He was made Chairman of the New York Committee for the reception of the Commissions from England and France under Balfour and Viviani and Marshal Joffre, who came to America after the declaration of war to confirm and help to make immediately practical and effective the new league of Democracy for the war against autocracy. It was his part to lead the people of his own City in a reception of our new Allies, so generous and warm-hearted as to strike the imagination of the people of all three countries.

He met the French Commission and then the British Commission. He welcomed them in our behalf with gracious and impressive hospitality. He rode with them through the streets thronged with cheering crowds, and shared with them the respect and homage accorded to the significant and representative figures of that great and unique occasion. He attended all the receptions and banquets, and public and private entertainments, by day and by night, which attended their visits. Daily and sometimes twice, and sometimes three times a day, he made public addresses, appropriate and dignified, and full of interest and deep feeling. His adequate representation filled his own people with pride, and aroused their patriotism and their noblest qualities, and he impressed our guests with confidence and satisfaction.

When the final service of the crowded week was finished, at the Cathedral of St. John the Divine on Sunday, the thirteenth of May, he bade Mr. Balfour good-bye with the words "Remember, we meet again to celebrate the victory", and with stout and cheerful heart he bore the burden of his years to his home to meet the physical reaction that he had been warned was inevitable; and in a few hours the great heart filled with the impulses of noble service and with love of Country and liberty and justice, ceased to beat. He had given his life for his Country.

I

ADDRESSES ABOUT LAWYERS

JAMES COOLIDGE CARTER

MEMORIAL READ BEFORE THE ASSOCIATION OF THE BAR OF THE CITY
OF NEW YORK, MARCH 13, 1906

James Coolidge Carter was born at Lancaster in the State of Massachusetts, on October 14th, 1827, and died in New York City, February 14th, 1905—his life covering a period of seventy-seven years and four months, just two-thirds of the existence of the Government of the United States. He thus lived during the administration of twenty of our twenty-five Presidents. In this single lifetime our country grew from twenty-four States, with 12,000,000 of people, to forty-five, with 80,000,000 and 10,000,000 more in our conquered dependencies—made material progress such as no equal period of the world has witnessed in any country, and became a world power ready and able to take a just and leading part in international affairs—Mr. Carter, coming into life with no advantages whatever but his own natural gifts stimulated by poverty and the spur of necessity, grew with the growth of the country and by sheer force of brains and character, had become at the time of his death one of her best known and most valued citizens, the acknowledged leader of the great profession of the law, foremost among its 110,000 votaries—and exercising a wide and powerful influence for good among the people of his time. Such a career is no accident, and it is interesting to recall as briefly as possibly the steps by which he rose from obscurity to national and international distinction.

When I entered Harvard College in 1848, Mr. Carter, who had already been there for two years, was a very marked man among the three hundred students who then constituted the entire community of that little college. To very commanding abilities he added untiring industry, and to lofty character most pleasing manners, a combination which made him easily foremost. He was filled with an honorable ambition, and took all the prizes, and not content with perfection in the college curriculum, he took an interest in the public questions of the day, and cultivated the art of public speaking with discriminating assiduity. Like all the young men of that day he was a devoted admirer of Mr. Webster, who did more than any other man to kindle the patriotism and arouse the national spirit of the younger generation, and I always thought that he modeled himself upon that noble example in style, in expression and in the mode of treating every question that arose. In-

deed in his last years I regarded him as the last survivor of the Websterian School. Dr. Storrs, who died some years before him, was another example of that noble school, and if he had followed the law as he began it, he would have been just such another lawyer as Carter, and his most formidable rival.

From lack of means, Mr. Carter found it a hard struggle to get through college, and even to enter it. For this reason he came two years late, having, I believe, engaged in some commercial employment to enable him to enter. He did not hesitate to avail himself of the generous aid of an admiring fellow townsman who recognized his great qualities, and meant that they should not be lost to the world. Just as Rufus Choate once told me, that it would be better to borrow the money for your college education at ten per cent. compound interest than not to get the education at all.

Well, seeing his manifest ability, his spirited and attractive personality, and his sympathetic interest in all our college affairs, we all recognized him as our leader. He exercised a potent influence upon all his companions. He was made Class Orator at Commencement—and entered upon life with assured prospects of success. But still the lack of means was an obstacle to his immediate entrance upon the profession of the law, to which he looked forward as the only one possible for him. I believe that he never had a thought of any other occupation in life. So, upon graduating he betook himself to teaching as a necessary means to that great end.

It is interesting to read the letter which Judge Willard Phillips, a great jurist and author of the leading work on marine insurance gave him to the gentleman in New York who had applied to him to recommend a teacher in his family. The letter bears date June, 1850, just before he graduated. It says:—

"The young gentleman who has been spoken with for instructor in your family is Mr. James C. Carter of Lancaster, Mass., a member of the Senior Class. He can teach all the branches of English education and the classics, he is, as Professor Pierce assures me a thoroughly educated, talented, accomplished, sensible and pleasing young gentleman, of good principles and high morals."

How many of us have had our first steps in life smoothed by just such letters!

At the same time that he took this engagement for a year's service as a teacher in the summer of 1850, he entered the office of Kent & Davies as a student, but his attendance there was only nominal. This firm was composed of Henry E. Davies, afterwards Chief Judge of the Court

of Appeals, and William Kent, the son of the Chancellor, who had been at one time a Circuit Judge, before the adoption of the Constitution of 1846. He always spoke of Judge Davies with great respect and esteem, but he simply loved Judge Kent, of whom he always spoke to me in terms of unbounded affection and admiration.

He remained in New York teaching till the autumn of 1851, when he entered the Dane Law School at Harvard and remained there three terms till the spring of 1853—so that I was with him there again for six months, and had full opportunity to observe that the same qualities which had made him so distinguished in college, to which was now added an unbounded enthusiasm for the law, made him still a leading and commanding spirit among his new associates.

What an impression he had left at the office in New York, in spite of his scanty attendance there, appears from the fact that in February, 1853, Mr. Davies visited the Law School and said that he had come on to see Mr. Carter—that his firm of Kent & Davies was about to dissolve—that he was going to take Henry J. Scudder as junior partner and wanted Mr. Carter to come to him as managing clerk. Mr. Carter accepted the position, and was soon after admitted to the Bar in New York. In 1854, Mr. Davies withdrew, to become Corporation Counsel, and the firm of Scudder & Carter was formed, with whom it was my good fortune to study the Code in the following year. This firm under its successive organizations of Scudder and Carter, Carter and Ledyard, Carter, Rollins and Ledyard, and Carter, Ledyard and Milburn has occupied a great place in the annals of the profession in New York.

But the firm of Scudder and Carter started in 1854 substantially as a new firm, and Mr. Carter instead of deriving any special benefit from it at the outset in his career at the Bar, had to make his own way there. It served as a good personal introduction to the profession, by whom he was received in that cordial and hospitable spirit which, when our Bar was smaller, was more characteristic of it.

He made no brilliant debut in the courts as Mr. Evarts had done in the celebrated Monroe Edwards case. He was not plunged at once into a great volume of business as some of us were who joined as juniors, old and long established firms, the elder members of which were already overworked. He had to paddle his own canoe and work his way up stream. But slowly and surely on a solid basis of work well done, he advanced step by step, and soon came to be recognized by his seniors at the Bar, by such men as Daniel Lord and O'Connor and Cutting and William M. Evarts and William Curtis Noyes, as a

young man who must be reckoned with, and as a foeman likely to be worthy to meet them in any cause.

From the first he aimed at nothing short of perfection in everything that he undertook, and as his ideals were high, and his conscience supreme, this involved an amount of labor and self absorption seldom if ever exceeded. In those days he had but few social duties or pleasures to distract him from minding the main chance, success on the forensic side of the profession, and to that he was able and eager to devote all his energies of mind and body. I know of no lawyer whose success was more fairly earned or more thoroughly deserved, or less derived from adventitious sources or external aid. By his own might he worked his way to the front. Let me try very briefly to trace the personal qualities which were the weapons by which he won the victory. For I have known personally all the lawyers in New York who for the last fifty years have one after another been foremost among us—and no two of them were alike.

Well, he had a very sound mind in a very sound body. But those are the common and necessary requisites of any measure of success. His mental endowments were of a very superior and splendid quality, and he appreciated his own intellectual powers and revelled in the exercise of them. Thinking, which to most of us is a painful and tiresome process, he delighted in, and pursued it as a most fascinating game. His mind was of a decidedly philosophical turn, fond of considering and solving all the problems of human society and progress—and the reasoning powers which in most of us are dwarfed or twisted, in him were naturally and fully developed. Logic as a pastime was as acceptable to him as golf or bridge is to the average man to-day.

He was undoubtedly extremely ambitious—but his ambition was of a very high order and made of the sternest kind of stuff. He would not stoop to conquer and disdained to climb by unworthy means. His nature was robust and his disposition combative, so that he loved the contests of the forum and its triumphs and trophies were a great joy to him. He eagerly seized the palm of victory, but with him it was always *palma non sine pulvere*, and always fairly won.

His conscience was clear as crystal, and never went back on him, as it sometimes does on men whose mental vision is less clear than his.

Absolute independence was the controlling feature of Mr. Carter's mind and character. It marked and guided his whole conduct, professional, public and personal. He must act on his own carefully matured judgment no matter with whom or with what it brought him in

conflict—and he had the courage which naturally accompanies such independence of character.

He was not without a large share of self-assertion, and yet was one of the most unselfish of men.

Imbued with a high sense of public duty, and most ardently patriotic, he studied with keen interest public questions as they arose from time to time, and was ever willing to give his fellow citizens the benefit of his opinion, but he never sought office and never allowed his interest in public affairs to distract him for a moment from the pursuit of his chosen profession, well knowing what a jealous mistress the law is.

His power of labor was prodigious, and as he had given no hostages to fortune in the shape of wife and children, he was always ready and able to serve his clients and the cause of justice with relentless devotion.

By nature warm hearted and magnanimous, he was one of the most loyal and persistent of friends, and in spite of his contentious life, I never heard of his having an enemy. He was too just and generous for that.

These excellent mental, moral and physical endowments, were the effective instruments by which he worked his way to fame and fortune.

His professional conduct and habits were just what you would have expected from such a character. He honored and magnified his profession, and fully recognized the debt which, as Lord Bacon says, we all owe to it. He scorned all mean and trifling arts, and relied solely on the merits of his cause and his own prowess in maintaining it.

He had a unique habit when he had embarked in a cause, of first convincing himself of its justice, before he undertook to convince court, or jury, or adversary. He was very far from limiting himself to causes that he thought he could win, or to such as were sound in law or right in fact. No genuine advocate that I know of has ever done that. He recognized and maintained the true relation of the advocate to the courts and the community, that it is a strictly professional relation, and that either side of any cause that a court may hear, the advocate may properly maintain. For him newspaper clamor had no terrors. He realized that the newspaper is accuser, judge and executioner, all in one, but for all that he could and did maintain the unpopular side of a controversy with the same zeal and fidelity, as if the whole press were backing his client's claims. As his fame increased he was called, like the leading physicians, into the most grave and critical cases—and I have no doubt that he lost in the long run more cases than he won. But having once undertaken the conduct of a case he made a careful study of it to try to build upon the facts a theory con-

sistent with his own sense of right and justice, which he might fairly and earnestly present to the favorable consideration of the court—and in this he generally succeeded—and having once convinced himself, he could apply all the clearness, force and earnestness of which he was master to convince the tribunal, whether court or jury.

He had such reliance on his own judgment, and confidence in his own opinion, that when he had once found the theory satisfactory to his own mind, on which he ought to present the cause, he never changed or departed from it, no matter what arguments the other side might present, or what decisions the court might make as the cause progressed; and even when the court of last resort had pronounced against him, he bowed to the law which the court by reason of its power had declared, but still maintained the theory which by the power of his reason he had evolved in the case. This forensic habit often gave to his weaker adversaries, who could tack and trim their sails as the judicial breezes changed, an apparent advantage. He would present his case on the first and second appeal, more strongly and more forcibly, of course, but it was always the same view of the same case, and we knew exactly where and how we should have to strike to meet it. This absolute reliance on his own judgment sometimes led him to underrate the force of his opponent's position. He regarded and treated the propositions of his adversary as "notions," and was surprised and indignant when they commanded the approval of the Court.

In another respect, also, he sometimes in the arena exposed to his adversary a vulnerable flank. So masterly was his independence of mind and character, that he was not always willing to admit or to recognize the binding force of precedents, however numerous, which failed to run the gauntlet of his own reasoning powers. One of his favorite maxims was, that nothing was finally decided until it was decided right, and so no amount of so-called authorities was sufficient to dissuade him from maintaining the contrary view.

So earnest and zealous and well sustained was his advocacy, that he sometimes presented the appearance of seeming to drive the court, which a weak judge would resent, and take refuge in his power to decide, while a strong judge would lock horns with him on the spot.

Mr. Carter's forensic character was a most interesting one to study, and it was always hard to say in the particular case whether those features, which seemed to give his adversary an advantage, were elements of strength or of weakness. But on the whole, he grew to be the most formidable advocate, in both the State and Federal courts, and was, I think so recognized throughout the country.

My judgment of him in this respect is confirmed by a review of the cases in which he was constantly engaged. They were mostly leading cases of great difficulty, magnitude and danger, involving the severest responsibility, and challenging the best powers of the advocate. A mere list of their titles recalls their overwhelming importance, and the prodigious labor that must have been involved in their preparation and argument. In all the important branches of the law, he seemed to be equally at home. Great maritime and commercial causes, great railroad controversies and, above all, great constitutional cases were constantly engrossing his attention and taxing his powers. His sense of duty and justice to his clients was shown, not only by his exhaustless labors in their behalf, but by the extreme moderation of his fees and charges. We used sometimes to think that in his careful consideration for his clients, he hardly did justice to the profession; and in this respect, by the great weight of his reputation and example, rather lowered the standard which we, with a more realizing sense of the wants of life, desired always to see highly advanced. But as long as lofty character, commanding abilities, and loyalty to the profession and to the truth constitute just and abiding claims to the admiration of lawyers and of laymen, we shall always be proud of his leadership and grateful for his example. A nobler model, on which young advocates may mould their careers, cannot be found in legal annals.

Early in his professional career, Mr. Carter's splendid talents and faculties attracted the special attention of the great leaders of that day, and particularly of Mr. Charles O'Connor, who was pre-eminent among them, not merely for profound erudition, but also for an experience seldom equalled, in all branches of the law, for his keen and subtle learning, and for his supreme contempt of all shams and false pretences in the way of the profession. He saw in Mr. Carter a kindred spirit, and a junior upon whom he could rely for thoroughness equal to his own—for inexhaustible power of labor, and for absolute devotion to any cause which he undertook, and they soon became co-laborers in several causes of unique magnitude, importance and difficulty. Probably no lawyer then at the bar was so exacting of himself or of his juniors in the preparation and trial of a cause as Mr. O'Connor, and Mr. Carter fully satisfied his most strenuous demands. In the great cause of the City against Tweed, to establish the claims of the City for that long series of deep-laid frauds and peculations by which, through a period of many years, it had been robbed of millions—a trial which extended through several weeks and involved an examination of the most complicated system of thefts which had been exposed by the

ingenious researches of Governor Tilden; the combined powers of Mr. Peckham, Mr. Carter and Mr. O'Connor were drawn upon to their utmost to unravel the tangled skein.

Mr. Carter's intimate and constant association with Mr. O'Connor, and laboring with him through many years had a marked and lasting effect upon the younger man—as such associations generally do have. The modes of thought and study, the absolute thoroughness, the exhaustless research, the style of speech, and even the modes of utterance, and expression of feature and mode of gesticulation of the younger man carried always a suggestion of his great senior. Of course, it was only an unintended and unconscious resemblance—for Mr. Carter was a much broader and fuller man than Mr. O'Connor, much more highly and generally educated, and more full of sympathy and sentiment—a bigger hearted man and built on a larger scale. And yet, what he thus insensibly imbibed or absorbed from Mr. O'Connor did strongly characterize his forensic conduct and style, and lent much force and emphasis to his bearing in court—and always recalled an impression of the great Irish advocate.

Before the trial of the Tweed case, another tremendous cause, still more laborious, absorbing and exciting had arisen,—The Jumel Will Case, and in this, in all its various forms from beginning to end, Mr. Carter and Mr. O'Connor were constantly associated, and bore between them the whole brunt and burden of the arduous contest. It involved not only the most difficult and diverse questions of law that called for great learning and study, but issues of fact of a highly dangerous and complicated character: questions of pedigree, marriage, paternity and consanguinity—dependent for their solution upon old and doubtful documents and papers, upon the fading memory of aged witnesses, upon history and tradition, and upon gatherings from the border line of evidence—all appealing strongly to the imagination as well as to the reason of the advocate; and there is no doubt that to this whole range of study and preparation, and to the final success in the case, Mr. Carter contributed, at least, his full share.

But he paid a bitter penalty for these splendid achievements and triumphs, for, taken with his own regular practice, which was already large, this additional burden proved too much for even his marvellous power of labor, and it ended in a truly tragical catastrophe. The exciting trial of the Jumel case attracted great popular interest, and engaged the attention of Judge Shipman and a jury in the United States Circuit Court for many weeks. The long hours of every day in court were a constant nervous strain, and the longer hours of every night

were protracted vigils of labor;—with an utter disregard of the commonest laws of health, even of the universal rule that the only cure for fatigue is rest—so that the wonder was that mere flesh and blood could stand it as long as they did.

Mr. O'Connor was a rule unto himself, and reversed the usual custom, taking himself the opening of the case and throwing the summing up upon his junior so that Mr. Carter, in the true spirit of the advocate, was in his own mind summing up the case every minute from the first word of the first witness to the last word of the last, and all the while defying the demands of nature for regular food, sleep and repose. His part was splendidly performed, but when the fatal morning of the closing argument arrived, and Mr. Carter arose to address the jury, after a few halting words it was manifest that nature could go no further, and he collapsed upon the spot, so that Mr. O'Connor, whose physique seemed to be made of gutta-percha and steel springs, had to take his place and sum up the case himself. But with the true grit and pluck that characterized him, he persevered, after a temporary recovery, in the trial of the Tweed case, and conducted a vast mass of litigation for the City besides, which resulted in a more disastrous breakdown, and for a period of nearly three years he appeared no more at the Bar or in New York. All his unique power of labor had disappeared—he was incapable of the least exertion, and his friends who saw him in the interval hardly dared hope that he would re-appear in the arena whose contests were so dear to him.

But his splendid constitution contained such reservoirs of strength and such living springs of vigor that in 1880, after three years of complete retirement, he came once more upon the scene, fully armed and equipped and ready for new contests. In truth, his long period of retirement and repose seemed to have renewed and invigorated all his powers. So that he entered upon another twenty years of professional achievement of the very highest order and dignity, which he sustained with new and constant safeguards of repose and sport and exercise, the neglect of which had so nearly proved fatal to him before.

From 1880 to 1900 his employment in the courts, State and Federal, was constant in causes of the greatest magnitude and importance, a mere enumeration of which demonstrates that he was all the while a most potent factor in the development of the law and the settlement of momentous constitutional questions. The most important of these were *Langdon vs. The Mayor*, which determined the respective rights of the City and of the riparian proprietors in the extension of the dock lines of both rivers; *The Nebraska Rate Case*; the cases of *The North River*

Sugar Refining Company, and The Aqueduct Case; the Income Tax Case; The Tilden Will; The Joint Traffic Case and the Trans-Missouri Case;—and these alone involved an amount of labor and study that is almost appalling. But his vigor seemed rather to increase with his years, and he was more than adequate to all the demands upon him.

All these great and conspicuous cases conducted with exquisite professional skill, with unflinching courage and courtesy, and with all the eloquence that earnest conviction and ever youthful enthusiasm could arouse, established his fame as a lawyer throughout the country, on a basis as nearly imperishable as any lawyer's ever can be. But his employment in 1893, as one of the chief counsel of the United States before the Tribunal established by the Treaty with Great Britain for the settlement of the long vexed Behring Sea dispute in regard to the Seal Fisheries—and the characteristic manner in which he performed that great service, gave him an international reputation of the highest value. He was associated with Edward J. Phelps and Frederic R. Coudert, and to oppose them Great Britain, as she always does on such occasions, selected her best, in the persons of Sir Charles Russell and Sir Richard Webster, both afterwards Lord Chief Justices of England under the names of Lord Russell of Killowen and Lord Alverstone. Both of those gentlemen have often expressed to me their profound appreciation and admiration of Mr. Carter's ability and forensic faculties, as displayed in that great international cause, and their warm friendship for him, which grew out of their protracted and intimate acquaintance with him in the course of it—in which he showed himself as the great lawyer and gentleman. The contestants were admirably matched, but the balance of the cause was most unequal, for our counsel had to rest their case upon the claim of property right in the seals, accruing to the United States from their being bred upon the Pribiloff Islands which we had acquired from Russia as part of the Alaska purchase, and our consequent right and duty to protect them wherever found on the high seas, to the extent that we might replevy them at the South Pole, and by force prevent any interference with them by vessels of other nations pursuing the business of pelagic sealing. The authority for the first proposition at common law was of the most meagre character, while there had certainly been no international agreement to the second proposition.

Great Britain relied upon the universally established doctrine of the freedom of the seas, and upon the proposition that the right of fishing on the high seas could not be interfered with except by the common consent of nations restraining the right.

We certainly had the strongest moral grounds for claiming the protection of the herd of seals from destruction, on our own account and on account of the world at large—and if the case could have been decided upon what ought to have been international law, our contention would have been more hopeful—indeed irresistible.

It was just the case for the exercise of Mr. Carter's characteristic qualities and methods in their very finest and highest forms. It fell to his lot in the division of labor between our counsel to open the case, which he did in a most exhaustive and eloquent argument of seven days. The preparation which this involved was incredible—for his argument contained an exhaustive history of the controversy, a complete narrative of Russian and American rule in Behring Sea for nearly a hundred years, an exploration of the habits of seals and of seal fishing during the entire period, a discussion of the principles of international law bearing nearly or remotely on the subject of dispute, the origin and growth of the right of property, particularly in animals, and the interpretation and effect of all treaties and regulations bearing upon the questions involved. It is needless to say that after months of toilsome preparation, Mr. Carter came to the argument with a theory of the case which, to his own mind, was absolutely irresistible, and pressed it upon the Tribunal with an eloquence, earnestness and force which even he had never equalled, that his splendid gifts of imagination and illustration were brought into play with graphic power, and that if we could have won the case by demonstrating what international law ought to have been, and what expediency, humanity and civilization demanded in the particular case, it was more than demonstrated. His argument, like all his arguments at the Bar from the beginning, was extremely dignified and pitched upon a very lofty plane of morals and right. But he was storming an impregnable citadel, when he sought to diminish the freedom of the seas without the warrant of an international agreement to that effect. It is greatly to be regretted that his labors could not have resulted in an effective agreement between the nations to that effect, so far as pelagic sealing was concerned, for the herds have already nearly vanished from the Islands, and the industry, most useful under proper limits, has been well nigh destroyed.

The time prescribed to me will hardly permit even an allusion to the great services rendered by Mr. Carter in maintaining by precept and example the dignity of the profession, and its protection from everything unworthy, in preserving the common law in its integrity as the basis and method of our jurisprudence, and rescuing it from the destructive assaults of the wholesale codifier; in his constant and

courageous warfare against everything that looked like corruption in the courts or in the profession; in his active participation in the foundation of this Association, as the bulwark of a sound and pure administration of justice; in his service again and again as its President, and in his persistent and successful efforts at all times to keep it up to the mark, and to achieve through its instrumentality the lofty objects of its founders.

It is melancholy to think how fast the memory of all this splendid service and achievement, of which I have given such a meagre and inadequate sketch, is fading away. He had for the last six or seven years of his life retired absolutely from the practice of his profession, so that to the younger members of the Bar his face and figure, which had once been so familiar in the courts, were almost unknown.

But in these years of retirement rendered necessary by constant threats of a return of the malady which had once laid him so low, he was never idle. He enjoyed these years in the heartiest manner, spending a large part of each of them in outdoor life and sports which he had learned to love so well, and to value so highly, as the only safeguards of declining health. But all the while his heart and mind were intent upon a great work, which he has left as a legacy to the profession, and which, if I am not mistaken, will long perpetuate his reputation as a jurist.

In a course of carefully prepared lectures on the philosophy of the law, which I have had the privilege of reading, completed just before his death, and intended to be delivered at the Harvard Law School, he has embodied the rich fruits of his ripe experience and learning, of which it will be an enduring monument. He has explored and portrayed the whole history of human conduct, in support of his favorite theory that law instead of being a "command" as defined by Austin, and other distinguished writers upon the subject, is entirely the growth of custom and of public opinion, that the common law as developed by English and American courts is the wisest and safest form of administering justice, and best adapted to the ever changing needs and exigencies of human society, and that all attempts to substitute in its place a rigid and crystallized codification in any form, must necessarily fail of their object. In this effort he has garnered up all the wealth of learning, of imagination, of common sense and of foresight, which in his long and busy life, devoted to his divine mistress, he had made his own. It is delightful to think that this masterpiece of legal literature, practically perfect as it came from his hand, will transmit some knowledge of the man to future genera-

tions, when all the great controversies in which he was engaged have lost their interest and been forgotten.

I have necessarily refrained from enlarging at all upon the spotless purity and manly independence of his public life and of its great and beneficent influence upon the thought of his Time—and of those charming and endearing traits of personal character, which made him so beloved in life and so lamented in death by all who had the great privilege of knowing him.

RUFUS CHOATE

ADDRESS DELIVERED AT THE UNVEILING OF HIS STATUE IN THE
COURT HOUSE IN BOSTON, OCTOBER 15, 1898

I deem it a very great honor to have been invited by the Suffolk Bar Association to take part on this occasion in honor of him who still stands as one of the most brilliant ornaments of the American Bar in its annals of two centuries. Bearing his name and lineage, and owing to him, as I do, more than to any other man or men—to his example and inspiration, to his sympathy and helping hand—whatever success has attended my own professional efforts, I could not refuse the invitation to come here to-day to the dedication of this statue, which shall stand for centuries to come, and convey to the generations who knew him not some idea of the figure and the features of Rufus Choate. Neither bronze nor marble can do him justice. Not Rembrandt himself could reproduce the man as we knew and loved him—for until he lay upon his death-bed he was all action, the “noble, divine, godlike action” of the orator—and the still life of art could never really represent him as he was.

I am authorized, at the outset, to express for the surviving children of Mr. Choate their deep sense of gratitude to the generous donor of this statue of their honored father, and their complete appreciation of the sentiment which has inspired the city and the court to accept it as a public treasure, and to give it a permanent home at the very gates of the Temple of Justice, at whose shrine he worshipped. They desire also to express publicly on this occasion their admiration of the statue itself, as a work of art, and a faithful portrait, in form and feature, of the living man as he abides in their loving memory. The City of Boston is certainly indebted to Mr. French for his signal skill in thus adding a central figure to that group of great orators whom its elder citizens once heard with delight—Webster, Choate, Everett, Mann, Sumner and Garrison. In life, they divided the sentiments and applause of her people. In death, they share the honors of her Pantheon.

It is forty years since he strode these ancient streets with his majestic step—forty years since the marvellous music of his voice was heard by the living ear—and those of us who, as students and youthful disciples, followed his footsteps, and listened to his eloquence, and

almost worshipped his presence, whose ideal and idol he was, are already many years older than he lived to be; but there must be a few still living, and present here to-day, who were in the admiring crowds that hung with rapture on his lips—in the courts of justice, in the densely packed assembly, in the Senate, in the Constitutional Convention, or in Faneuil Hall consecrated to Freedom—and who can still recall, among life's most cherished memories, the tones of that matchless voice, that pallid face illuminated with rare intelligence, the flashing glance of his dark eye, and the light of his bewitching smile. But, in a decade or two more, these lingering witnesses of his glory and his triumphs will have passed on, and to the next generation he will be but a name and a statue, enshrined in fame's temple with Cicero and Burke, with Otis and Hamilton and Webster, with Pinkney and Wirt, whose words and thoughts he loved to study and to master.

Many a noted orator, many a great lawyer, has been lost in oblivion in forty years after the grave closed over him, but I venture to believe that the Bar of Suffolk, aye, the whole Bar of America, and the people of Massachusetts, have kept the memory of no other man alive and green so long, so vividly and so lovingly, as that of Rufus Choate. Many of his characteristic utterances have become proverbial, and the flashes of his wit, the play of his fancy and the gorgeous pictures of his imagination are the constant themes of reminiscence, wherever American lawyers assemble for social converse. What Mr. Dana so well said over his bier is still true to-day: "When as lawyers we meet together in tedious hours and seek to entertain ourselves, we find we do better with anecdotes of Mr. Choate, than on our own original resources." The admirable biography of Professor Brown, and his arguments, so far as they have been preserved, are text books in the profession—and so the influence of his genius, character and conduct is still potent and far reaching in the land.

You will not expect me, upon such an occasion, to enter upon any narrative of his illustrious career, so familiar to you all, or to undertake any analysis of those remarkable powers which made it possible. All that has been done already by many appreciative admirers, and has become a part of American literature. I can only attempt, in a most imperfect manner, to present a few of the leading traits of that marvellous personality, which we hope that this striking statue will help to transmit to the students, lawyers and citizens who, in the coming years, shall throng these portals.

How it was that such an exotic nature, so ardent and tropical in all its manifestations, so truly southern and Italian in its impulses, and

at the same time so robust and sturdy in its strength, could have been produced upon the bleak and barren soil of our northern cape, and nurtured under the chilling blasts of its east winds, is a mystery insoluble. Truly, "this is the Lord's doing, and it is marvellous in our eyes." In one of his speeches in the Senate, he draws the distinction between "the cool and slow New England men, and the mercurial children of the sun, who sat down side by side in the presence of Washington, to form our more perfect union." If ever there was a mercurial child of the sun, it was himself most happily described. I am one of those who believe that the stuff that a man is made of has more to do with his career than any education or environment. The greatness that is achieved, or is thrust upon some men, dwindles before that of him who is born great. His horoscope was propitious. The stars in their courses fought for him. The birthmark of genius, distinct and ineffaceable, was on his brow. He came of a long line of pious and devout ancestors, whose living was as plain as their thinking was high. It was from father and mother that he derived the flame of intellect, the glow of spirit and the beauty of temperament that were so unique.

And his nurture to manhood was worthy of the child. It was "the nurture and admonition of the Lord." From that rough pine cradle, which is still preserved in the room where he was born, to his premature grave at the age of fifty-nine, it was one long course of training and discipline of mind and character, without pause or rest. It began with that well-thumbed and dog's-eared Bible from Hog Island, its leaves actually worn away by the pious hands that had turned them, read daily in the family from January to December, in at Genesis and out at Revelations every two years; and when a new child was born in the household, the only celebration, the only festivity, was to turn back to the first chapter, and read once more how "in the beginning God created the heaven and the earth," and all that in them is. This Book, so early absorbed and never forgotten, saturated his mind and spirit more than any other, more than all other books combined. It was at his tongue's end, at his fingers' ends—always close at hand until those last languid hours at Halifax, when it solaced his dying meditations. You can hardly find speech, argument or lecture of his, from first to last, that is not sprinkled and studded with biblical ideas and pictures, and biblical words and phrases. To him the book of Job was a sublime poem. He knew the Psalms by heart, and dearly loved the prophets, and above all Isaiah, upon whose gorgeous imagery he made copious drafts. He pondered every word, read with most sub-

tle keenness, and applied with happiest effect. One day coming into the Crawford House, cold and shivering—and you remember how he could shiver—he caught sight of the blaze in the great fireplace, and was instantly warm before the rays could reach him, exclaiming, “Do you remember that verse in Isaiah, ‘Aha! I am warm. I have *seen* the fire’?” and so his daily conversation was marked.

And upon this solid rock of the Scriptures he built a magnificent structure of knowledge and acquirement, to which few men in America have ever attained. History, philosophy, poetry, fiction, all came as grist to his mental mill. But with him, time was too precious to read any trash; he could winnow the wheat from the chaff at sight, almost by touch. He sought knowledge, ideas, for their own sake, and for the language in which they were conveyed. I have heard a most learned jurist gloat over the purchase of the last sensational novel, and have seen a most distinguished bishop greedily devouring the stories of Gaboriau one after another, but Mr. Choate seemed to need no such counter-irritant or blister, to draw the pain from his hurt mind. Business, company, family, sickness—nothing could rob him of his one hour each day in the company of illustrious writers of all ages. How his whole course of thought was tinged and embellished with the reflected light of the great Greek orators, historians and poets; how Roman history, fresh in his mind as the events of yesterday, supplied him with illustrations and supports for his own glowing thoughts and arguments, all of you who have either heard him or read him know.

But it was to the great domain of English literature that he daily turned for fireside companions, and really kindred spirits. As he said in a letter to Sumner, with whom his literary fraternity was at one time very close: “Mind that Burke is the fourth Englishman,—Shakespeare, Bacon, Milton, Burke;” and then in one of those dashing outbursts of playful extravagance, which were so characteristic of him, fearing that Sumner, in his proposed review, might fail to do full justice to the great ideal of both, he adds: “Out of Burke might be cut 50 Mackintoshes, 175 Macaulays, 40 Jeffreys and 250 Sir Robert Peels, and leave him greater than Pitt and Fox together.” In the constant company of these great thinkers and writers he revelled, and made their thoughts his own; and his insatiable memory seemed to store up all things committed to it, as the books not in daily use are stacked away in your public library, so that at any moment, with notice or without, he could lay his hand straightway upon them. What was once imbedded in the gray matter of his brain did not lie buried

there, as with most of us, but grew and flourished and bore fruit. What he once read he seemed never to forget.

This love of study became a ruling passion in his earliest youth. To it he sacrificed all that the youth of our day—even the best of them—consider indispensable, and especially the culture and training of the body; and when we recall his pale face, worn and lined as it was in his later years, one of his most pathetic utterances is found in a letter to his son at school: "I hope that you are well and studious, and among the best scholars. If this is so, I am willing you should play every day till the blood is ready to burst from your cheeks. Love the studies that will make you wise, useful and happy when there shall be no blood at all to be seen in your cheeks or lips." He never rested from his delightful labors—and that is the pity of it—he took no vacations. Except for one short trip to Europe, when warned of a possible breakdown in 1850, an occasional day at Essex, a three days' journey to the White Mountains was all that he allowed himself. Returning from such an outing in the summer of 1854, on which it was my great privilege to accompany him, he said "That is my entire holiday for this year." So that when he told Judge Warren so playfully that "The lawyer's vacation is the space between the question put to a witness and his answer," it was of himself almost literally true. Would that he had realized his constant dream of an ideal cottage in the old walnut grove in Essex, where he might spend whole summers with his books, his children and his thoughts.

His splendid and blazing intellect, fed and enriched by constant study of the best thoughts of the great minds of the race, his all-persuasive eloquence, his teeming and radiant imagination whirling his hearers along with it, and sometimes overpowering himself, his brilliant and sportive fancy, lighting up the most arid subjects with the glow of sunrise, his prodigious and never-failing memory, and his playful wit, always bursting forth with irresistible impulse, have been the subject of scores of essays and criticisms, all struggling with the vain effort to describe and crystallize the fascinating and magical charm of his speech and his influence.

But the occasion and the place remind me that here to-day we have chiefly to do with him as the lawyer and the advocate, and all that I shall presume very briefly to suggest is, what this statue will mean to the coming generations of lawyers and citizens.

And first, and far above his splendid talents and his triumphant eloquence, I would place the character of the man—pure, honest, delivered absolutely from all the temptations of sordid and mercenary

things, aspiring daily to what was higher and better, loathing all that was vulgar and of low repute, simple as a child, and tender and sympathetic as a woman. Emerson most truly says that character is far above intellect, and this man's character surpassed even his exalted intellect, and, controlling all his great endowments, made the consummate beauty of his life. I know of no greater tribute ever paid to a successful lawyer, than that which he received from Chief Justice Shaw—himself an august and serene personality, absolutely familiar with his daily walk and conversation—in his account of the effort that was made to induce Mr. Choate to give up his active and exhausting practice, and to take the place of Professor in the Harvard Law School, made vacant by the death of Mr. Justice Story—an effort of which the Chief Justice, as a member of the corporation of Harvard, was the principal promoter. After referring to him then, in 1847, as "the leader of the Bar in every department of forensic eloquence," and dwelling upon the great advantages which would accrue to the school from the profound legal learning which he possessed, he said: "In the case of Mr. Choate, it was considered quite indispensable that he should reside in Cambridge, on account of the influence which his genial manners, his habitual presence, and the force of his character, would be likely to exert over the young men, drawn from every part of the United States to listen to his instructions."

What richer tribute could there be to personal and professional worth, than such words from such lips? He was the fit man to mould the characters of the youth, not of the city or the State only, but of the whole nation. So let the statue stand as notice to all who seek to enter here, that the first requisite of all true renown in our noble profession—renown not for a day or a life only, but for generations—is Character.

And next I would point to it as a monument to self discipline; and here he was indeed without a rival. You may search the biographies of all the great lawyers of the world, and you will find none that surpassed, I think none that approached him, in this rare quality and power. The advocate who would control others must first, last and always control himself. "Every educated man," he once said, "should remember that 'great parts are a great trust,'" and, conscious of his talents and powers, he surely never forgot that. You may be certain that after his distinguished college career at Dartmouth—first always where there was none second—after all that the law school, and a year spent under the tuition of William Wirt, then at the zenith of his fame, could lend to his equipment, and after five years of patient

study in his office at Danvers, where he was the only lawyer, he brought to the subsequent actual practice of his profession an outfit of learning, of skill and research, which most of us would have thought sufficient for a lifetime; but with him it was only the beginning. His power of labor was inexhaustible, and down to the last hour of his professional life he never relaxed the most acute and searching study, not of the case in hand only, but of the whole body of the law, and of everything in history, poetry, philosophy and literature that could lend anything of strength or lustre to the performance of his professional duties. His hand, his head, his heart, his imagination were never out of training. Think of a man already walking the giddy heights of assured success, already a Senator of the United States from Massachusetts, or even years afterwards, when the end of his professional labors was already in sight, schooling himself to daily tasks in law, in rhetoric, in oratory, seeking always for the actual truth, and for the "best language" in which to embody it—the "precisely one right word" by which to utter it—think of such a man, with all his ardent taste for the beautiful in every domain of human life, going through the grinding work of taking each successive volume of the Massachusetts Reports as they came out, down to the last year of his practice, and making a brief in every case in which he had not been himself engaged, with new researches to see how he might have presented it, and thus to keep up with the procession of the law. Verily, "all things are full of labor; man cannot utter: the eye is not satisfied with seeing, nor the ear filled with hearing."

So let no man seek to follow in his footsteps, unless he is ready to demonstrate, in his own person, that infinite work is the only touchstone of the highest standing in the law, and that the sluggard and the slothful who enter here must leave all hope behind.

Again we hail this statue, which shall stand here as long as bronze shall endure, as the fit representative of one who was the perfect embodiment of absolute loyalty to his profession, in the highest and largest and noblest sense; and, if I might presume to speak for the whole American Bar, I would say that in its universal judgment he stands in this regard pre-eminent, yes, foremost still. Truly, he did that pious homage to the Law which Hooker exacted for her from all things in Heaven and Earth, and was governed by that ever-present sense of debt and duty to the profession of which Lord Bacon spoke. He entered her Courts as a High Priest, arrayed and equipped for the most sacred offices of the Temple. He belonged to the heroic age of the Bar, and, after the retirement of Webster, he was chief among its heroes. He

was the centre of a group of lawyers and advocates, the ablest and the strongest we have known, by whose aid the chief tribunal of this ancient commonwealth administered justice so as to give law to the whole country. Such tributes as Loring and Curtis and Dana lavished upon his grave can never wither. Each one of them had been his constant antagonist in the great arena, and each could say with authority:

—— “*Experto credite, quantus
In clypeum assurgat, quo turbine torqueat hastam.*”

One after the other, they portrayed in words not to be forgotten his fidelity to the Court, to the client and to the law, his profound learning, his invincible logic, his rare scholarship and his persuasive eloquence, his uniform deference to the Court and to his adversaries—and more and better than all these—what those specially interested in his memory cherish as a priceless treasure—his marvellous sweetness of temper, which neither triumph nor defeat nor disease could ruffle, his great and tender and sympathetic heart which made them, and the whole bench and bar, love him in life, and love him still.

He magnified his calling with all the might of his indomitable powers. Following the law as a profession, or, as Judge Sprague so justly said, “as a science, and also as an art,” he aimed always at perfection for its own sake, and no thought of money, or of any mercenary consideration, ever touched his generous and aspiring spirit, or chilled or stimulated his ardor. He espoused the cause of the poorest client, about the most meagre subject of controversy, with the same fidelity and enthusiasm as when millions were at stake, and sovereign States the combatants. No love of money ever planted the least root of evil in his soul; and this should not fail to be said in remembrance of him, in days when money rules the world.

His theory of advocacy was the only possible theory consistent with the sound and wholesome administration of justice—that, with all loyalty to truth and honor, he must devote his best talents and attainments, all that he was, and all that he could, to the support and enforcement of the cause committed to his trust. It is right here to repeat the words of Mr. Justice Curtis, speaking for himself and for the whole Bar, that “Great injustice would be done to this great and eloquent advocate, by attributing to him any want of loyalty to truth, or any deference to wrong, because he employed all his great powers and attainments, and used to the utmost his consummate skill and eloquence, in exhibiting and enforcing the comparative merits of one side of the cases in which he acted. In doing so he but did his duty. If other people did theirs, the administration of justice was secure.”

His name will ever be identified with trial by jury, the department of the profession in which he was absolutely supreme. He cherished with tenacious affection and interest its origin, its history and its great fundamental maxims—that the citizen charged with crime shall be presumed innocent until his guilt shall be established beyond all reasonable doubt; that no man shall be deprived by the law of property or reputation until his right to retain it is disproved by a clear preponderance of evidence to the satisfaction of all the twelve; that every suitor shall be confronted with the proofs by which he shall stand or fall; that only after a fair hearing, with full right of cross-examination, and the observance of the vital rules of evidence, shall he forfeit life, liberty or property, and then only by the judgment of his peers.

Regarding these cardinal principles of Anglo-Saxon justice and policy as essential to the maintenance of liberty and of civil society, he stood as their champion

“with spear in rest and heart on flame,”

sheathed in the panoply of genius.

To-day, when we have seen a great sister republic on the verge of collapse for the violation of these first canons of Freedom, we may justly honor such a champion.

But he displayed his undying loyalty to the profession on a still higher and grander scale, when he viewed and presented it as one of the great and indispensable departments of Government, as an instrumentality for the well-being and conservation of the State. “*Pro clientibus saepe; pro lege, pro republica semper.*”

I regard the magnificent argument which he made on the judicial tenure in the Constitutional Convention of 1853 as the greatest single service which he ever rendered to the profession, and to the Commonwealth, of which he was so proud. You will observe, if you read it, that it differs radically in kind, rather than in degree, from all his other speeches, arguments and addresses.

Discarding all ornament, restraining with careful guard all tendency to flights of rhetoric, in clear and pellucid language, plain and unadorned, laying bare the very nerve of his thought, as if he were addressing, as no doubt he meant to address and convince, not alone his fellow delegates assembled in the Convention, but the fishermen of Essex, the manufacturers of Worcester and Hampden, and the farmers of Berkshire—all the men and women of the Commonwealth, of that day and of all days to come—he pleads for the continuance of an ap-

pointed judiciary, and for the judicial tenure during good behavior, as the only safe foundations of justice and of liberty.

He draws the picture of "a good judge profoundly learned in all the learning of the law;" "not merely upright and well intentioned;" "but the man who will not respect persons in judgment;" standing only for justice, "though the thunder should light upon his brow," while he holds the balance even, to protect the humblest and most odious individual against all the powers and the people of the Commonwealth; and "possessing at all times the perfect confidence of the community, that he bear not the sword in vain." He stands for the existing system which had been devised and handed down by the Founders of the State, and appeals to its uniform success in producing just that kind of a judge; to the experience and example of England since 1688; to the Federal system which had furnished to the people of the Union such illustrious magistrates; and finally to the noble line of great and good judges who had from the beginning presided in your courts. He then takes up and disposes of all objections and arguments drawn from other States, which had adopted an elective judiciary and shortened terms, and conclusively demonstrates that to abide by the existing constitution of your judicial system was the only way to secure to Massachusetts forever "a government of laws and not of men."

It was on one of the red-letter days of my youth that I listened to that matchless argument, and, when it ended, and the last echoes of his voice died away as he retired from the old Hall of the House of Representatives, leaning heavily upon the arm of Henry Wilson, all crumpled, dishevelled and exhausted, I said to myself that some virtue had gone out of him—indeed some virtue did go out of him with every great effort—but that day it went to dignify and ennoble our profession, and to enrich and sustain the very marrow of the Commonwealth. If ever again that question should be raised within her borders, let that argument be read in every assembly, every church and every school-house. Let all the people hear it. It is as potent and unanswerable to-day, and will be for centuries to come, as it was nearly half a century ago when it fell from his lips. Cling to your ancient system, which has made your Courts models of jurisprudence to all the world until this hour. Cling to it, and freedom shall reign here until the sunlight shall melt this bronze, and justice shall be done in Massachusetts, though the skies fall.

And now, in conclusion, let me speak of his patriotism. I have always believed that Mr. Webster, more than any other one man,

was entitled to the credit of that grand and universal outburst of devotion, with which the whole North sprang to arms in defense of the Constitution and the Union, many years after his death, when the first shot at Fort Sumter, like a fire bell in the night, roused them from their slumber, and convinced them that the great citadel of their liberties was in actual danger. Differ as we may and must as to his final course in his declining years, the one great fact can never be blotted out, that the great work of his grand and noble life was the defense of the Constitution—so that he came to be known of all men as its one Defender—that for thirty years he preached to the listening nation the crusade of nationality, and fired New England and the whole North with its spirit. He inspired them to believe that to uphold and preserve the Union, against every foe, was the first duty of the citizen; that if the Union was saved, all was saved; that if that was lost, all was lost. He moulded better even than he knew. It was his great brain that designed, his flaming heart that forged, his sublime eloquence that welded the sword, which was at last, when he was dust, to consummate his life's work, and make liberty and Union one and inseparable forever.

And so, in large measure, it was with Mr. Choate. His glowing heart went out to his country with the passionate ardor of a lover. He believed that the first duty of the lawyer, orator, scholar was to her. His best thoughts, his noblest words, were always for her. Seven of the best years of his life, in the Senate and House of Representatives, at the greatest personal sacrifice, he gave absolutely to her service. On every important question that arose, he made, with infinite study and research, one of the great speeches of the debate. He commanded the affectionate regard of his fellows, and of the watchful and listening nation. He was a profound and constant student of her history, and revelled in tracing her growth and progress from Plymouth Rock and Salem Harbor, until she filled the continent from sea to sea. He loved to trace the advance of the Puritan spirit, with which he was himself deeply imbued, from Winthrop and Endicott, and Carver and Standish, through all the heroic periods and events of colonial and revolutionary and national life, until, in his own last years, it dominated and guided all of Free America. He knew full well, and displayed in his many splendid speeches and addresses, that one unerring purpose of freedom and of Union ran through her whole history; that there was no accident in it all; that all the generations, from the Mayflower down, marched to one measure and followed one flag; that all the struggles, all the self-sacrifice, all the prayers and

the tears, all the fear of God, all the soul-trials, all the yearnings for national life, of more than two centuries, had contributed to make the country that he served and loved. He, too, preached, in season and out of season, the gospel of Nationality. He was the faithful disciple of Webster, while that great Master lived, and, after his death, he bore aloft the same standard and maintained the same cause. Mr. Everett spoke nothing more than the truth, when he said in Faneuil Hall, while all the bells were tolling, at the moment when the vessel bringing home the dead body of his lifelong friend cast anchor in Boston Harbor: "If ever there was a truly disinterested patriot, Rufus Choate was that man. In his political career there was no shade of selfishness. Had he been willing to purchase advancement at the price often paid for it, there was never a moment, from the time he first made himself felt and known, that he could not have commanded anything that any party had to bestow. But he desired none of the rewards or honors of success."

He foresaw clearly that the division of the country into geographical parties must end in civil war. What he could not see was, that there was no other way—that only by cutting out slavery by the sword, could America secure Liberty and Union too—but to the last drop of his blood, and the last fibre of his being, he prayed and pleaded for the life of the nation, according to his light. Neither of these great patriots lived to see the fearful spectacle which they had so eloquently deprecated. But when at last the dread day came, and our young heroes marched forth to bleed and die for their country—their own sons among the foremost—they carried in their hearts the lessons which both had taught, and all Massachusetts, all New England, from the beginning, marched behind them, "carrying the flag and keeping step to the music of the Union," as he had bade them, and so I say, let us award to them both their due share of the glory.

Thus to-day we consign this noble statue to the keeping of posterity, to remind them of "the patriot, jurist, orator, scholar, citizen and friend," whom we are proud to have known and loved.

RICHARD HENRY DANA

ADDRESS ON DANA AS A LAWYER AND CITIZEN, DELIVERED AT THE EXERCISES IN SANDERS THEATRE, CAMBRIDGE, MASS., UNDER THE AUSPICES OF THE CAMBRIDGE HISTORICAL SOCIETY, CELEBRATING THE ONE HUNDREDTH ANNIVERSARY OF HIS BIRTH, OCTOBER 20, 1915 *

I regarded it as a great honor to be asked to prepare a paper about Richard H. Dana, as a lawyer and citizen, for the celebration of the centenary of his birth.

He has been dead for thirty-four years, and sleeps in the old Protestant cemetery at Rome in company with Shelley and Keats in a land which he loved to visit and where his closing years were spent.

At such a distance of time the professional life and work of any lawyer, however distinguished, ceases to be of general interest unless connected with events which have become historical and of surpassing human interest. Fortunately for Mr. Dana, his active professional and public life of twenty-five years embraced the period of the Civil War and the thrilling events which preceded and followed it, and he was able to render signal services to the state and the nation which ought never to be forgotten.

The unusual fame which he had acquired as a very young man by the publication of "Two Years Before the Mast," which still reads like a romance and a companion-piece to "Robinson Crusoe," and the publication of the "Seaman's Friend," which naturally followed it, necessarily brought him a sort of maritime practice when he was admitted to the bar and opened a law office in 1841 at the age of twenty-six.

He had just married, was without independent means, and had every incentive, as he had abundant ability, to take a leading place in the profession for which his keen intelligence, his habits of profound thought, and his soaring ambition naturally fitted him. There was another thing which doubtless stimulated his hope and desire for the rapid advance in professional and public affairs, which might well have been expected from his brilliant talents and his undisputed

* Other speakers were Professor Bliss Perry, whose subject was Dana as a Man of Letters, and Moorfield Storey, who spoke on Dana as an Anti-slavery Leader.

ability. He was justly proud of his distinguished lineage, which ran back into colonial days. Several of his direct ancestors, whose names can be found in the Harvard Catalogue, had taken part in the public life of New England. His grandfather, Francis Dana, had been a delegate from Massachusetts to the Continental Congress, had signed the Articles of Confederation, had been appointed minister to Russia during the Revolutionary War, and after the adoption of the Constitution was for fifteen years Chief Justice of Massachusetts. There were, also, in the maternal line of his ancestry two colonial governors and a signer of the Declaration of Independence.

It cannot be denied, however, that he had a certain fastidiousness of manner which kept him aloof from the ordinary run of men. He had a natural liking for the best company, which he always frequented, and no desire to cultivate miscellaneous acquaintances, none of the hail-fellow-well-met to everybody, which naturally tends to promote a young man's rapid advancement in the profession or in public life. But for all that he had a genuine enthusiasm for popular liberty and equality under the law, and an abiding faith in government of the people, by the people, and for the people, as it was advocated by Lincoln.

I doubt, too, whether he had that all-absorbing love of the law which is necessary to a highly sustained professional career. He loved to travel, and was particularly fond of the society of superior men and women. He evidently had a strong liking for public life, and an ambition for high office, which he was admirably qualified to fill, so that he followed the law rather as a means of livelihood than as an exalted vocation to which he could devote all his strong and manly qualities, and strive for success in it as though there were no other object worth living for.

His personal devotion to Washington Allston, who had married his father's sister, was strikingly characteristic, and I think he derived from Allston some of his habits of thought and of action.

Allston, besides being a great artist, was a man of rare and delicate and sensitive personality, quite likely to impress strongly a high-toned youth like Dana.

The latter says of him in his Journal: "He says that if things go on as they promise now that 'in eighty years there will not be a gentleman left in the country.' He says that the manners of gentility, its courtesies, its deferences, and graces are passing away from among us. Whether they pass away or no, he is a good specimen of them. Born of a distinguished family in Carolina, and educated

in the feelings and habits of a gentleman, with a noble nature, a beautiful countenance, and a graceful person, what else could he be?"

And on the occasion of Allston's sudden death, he takes leave of him in these words: "The exquisite moral sense, the true spirituality, the kindliness and courtesy of heart as well as of manner, the corresponding external elegance, the elevation above the world and the men and things of it, where have these ever been so combined before?" And the same question might well be asked about Mr. Dana.

His own early and even precocious literary success had something, I think, to do with shaping his subsequent life. It gave him an easy footing in the society and friendship of the best men, such as Mr. Webster, Judge Story, George Ticknor, Charles Francis Adams, Franklin Dexter, Charles Sumner, George S. Hillard, and others who were the leaders of New England life, and he stood well with them all. Indeed, literature must have been his first love, which was evinced by his signal success in that direction even before he came of age, and by his devotion in later years to the company of those choice and kindred spirits and men of letters who composed the famous Saturday Club.

Mr. Horace Mann he did not altogether like; and no wonder, for there could hardly be two more opposite natures than theirs. When Mann was at the head of the Board of Education, he proposed to Mr. Dana that the Board of Education should publish his "Two Years Before the Mast" if he would practically rewrite it to suit Mr. Mann's practical ideas, and his account of their interview at which the matter was discussed is most amusing. It ended in Mr. Dana positively refusing to make any substantial changes in the book, and Mr. Mann being contented with nothing less than changes which would entirely destroy its character.

Too strenuous labor, after he reached the age of forty-five, seems frequently to have overtaxed Mr. Dana's strength. Up to that time he had a remarkable buoyancy and vigor which had been splendidly fortified by his two years at sea. A weakness of the eyes had compelled him to take the voyage of which his book is the record, out of the very heart of his college life, coming back to graduate with a class two years later than that which he had entered. From the beginning to the end of his professional life, whatever his hands found to do he did it with his might. His attention to details was extraordinary, and thus he was always in danger of overwork, which compelled him to take frequent vacations to counteract that danger.

There was one great hero with whom these vacation rambles

brought him into close and interesting contact, and that was John Brown, not yet John Brown of Ossawatimie, but a plain and rugged farmer of North Elba in the Adirondacks, where he ran an active branch of the famous underground railroad, over which he was constantly conducting fugitive slaves to freedom.

More than twenty years afterward Dana wrote an account of it for the *Atlantic Monthly*, and it is pleasant to read of Mr. Dana, fastidious though he was, sitting down to dinner with Mr. Brown and "his unlimited family of children, from a cheerful, nice healthy woman of twenty or so and a full-sized, red-haired son, who seemed to be foreman of the farm, through every grade of boy and girl to a couple who could hardly speak plain," and among them two fugitive negroes whom he had just brought in and whom he introduced to Mr. Dana as Mr. Jefferson and Mrs. Wait, as persons of entire social equality.

Little did he think, as he sat at that rude feast of "Ruth's best bread, butter, and corn cakes, with some meat and tea," that in a few years the rugged farmer, who sat at the head of the table and entertained him so cordially, would have become the great martyr of freedom, so that his name and his spirit would lead the embattled hosts of America to the final triumph of liberty and union!

Mr. Dana's first venture in politics, in his thirty-third year, in 1848, marked clearly his independence of spirit, his love of the right, and determination to maintain it at whatever cost, and his clear foresight into the political future. He had, like almost all Massachusetts boys, grown up as a disciple of Mr. Webster. He hated the Abolitionists who were altogether too unconventional for him, but he made his debut in political life as chairman of the Free Soil meeting at the Tremont Temple. He declared: "I am a Free Soiler, because I am (who should not say so) of the stock of the old northern gentry, and have a particular dislike to any subserviency, or even appearance of subserviency, on the part of our people to the slaveholding oligarchy. I was disgusted with it in college and at the law school, and have been since, in society and politics. The spindles and day-books are against us just now, for Free Soilism goes to the wrong side of the ledger. The blood, the letters, and the people are our chief reliance."

It was a bold step for a young lawyer and statesman to come out in this way in 1848 in Boston, where Webster was still lord of the ascendant and where all the best people, with whom Dana had always been associated, were his devoted followers, and where there was

a strong affiliation, as Charles Sumner put it, "between the lords of the lash and the lords of the loom." But Dana was not dismayed. He went to the Buffalo convention as a delegate and came back to advocate the election of Martin Van Buren for President and Charles Francis Adams for Vice-President, and from August to November he laid aside his law practice and devoted himself to making speeches for this seemingly hopeless cause, which he had the foresight to see would result by and by in the collapse of the Whig party and the prevention of the further extension of slavery. From this time forward he was generally recognized as one of the most brilliant and promising antislavery men of the country, rather to the horror and disgust of many of his old associates; and some of his social relations that had been of the warmest and closest character were broken off.

The wealth of Boston, its merchants and manufacturers and ship-owners, were against him, and his success as a lawyer, which had been good at the start, must have been seriously interfered with; but little did he care for that, for he knew he was right and meant to stick to it, and presently, by the very reason of his political secession, his great opportunity came in the fugitive slave cases, which enabled him as a lawyer to render memorable service to the good of mankind.

I think myself that when the first attempts to enforce the fugitive slave law of 1850 were made in Boston, the great majority of the educated people, and, indeed, of all the people of Massachusetts, would have preferred that the enforcement of the odious law should be quietly submitted to without any demonstration against it. The compromise measures of 1850, of which that law was a part, had been accepted, strangely enough, as a finality. They had been advocated by Mr. Webster, Mr. Clay, and Mr. Calhoun, all of them already old men, who had desired nothing so much as that the slavery question should be settled for once and forever, while they were still upon the political stage. They believed that the fugitive slave law was practically guaranteed by the Constitution, and that attempts to enforce it would result in no serious harm. In this, as the result showed, they proved to be blind leaders of the blind; but the people of Massachusetts generally were still inclined to follow their lead. But not so with Mr. Dana and Charles Sumner and Robert Rantoul. They appear to have recognized the binding force of the constitutional provision, that "no person held to service or labor in one State under the laws thereof, escaping into another state, shall in consequence of any law or regulation therein, be discharged from

such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due"; but they believed also that this did not dispense with essential safeguards for the protection of persons involved, and especially that they were entitled to a trial by jury and to such other protection as might be afforded to them by legislative provisions of the states which would not be in conflict with the Constitution of the United States.

So when the first seizure under the odious law was made by the arrest of Shadrach in Boston on the 15th of February, 1851, Mr. Dana, having heard of it, instantly repaired to the Court House, and, offering his services to the fugitive, prepared and presented to Chief Justice Shaw a petition for a writ of habeas corpus in his behalf. But the learned Chief Justice was not inclined to interfere, and while Mr. Dana was considering going before another judge, a mob of negroes invaded the Court House and rescued the prisoner and enabled him to make his way to freedom. The arrest and the rescue and the attack upon the Court House made a tremendous sensation, and the federal authorities made strenuous efforts to punish somebody for the escape of the prisoner.

Among others they made a wholly unwarranted attack upon Mr. Charles G. Davis, who had assisted Mr. Dana in the proposed defense of Shadrach, charging him with aiding and abetting in the escape of the fugitive slave, with which he had no more to do than the man in the moon; but his trial before the United States commissioner occupied four days, and he was ably defended by Mr. Dana, whose argument in his defense is a model of forensic eloquence, a perfect gem; and Mr. Davis was discharged by the commissioner, who found no case against him.

In the meantime, Mr. Dana and Mr. Sumner were busily employed in drawing up laws to meet what they regarded as the dangers and outrages of the Fugitive Slave Bill, at the request of a committee of the legislature.

On the 7th of April in the same year another fugitive slave, Sims, was arrested by the marshal and his posse and locked up in the Court House, which was guarded by a huge force of policemen, and a chain was stretched entirely around it, so that everyone that entered it, including the judges of the Supreme Court and parties having business before that tribunal, must go under the chain. Mr. Rantoul and Mr. Dana appeared in the Supreme Court and moved again for a writ of habeas corpus, which was promptly denied, the Chief Justice giving the opinion of the court refusing the writ. The opinion held

that "the only question was whether the Commissioner could constitutionally act:—that the act of 1793 gave the same powers to magistrates which this act gives to Commissioners, and was acquiesced in for more than fifty years, and recognized, or at least was not decided to be unconstitutional by any court. So the court held that the point must be considered as settled by lapse of time, acquiescence, and recognition." And again Mr. Sumner and Mr. Dana went before a federal judge and made an ineffectual effort for release of the fugitive, and the next day, as Mr. Dana relates, between four and five o'clock in the morning "the poor fellow, with tears in his eyes, was marched on board a vessel, escorted by a hundred or more of the city police under orders of the United States marshal, armed with swords and pistols, and in a few minutes she sailed down the harbor."

In connection with this case it is pleasant always to remember that Judge Devens, who was the marshal on the occasion and had such an unpleasant duty to perform, afterward, when he became Attorney General of the United States in 1877, employed Sims as a messenger in the Department of Justice, which position he held for several years while Devens remained in office.

But one startling and immediate result of these two cases was the election, within a fortnight after the rendition of Sims, of Charles Sumner as United States Senator to fill the seat which Mr. Webster had occupied. Meanwhile Mr. Dana continued for several months the defense of the rescue cases, as they were called, and nobody that he defended was ever convicted.

One of the most singular of these cases was that of Elizur Wright, the celebrated journalist and linguist. He was tried for complicity in the rescue of Shadrach, and as he was absolutely innocent, he refused to have any counsel, but defended himself. The jury disagreed, standing eleven for conviction and one for acquittal, but on a new trial he was acquitted, being defended this time by Mr. Dana, who says that Wright was entirely clear of all connection with the rescue in fact, although he was delighted with the result. The result of his trial, Mr. Dana says, showed the importance of the professional services of an advocate.

Mr. Dana's services in the cause of freedom continued as long as there was any slave-hunting upon the soil of Massachusetts, and ended on Boston's Black Friday, the 2d of June, 1854, when Anthony Burns, the last fugitive slave arrested under the act, was consigned by Judge Loring to the custody of the marshal to be escorted back to slavery.

Mr. Dana in his Diary thus describes it: "This was a day of intense excitement and deep feeling in the city, in the State, and throughout New England, and indeed a great part of the Union. The hearts of millions of persons were beating high with hope, or indignation, or doubt. The Mayor of Boston has ordered out the entire military force of the city, from 1500 to 1800 men, and undertaken to place full discretionary powers in the hands of General Edmands. These troops and the three companies of regulars fill the streets and squares from the Court House to the end of the wharf where the revenue cutter lies, in which Burns, if remanded, will be taken to Virginia."

Mr. Dana labored very hard for the acquittal of this fugitive, and his argument at the conclusion of the case, which occupied four hours in its delivery, is so incisive and convincing that but for his adamant conservatism Judge Loring, the magistrate, who was the learned Judge of Probate and a professor in the Dane Law School, might well have decided in favor of freedom and discharged the prisoner.

I have laid great stress upon the services of Mr. Dana in his fugitive slave cases, not only because of the intense interest in that exciting period of our history, but also because they placed him in the very front rank of his profession in Massachusetts and made him an exceedingly prominent figure among the public men of New England; and we should, I think, have expected that his aspirations for public office would have been sooner gratified. These services of his brought him no pecuniary reward, for they were rendered in behalf of those who were wholly without means or credit, and in the case of Anthony Burns, which was the most important of all, he absolutely declined all pecuniary compensation. I have described these labors of Mr. Dana's as great services rendered not only to the State but to the Nation, because they aroused universal attention to the fact that the boasted compromise measures of 1850, which were designed to settle the slavery question forever, were not final, but a total failure; that freedom would not down at the bidding of Congress, even when led by the great statesmen of a past age. Mr. Clay and Mr. Webster both died in 1852, Mr. Calhoun having preceded them to the grave in 1850. Their compromise measures were buried with them, and the whole question had to be fought out in blood under the lead of Lincoln.

In the midst of these exciting and unrewarded professional labors, Mr. Dana spent three months in the summer of 1853 as a member of the Constitutional Convention of Massachusetts, of which many of the leading men of the state were members, and among whom, from his

first appearance, although it was his first experience in a deliberative body, he at once came to the front.

Mr. Adams very justly says that "there was no man in the convention who rose more rapidly, or into greater prominence as a debater, than did Dana." And Charles Sumner, who was also a member, subsequently spoke of him as "the man of by far the greatest legislative promise," criticising only his tendency to over-debate, due to excessive readiness and facility. He took an active part in all the serious discussions, and in that which was the most important of all, the judiciary question, he made a most effective and conclusive argument, which Mr. Choate, who the next day made one of the great speeches of his life in the convention on the same subject, declared to be "such a speech as one hears once in an age." He spoke in favor of the proposition that it was inexpedient to make any change in the appointment or tenure of judges. There was some popular demand that Massachusetts should follow the example that had then been set by many of the states of the Union to have her judges elected by the people instead of appointed by the governor for life or during good behavior. There was also a proposition that the judges should be appointed by the governor and council for a term of ten years.

To both of these propositions Mr. Dana, from beginning to end, made strenuous and unceasing opposition, culminating in the argument to which I have already referred.

Unfortunately, almost all the states of the Union have abandoned the ancient system of appointing judges for life or during good behavior, which has worked so admirably in England since the Revolution of 1688, in the United States federal system since the foundation of the government, and to this day remains intact in Massachusetts; and it is largely owing to the loyal and powerful exertions of such men as Mr. Dana and Mr. Choate that this commonwealth owes the retention of that system, which makes its judiciary, to say the least, compare favorably with that of the other states of the Union, and puts its courts side by side in the administration of the common law with those of England and with the Supreme Court of the United States.

If the people of Massachusetts understand their true interest and set a proper value upon the high-toned administration of justice as it prevails to this day in its courts, they will always reject all attempts from whatever quarter to make their judiciary elective. There is always a danger of efforts being made in that direction, and nothing

shows more clearly the imminent character of that danger than the fact that in this very Constitutional Convention of 1853, the last, I believe, that has been held in Massachusetts, the Constitution, as adopted and submitted to the people, proposed the appointment of judges for the term of ten years, which led to its defeat by a majority of about six thousand in a total popular vote of 125,000, so that to-day your people stand on this question as they have stood ever since the adoption of the Constitution of 1780, and will, as I hope, stand forever. You have to-day an absolutely independent judiciary, as impartial as the lot of humanity admits, which helps to make the government of the commonwealth a government of laws, and not of men.

After all these labors Mr. Dana took a holiday, and had his first glimpse of Europe, to which he had long looked forward with eager anticipation. To be sure, it only lasted for two months, but he saw and enjoyed and recorded everything. He was just at the age to make the most of it, and so thorough and constant had his reading been all his life about England, that he seemed to know it all by heart, and revelled most heartily in all the places and people with which his reading had made him so familiar. In English history especially he was thoroughly versed, and he lost no time in his haste to visit all the great and interesting historical places,—Westminster Hall, the Houses of Parliament, the Inns of Court, Kenilworth and Warwick Castle, the Courts of Justice, Stonehenge and Wilton, Greenwich and the Zoo, and St. James's Park,—and he happily fell in with many of the leading English men and women of the day, whom he appreciated, and they manifestly appreciated him. Nothing could possibly have been more to his liking, and he returned at the end of his perfect vacation thoroughly refreshed and renewed, to resume the daily work of his profession, which must have seemed to him after the supreme delights of the summer a little more arduous toil than ever before.

From 1856 to 1860 was the best and richest period of his professional life. He had some great cases, which attracted wide attention, in one of which, the Dalton case, the cause célèbre of the time, he proved himself a match single-handed against two great leaders of the bar, Rufus Choate and Henry F. Durant, who together opposed him, and but for the twelfth dissenting juror he would have won the case.

Those were the days of overwork for all eminent lawyers, for Mr. Choate, in summing up, talked for ten hours, taking two entire days of the court's time, and Mr. Dana followed and spoke for

twelve hours, occupying parts of three days. Fortunately for us to-day time is more precious, the pressure upon the courts vastly more intense, and the two-hour rule would be strictly applied.

Those four years were much the hardest of Mr. Dana's life, and his constitution proved in the end wholly unequal to the strain; for at the end of them, in spite of occasional holidays and voyages, he completely collapsed in the midst of the argument of an exciting cause, and recalling the experience of his two years before the mast, he wisely concluded that nothing less than a voyage around the world would save him; and after a lapse of fifteen months, in which he made the circuit of the globe, concluding with a brief glimpse again of England, he returned home, once more in good health, to find his country in the midst of that great campaign of 1860 which resulted in the election of Lincoln and brought on the Civil War.

Through all that anxious period he held the office of United States Attorney for the district of Massachusetts, a position which he greatly magnified by his wonderful qualifications in character and ability, and he argued with a consummate power the prize causes in which the legality of the whole conduct of the government during the Civil War was directly challenged. Both in the District court of Massachusetts and in the Supreme Court of the United States, where he opened, and Mr. Evarts, the companion of his boyhood and his lifelong friend, closed, he cleared up all the difficult and knotty questions involved. Mr. Adams records that one who was present at the final hearing, after Mr. Dana had closed his argument, happened to encounter Judge Grier, who had retired to the corridor in the rear of the bench, and whose clear judicial mind and finely cultivated literary taste had keenly enjoyed the speech; in a burst of unjudicial enthusiasm he said: "Well your little 'Two Years Before the Mast' has settled that question; there is nothing more to say about it." Judge Grier shortly afterward stated the opinion of the court, affirming at almost every point the positions of the government, and giving the highest legal sanction to President Lincoln's acts. This was undoubtedly Mr. Dana's greatest professional achievement and the one to which he looked back to the end of his life with the utmost elation.

I should be doing great injustice to Mr. Dana if I failed to mention the famous speech he delivered in Faneuil Hall on June 21, 1865, at an important meeting called to consider the subject of the reorganization of the states lately in rebellion, and the address to the

country which he prepared on that occasion, and which, like the speech, attracted wide notice.

Mr. Dana to the end of his days justly took great pride in this address, in which he seems to have led the way in claiming that the government, having put down the rebellion by force of arms, and holding all the rebel states in the "grasp of war," as he called it, might continue its military occupation of the conquered territory until it could secure what it regarded as a just solution of the tremendous questions involved.

He said: "We stand upon the ground of war, and we exercise the powers of war. I put that proposition fearlessly: The conquering party may hold the other in the grasp of war until it has secured whatever it has a right to require. Having succeeded in this war, and holding the rebel states in our military occupation, it is our right and duty to secure whatever the public safety and the public faith require."

But he by no means justified those portions of the measures of reconstruction which led for a while to the shocking negro domination in several of the southern states, and in the same speech, and in the memorable address to the people of the United States, which was drawn by him, he did not ask that the nation should insist on an unconditioned universal suffrage for the freedmen, but that the right of suffrage should be given to them in such manner as to be impartial, and not based in principle upon color, but to be reasonably attainable by intelligence and character, putting them on the same ground of equality as prevails in Massachusetts, where the right to vote is secured alike to black men and white who can read and write.

It is safe, I think, to say that if the doctrines laid down by Mr. Dana in this speech and address had been more closely followed, great mischiefs would have been avoided and the terrible task of reconstruction would have been made more easy.

After the close of the war Mr. Dana resigned his office, and was not engaged in any more serious forensic conflicts, but he devoted two continuous years to his edition of Wheaton's "Elements of International Law," which he greatly enriched by a series of most learned and elaborate notes, and it may fairly be said that, until the outbreak of the present horrible war, this book of his, in which he embodied all the rich fruits of his learned and laborious life, was a great standard authority on the subject of which it treated, and was valued as such, not only in his own country, but in England and among the continental nations.

At this moment international law must be admitted to be in a state of suspense; at any rate when peace comes it will have to be restated and remade with all the changes necessitated by the exigencies of the war and its results. Even if it ends as we hope, international law cannot be taken up where it stood in August, 1914; but Dana's notes to Wheaton's Elements will form a most valuable stepping-stone to its future progress, by which, as we hope, the permanent peace of the world will be secured.

Let me give you a single illustration of how international law has failed to deal by any possibility with the difficulties presented by the present war, on the single subject of aeroplanes and Zeppelins, which have been causing so much havoc and dismay throughout the world during the last twelve months. When the Emperor of Russia issued his call for the first peace congress he referred to the subject of aircraft and commended it to the study of the first conference. The first conference met in 1899. They discussed the subject very fully, and finally concluded that the world was not ripe for action on their part; but they prohibited the throwing of projectiles from dirigible balloons or any other aircraft for the period of five years, expecting that the second conference would meet by that time and take the subject up with better knowledge. Well, no conference was called until eight years, in 1907. And there we had a great discussion on the subject. England and Germany were of one mind, to prohibit the throwing of these projectiles. Lord Reay, one of the leading English delegates, made a brilliant speech in support of the proposition to prohibit, in which he said that two elements, the land and the sea, were enough for war; that the air and the sky ought to be reserved for peace. And the result was that we, with consummate wisdom, as we thought, but with what seems to have been utter folly, renewed the prohibition for a period that should terminate with the adjournment of the third Hague conference, which has never met and perhaps will never meet. So it is all left in the air.

Mr. Dana still cherished his lifelong ambition for high political office, for which he was so admirably qualified, but this ambition was doomed to bitter disappointment, which, however, he never allowed to cloud his later years, for these were always cheerful, happy, and devoted to good works.

He accepted the nomination for Congress in the Essex district against the notorious General Butler, with whom he maintained an unequal contest single-handed. He proved to be no match for the general in the latter's characteristic rough-and-tumble methods of

warfare, and came out at the end of the poll with an unhappily small vote. But he had the satisfaction of standing for the public credit against the avowed champion of repudiation.

Another visit to England and Scotland, again for health's sake, brought him back to America to resume in a quiet way the practice of his profession. After his misadventure in the congressional election he had substantially abandoned all hope of public life, when suddenly, to his great surprise, President Grant in 1876 sent in his name to the Senate for the very office which of all others it would have given him the greatest pleasure to fill, and which, as I think, of all Americans he was then the most fit to fill and to adorn—the English mission. But here again he encountered obstacles which neither he nor the President could have expected. Politics of a very questionable character overwhelmed his nomination, and his old and doughty antagonist, with all the hostile company that he could muster, venomously besieged the Senate Committee on Foreign Affairs, to whom the nomination had been referred. The nomination was reported adversely as the result of a very sorry chapter in senatorial politics.

Had his nomination been confirmed, Mr. Dana's appointment as minister to England would have been a perfectly ideal one. His character, his education, his sympathies, and all the associations of his life would have made him a most acceptable and popular representative of the United States in the mother country, and he in turn would have revelled in the duties and pleasures of the office. I regard his defeat as having worked a very serious loss to the governments and the people of both nations.

His defeat, however, did not prevent the State Department, of which Mr. Evarts was then the head, from selecting Mr. Dana as one of the counsel of the United States Government before the international commission appointed to meet at Halifax to dispose of the fisheries questions between the two countries, where again he rendered most excellent service, after which he bade farewell to the profession and spent his remaining days in Europe, contemplating and preparing for a new work upon international law, which unhappily he never lived to complete.

I confess my inability, in the space of time allotted, to do justice to Mr. Dana's lofty character and to his signally noble career, which was guided from first to last by high principle, an indomitable courage, a lofty independence of spirit, and a mind always conscious to itself of right. He met with many cruel disappointments,

his aspiring dreams were not realized, but take him for all in all he was a man of whom his native state and country may well be proud and give him a high place among their immortals.

I have said nothing of his private and domestic relations, but I cannot refrain from quoting what Mr. Parker, his partner for many years, said when he heard of his death: "He was the steadiest of friends, the most indulgent and affectionate to those whom he once honored with his friendship."

We may well close this celebration of the centenary of Mr. Dana's birth by commending the study of his pure and dignified life and character to the young men of coming generations; from first to last the perfect gentleman.

JOHN F. DILLON

MEMORIAL READ BEFORE THE ASSOCIATION OF THE BAR OF THE CITY
OF NEW YORK, DECEMBER 8, 1914

It is a great pleasure to me to be asked by the Memorial Committee of the Bar Association to contribute a memorial of the Hon. John F. Dillon, one of its most loved and honored members, who died in New York on the 5th day of May last.

We were almost exact contemporaries and had been thrown together in later years in the most loving and delightful friendship.

It has been found very difficult to ascertain the details of Judge Dillon's education or of his earliest legal practice. Born on Christmas Day, 1831, in an obscure rural district, where there were no opportunities whatever for education, and migrating at the age of seven to the western boundary of Iowa, which had not yet been transformed from a territory into the State of Iowa, a region which was equally destitute of educational advantages of any sort, and being admitted to the bar in 1852, without any adequate previous training, except that which he had given himself, he seems to have been a pioneer in giving the bar and the profession in Iowa form and shape. At that time the administration of justice in the extreme West was undoubtedly conducted on simple and very general principles, and the manners and customs of the profession were of a like primitive character.

When my brother William and I, after being admitted to the bar in Massachusetts in 1855, made a prospecting tour across the continent, so far as it was then inhabited, in search of the best place to establish ourselves for the practice of law, we reached Davenport in Iowa, then the extreme limit of railroad travel to the west, and there, at the office of Cook & Sargeant, heard of Mr. Dillon, as having been recently admitted to the bar and become the Prosecuting Attorney of the county, although we did not then have the pleasure of meeting him.

In the western States at that time the etiquette of the courts and bar was not very far advanced. At Freeport, in Illinois, hearing that the Supreme Court was in session, we visited the Courthouse, and a trial *at nisi prius* seemed to be progressing in complete order except for the lack of the presence of the judge. The jury were in their places, a witness was being examined by counsel, and the bar was full of lawyers but no judge in sight. Careful scrutiny, however, soon revealed the soles of a pair of slippers upon the bench, and the

prostrate form of the judge lay behind it, doubtless taking in all the testimony with patient ears; and I have no doubt that justice was practically done in the case as well as if the presiding magistrate had been erect in his seat upon the bench, but the forms were disregarded.

About the same time, my friend, James Savage of Boston, visited a western State to try a case before the Supreme Court. It was an exceedingly hot day. The court was opened and the presiding justice sat upon the court in his shirt sleeves and called the calendar, and Savage when his case was called answered, "Ready," as did the counsel on the other side. After disposing of the necessary formal business that preceded, the judge called upon him to begin. Whereupon, Mr. Savage took off his coat, folded it up, and laid it upon the counsel's table, and his waistcoat followed suit, and he was proceeding to take off his shoes, when the judge called out, "Counselor, what are you doing?"

"Why," said Mr. Savage, "your Honor said the court was ready and I was proceeding to make good my word that I was ready."

"Well, well, Counselor," said he, "let us compromise on that; you stay as you are now, and I will stay as I am, and the case will proceed." And so it went on to speedy and final justice.

But matters were very soon to mend. Judge Dillon was very soon to become, at the age of twenty-seven, a judge of the District Court of the Seventh Judicial District of Iowa; and he continued in that jurisdiction as a judge until 1879, a period of twenty-two years. And it is safe to say that during all that period, as always afterwards, he was every inch a judge, and that in response to his own personal dignity, the decorum of the bench and bar was studiously cultivated and preserved, and the learning of both was maintained and brought to a high degree of perfection, so that the courts of Iowa ranked well with those of any of the older States of the Union, both in character and dignity, and in breadth of learning.

And yet, Judge Dillon had no advantages whatever. On the contrary, regarded from the eastern point of view, he would have been thought to be wholly destitute of them, and there was nothing in his youth to indicate that he was rapidly to advance in the profession of the law and become one of the most distinguished and useful lawyers and judges in the United States. He was born in Montgomery County in the State of New York on December 25, 1831, and as he said, many years afterwards, "What is now known as Iowa was then an uninhabited region filled with savages," and Montgomery County in New York held out not much greater prospects for the future lawyer.

But in 1837, the hard year throughout the United States, his father left his young family there, and in company with his brother-in-law, John Forrest, for whom Judge Dillon was named, sought a home in the far West, and finally fixed upon Davenport. In August, 1838, he brought his family to Davenport and thus became one of the pioneer settlers, in a city destined to become great and prosperous, but which at that time probably did not number five hundred people.

And to show how our subject began life there, I quote from what he wrote half a century later:

"Though I still remember, I shall not recount the privations and struggles of the early settlers for many years after 1838. Money was there almost none. Everything was done on a traffic or trade basis. My father kept a hotel on the bank of the river near Western Avenue, for the accommodation of travelers and especially of the farmers in the surrounding country, who, coming to town with their produce or on business, had to remain over night. The standard charge for supper, lodging, and breakfast for man, and stable accommodation for beast for the night, was fifty cents, for which we were paid, not in money, but in store orders on merchants who bought the farmers' produce, 'payable in store goods.' I well recollect this, for it fell to my lot to help take care of the farmers' horses, and to take in my hand the store orders, go to the store for sugar, coffee, or what not, have the amount of each purchase endorsed on the order, and to carry home the articles purchased."

And he was then only six or seven years old. And he adds:

"When by grandfather, Timothy Dillon, with his family followed my father to Davenport in 1840, he brought some silver money with him, and he gave to me a new coined silver dime, the first I ever saw. How rich I felt!"

And then he was ten years old.

His education from ten to eighteen appears to have been of the most miscellaneous character, and is in striking contrast to the standard training of boys in the East, looking forward to professional life. Instead of a regular academic and classical training as a fitting for college life, we find him at the grammar school in Davenport, and taking lessons in elocution from the proprietor of a local newspaper, and at a very early age making up his mind to become a physician. Mr. Stiles, who has published an excellent biography of him in the *Annals of Iowa*, says:

"As the interior of Iowa, at the time of his father's removal there, was for the most part an unbroken wilderness, and Davenport but

an outpost of civilization, his means of education were necessarily limited. He had, however, the irrepressible instincts of a scholar and that insatiable thirst for knowledge which deeply characterized his whole life, and brought forth fruits which will durably perpetuate his name."

He was to be an entirely self-made man, but made on a large scale, with a strong brain, a warm and tender heart, and a clean conscience.

At the age of seventeen we find him studying in the office of Dr. Barrows of Davenport, who had been an army surgeon and had attained local distinction in Iowa; and two years later, in 1850, he was graduated as a physician from the College of Physicians and Surgeons of Davenport. In June of that year he was one of the regular physicians of the State, who met at Burlington to organize the Iowa State Medical Society, and was elected librarian of that body. He wrote the first article in the first number of the first medical journal published in Iowa, *The Western Medico-Chirurgical Journal*, published at Keokuk, entitled, "Rheumatic Carditis, Autopsical Examination, by John Forrest Dillon, M. D., Farmington, Iowa."

Farmington was a little village with only a few inhabitants and where two physicians were already practicing. One who knew Judge Dillon in later years could hardly imagine him as the young doctor of a country village in the far West. Writing fifty-seven years afterwards, he thus describes his settlement as a physician:

"My exchequer was far from plethoric and I was obliged to practice strict economy. I rented for an office a small brick building on the crumbling bank of the Des Moines River, one story high, about twenty feet square, in a dilapidated condition, at a cost of four dollars per month. I engaged board and lodging at a boarding house, where I made my home during the three or four months I remained at Farmington at a cost of three and a half dollars a week. Among the boarders was a young lawyer by the name of Howe, who had resided in Farmington some little time. We became well acquainted and spent nearly every evening walking up and down the banks of the Des Moines River, speculating upon what the future had in store for us. He was almost as destitute of clients as I was of patients."

But his first case seems to have disgusted him with the profession of medicine. Being summoned on a hot August night to visit a group of workmen at a brickyard two miles away, who after an imprudent diet had been seized with cholera morbus, and having no horse or buggy, he tramped out to the brickyard and found the patients in a state requiring liberal doses of laudanum and stimulants,

and his personal attention for several hours; and then he tramped back again to his lodgings in Farmington, which he reached at sunrise in a state of great exhaustion himself. And being asked many years afterwards, after he had given the narrative of his medical professional experience, "Now that you have told all about this, there is one thing you have not mentioned, did these men live or die?" to which he responded, "That question has been more than once asked, but I have always evaded an answer."

The night's experience set him thinking and the next evening, when he and the young lawyer Howe were taking their regular walk up and down the banks of the Des Moines River, he turned to him and said:

"Howe, I have made a great mistake; I cannot practice medicine in this country without being able to ride on horseback, which I am utterly unable to do. I might as well admit the mistake and turn my mind to something else. I shall read law. Tell me, what is the first book that a student of the law requires?" He answered, 'Blackstone's Commentaries.' 'Have you got them?' He replied, 'Yes, I have them and the Iowa Blue Book of Laws, and those are the only books I have.' He was kind enough to loan me his Blackstone, and I began at once to read law in my little dilapidated office."

It reminds us of Lincoln twenty years before, in the backwoods of Indiana, beginning his training for the bar by reading by the light of a tallow dip after his hard day's work was done, Blackstone's Commentaries and a borrowed copy of the statutes of Indiana as his entire library.

The truth is that, like Lincoln, Judge Dillon was absolutely self-educated—no college, no law school, no lawyer's office; but like Lincoln, he had the indomitable will to succeed, great power of concentration, an insatiable thirst for knowledge, and an intense love of reading. As he said in his very notable address at the opening of the Davenport Free Public Library, in 1904:

"My own love of books seems to me to be congenital; it is certainly immemorial. Their fascination has been unextinguishable, deep, irresistible. Age does not chill or repress but rather intensifies my love of books, and my personal sense of their value. Books that I have once read and found worth the reading become incorporate into my existence, and have thenceforward all the human interest of personal association, and are veritable companions and friends, to be kept and cherished as long as life shall last. With nothing inanimate would I more reluctantly part."

And again, telling how his love of books clung to him in old age, for he was then seventy-three, he says:

"Then it is, if such an one has been blest with the love of books, and has not suffered the springs of this love to dry up in the arid soil of the insatiate greed of gain or the madding pursuit of business, then it is he finds that books take the place of friends and relatives that have crossed the bar, and thus to the old they have a companionship and solace which they cannot have to others."

In pursuance of his purpose to become a lawyer, he gave up any further attempt to practice medicine at Farmington, and removed to Davenport, where for the better support of himself and to be near his mother and sisters, he opened a drug store in the fall of 1850, which he thought would also afford leisure time to enable him to read law. This he continued to do until the spring of 1852, when, lacking still half a year of his majority, he applied for admission to the bar of the District Court, and on motion of Mr. Austin Corbin, afterwards known to many of us as a noted banker in New York, but then at the Iowa bar, he was admitted. The same year he was elected Prosecuting Attorney for the county and practiced law in Scott and adjoining counties until 1858.

Mr. Taggart writes me this about his extremely conscientious preparation for his duties as Prosecuting Attorney:

"After he was elected Prosecuting Attorney, and in his preparation for the duties of that office, the principal book on criminal law to which he had access, outside of the Criminal Code of Iowa, was a book of forms of indictment. He took the book and went through it, copying every form of indictment in his own hand, supplying the elements of the crime in each case and studying the requirements which would be necessary to make the indictment complete in each particular case. This consumed some months of his time, but he took such pains with it that he felt that, with respect to each particular indictment, he understood definitely what would be required to make it complete.

"Shortly after he was inducted into office, he was called upon to draw an indictment against a German charged with the sale of liquor contrary to the statute of Iowa. The statute was peculiar in its wording, and up to that time no indictment drawn under it had been sustained. In the light of his previous work, however, he proceeded to draft an indictment and had the satisfaction of knowing that his work was well done, for it was sustained in the lower court, and after conviction and appeal by the defendant, it was also sustained by the Supreme Court.

"The incident illustrates the thoroughness of the man and the character of the attention which he gave to his work.

"When he narrated this to me, I had a new glimpse of the reasons for his great success in after life."

Of the details of this practice we know nothing, but he must have made his mark, for in the last named year, at the age of twenty-seven, he was elected Judge of the District Court of the Seventh Judicial District, and then began his judicial life, which lasted continuously without interruption until 1879.

To show what stuff he was made of, and how thoroughly in earnest he was to succeed as a judge, he tells us that on being elected to that office, he carefully read every published case of the Supreme Court of Iowa, from the beginning up to that time, making careful notes as he proceeded, and placing each under its appropriate head. He said that his sole purpose in doing this was to familiarize himself with what the court had decided, in order that he might not run contrary thereto; and that he might be in harmony therewith, he kept this up and added to it as additional reports appeared. And so valuable did he find it, and so convinced was he that the results of his reading would be of equal value to the whole bar of Iowa, that he published his work, as the first and only Digest at that time, of the reports of the State of Iowa, as Dillon's Digest, which was the beginning of a long series of valuable publications from his pen, which have entered into and formed a most useful part of the legal literature of America.

It is customary in modern days to look to our leading law schools as the great and most valuable nurseries of the profession, and very great praise, but none too great, has been ascribed to Professor Langdell, as the originator of the scheme of legal training which is based upon the study of the law in original cases, properly classified and coordinated. But it is never to be forgotten, that before law schools themselves were invented, and had become such important factors in legal education, there were hundreds of great and learned lawyers who never saw the inside of a law school, and that in our own time law schools were, at the first, seats of leisurely repose where little was learned by many of the students. And I might cite the names of Charles O'Connor, Charles F. Southmayd, and John F. Dillon, as examples of self-educated lawyers, who built up their professional careers upon the reading of the original cases in the reports, in the same way that was long afterwards broadened and extended by Professor Langdell, and that these old-time lawyers worked their way to

the front, by intense labor and unremitting application, in digging at the very foundations of the law.

His love of work was as insatiable as his thirst for knowledge and his mania for reading, and after five years in the District Court, probably spent mostly in the trial of cases at nisi prius, of which he was said to have become a consummate master, he was elected a Judge of the Supreme Court of the State of Iowa, and very shortly after, Chief Justice. It was then that he conceived the idea of writing a law book which should be of use and value, not only to the bar of Iowa, but to that of the whole United States, which presently took the shape of his great work on municipal corporations, which will inevitably keep his memory green among lawyers for generations to come. It easily takes rank with the most valuable text-books in English and American law, and is looked to in both countries as the leading authority on the important subject of which it treats.

He says (and I love to give the story of his life in his own words as far as possible):

"I selected my subject, 'Municipal Corporations,' and entered upon the work of thorough and systematic preparation, without the aid of stenographer or typewriter. And with no previous American treatise to guide me, I began an examination one by one of thousands of law reports, commencing with Volume I of the State of Maine and continuing through successive reports in that State to date. In like manner the reports of every one of the States and of the Federal and English courts were examined, occupying all my available time for about six years. The result of this research I have never had occasion to regret. The book was successful, and it has profoundly affected my whole professional career."

He also informs us that the first year's royalty on this book amounted to five thousand dollars, and that it has continued of value to the present time, in all not less than fifty thousand dollars.

There is an old adage that for a young lawyer to succeed he should either marry his employer's daughter or write a law book. We have many instances among us of the success of the former expedient, and Judge Dillon's example proves the enormous value of the latter. Beginning in the first edition as a single volume of five or six hundred pages, he continued to prepare and publish new editions, keeping up with all the cases to date, until in the fifth edition, published in 1911, it assumed the form of a work of five volumes containing all the law up to the present time on the subject, and welcomed everywhere by the profession as an invaluable book.

An extract from his preface to this last edition is so touching and pathetic, that I shall ask no excuse for reading it here in full. He says: "Over forty-five years have elapsed since the preparation of *Municipal Corporations* began, and more than thirty-eight years since its first publication. It is, therefore, not only a child, but the companion of the greater part of a prolonged professional career. Any justifiable satisfaction I might feel in its success is somewhat subdued, if not saddened, by the somber, although not melancholy reflection that in this edition I am taking final leave of a work which is intimately incorporated with the studies, lucubrations and labors of so many years. If these observations and reflections betray an author's vanity they may, perhaps on that account even, be pardoned. I have indulged in these retrospections, not to gratify my feelings, but because they give opportunity to add that my chief pride and satisfaction in the work consists in the fact that it constitutes the largest and certainly the last payment that I shall be able to make on the Baconian debt which I acknowledge myself owing to this great profession of the law, to which without distraction, diversion, intermission or other ambitions, I have given fifty-nine years,—the whole of my active life. The work falls far below my ideal and far short of what I could perhaps have made it, had I not been engrossed during all this time with the exacting duties of a lawyer, teacher and judge. Yet these obstacles have their compensations, for no doctrinaire, no mere closet student of the law can be thoroughly prepared to write a practical and technical treatise on the law of municipal corporations as it exists at this time and in this country. The author of a comprehensive treatise on the law ought to be a person who has the experience and training which are possible only to the practising lawyer and the judge. And these qualifications on the bench and in daily practice, I have had in full measure, and I feel that to this environment the work is indebted for a large share of whatever practical value and usefulness it may possess."

But in spite of his large extraneous labors in a literary way, which must have absorbed a vast deal of his time and thought, his devotion to his judicial duties was always assiduous and intense, and the results of his labors as Justice and Chief Justice of the Supreme Court of Iowa, which run through fourteen volumes of the *Iowa Reports*, from the 15th to the 28th, are permanent proofs of his wonderful judicial ability, his sound learning, and of his constant purpose to maintain the best ideal of law.

After eleven years' service in the State Courts, he was selected by

President Grant to be a Justice of the United States Circuit Court for the Eighth Judicial Circuit, and from that time his judicial reputation, which was before confined to the State of Iowa, assumed a broadly national character. His ten years' service in that Court, recorded in the five volumes of Dillon's Reports, testify to the broad scope of his mental development, the grand result of his accumulated learning, and to his notable leadership among the great judges of the land.

After ten years in the United States Circuit Court, in 1879 he tendered his resignation, to take effect at the end of that year, in order to accept the professorship of Real Estate and Equity Jurisprudence in the Law School of Columbia College, and that of General Counsel to the Union Pacific Railroad, which was tendered to him at the same time. And so he took leave of the State of Iowa, of which he was perhaps the most distinguished and most honored citizen, and to which he continued most warmly attached to the day of his death, and took up his residence among us in New York.

His resignation, after twenty-two years of judicial service, was made the occasion of a great demonstration of affection and regard by his professional brethren throughout the Eighth Circuit. The bar of every State embraced in that Circuit took formal action to give expression to their love for him, for he had always exercised the functions of his high office so as to endear himself to all who came in contact with him, as well as to command universal appreciation of his great judicial qualities. Especial notice was taken of the uniform help and encouragement which he had extended to young practitioners, stimulating them by his approving countenance, and listening to the least experienced among them with the same attentive ear that he lent to the oldest and most famous practitioners; of the marvelous power of labor which he had brought to the discharge of his official functions; of the absolute freedom from envy or detraction from any quarter that had constantly attended his ascending career; and of the clearness and precision of his judicial decisions, which had generally been so satisfactory as to command the approval even of the counsel against whom the decision was rendered, so as to render appeals from his judgments infrequent and generally useless.

As the Attorney-General of Kansas well said of his administration of the law:

"A term of this Court has not only been regarded by the oldest and most experienced of our practitioners as a school where the better parts of their profession were ably taught, but it has been a source of pride to us all that, as counselors here, we were assisting in as pure

and efficient an administration of public justice as is possible anywhere."

I have seldom heard or read more emphatic tributes to the integrity, the ability, the conscientiousness, and the power of a judge, than those which were justly expressed on this occasion.

Mr. Justice Miller of the Supreme Court, who had presided in the courts of the Eighth District for a period which included the entire time of Judge Dillon's service in the Court, expressed himself in a most feeling and effective manner upon the great loss which the Court was sustaining by his resignation, and of the difficulty which any successor, however talented by nature or accomplished by learning, would find in giving the same assistance in the performance of the judicial duties, and to him, as presiding justice, the same relief from unnecessary responsibility which had made his relations with Judge Dillon so pleasant.

In truth, by good rights, Judge Dillon should have been the successor of Judge Miller himself, in the Supreme Court at Washington. There was a singular similarity in the early stages of their careers, for Judge Miller, too, had begun life as a physician and had continued in that profession for many years before he took to the law. Their friendship was most constant and their mutual regard singularly free from any drawback. They loved each other as brothers, and were constant companions whenever an opportunity afforded, and I am sure that when Judge Miller died, after his most distinguished life upon the Bench, there was no man in the country so well qualified by learning and character and the good will of the profession, to be his successor, as Judge Dillon himself. It is not often that such an opportunity occurs, to fill the place of one great man by one equally great and efficient. I do not know that Judge Dillon at that time would have accepted the place, but his succession to one who had been among the greatest of our judges and the best masters of the English language that ever sat upon the Bench, would have been welcomed by the entire bar of the country with great unanimity. That great tribunal, the pride and glory of the nation, must not be allowed to dwindle, and the only way to secure that end, is by the appointment, as each vacancy occurs, of the best and greatest lawyer in the country, who can be found and induced to fill the place. Political or routine appointments will never do it.

Resigning and retiring judges often have great fears that they may not succeed in the practice of the law, and not without reason, for the judicial habit of mind is vastly different from the forensic. But Judge Dillon could have had no such apprehensions, for he launched at once

upon a great professional career at the bar, which continued without interruption until his death thirty-four years afterwards. As might have been expected from his great fame already acquired, his success was immediate and constant. He was habitually employed, not only in giving important advice and writing carefully prepared opinions, which I regard as the most difficult and critical service that a lawyer can be called upon to render, but in the preparation and trial and argument of great and important cases, the decisions of which fill the federal reports during all that protracted period. He constantly appeared before the Supreme Court of the United States, with all the judges of which he was a great personal favorite, for nobody could fail to be attracted and fascinated by his fairness and frankness in the presentation of an argument, his deference to the Court and to his adversary, and his manifest love of what was right.

He was soon employed by other great corporations, including the Western Union Telegraph Company and many others, and his aid was sought as Counsel, especially in corporation cases, from all parts of the Union. And the service that he rendered in such cases never brought upon him the least suspicion of spending his time in teaching his clients how to evade the law, or how to accomplish dishonest purposes within the limits of the revised statutes. He was a splendid example of an honorable, upright, and high-minded counselor, a notable example to his brethren in the profession.

I do not think that he was largely engaged in the trial of jury cases, but he did not shrink from them in the necessary service of his clients. I remember one in particular, in which he was good enough to retain me to assist him, the case of Farnsworth, Receiver, against the Western Union Telegraph Company. We began the trial in the early part of May, and it proceeded continuously until about the 12th of July, running far into our summer vacation. But throughout all those weary weeks, as for many weeks before, Judge Dillon's vigilant labor in the preparation and presentation of the case was most searching and successful. The case was full of difficulty and danger at every step, but, undismayed, he met every obstacle with unflagging courage, industry, and hope, and made from the beginning to the end of the trial, a deep and constant impression upon the Court and upon the jury.

At this distance of time, upwards of twenty-five years, I cannot undertake to state all the facts of the case, but only its general features. Our client, the Western Union, had an intense and dangerous rival in the Central Company, whose wires extended through the country, and one morning these wires were found to have been clandestinely cut,

so as to put the whole system out of commission, and a huge claim, supported by very loud clamor, was made against the Western Union. I think the complaint set forth a terrible story of ruthless onslaught, and wound up with a claim of damages of two million dollars. The best Counsel for such a claim appeared in the persons of Roscoe Conkling, who had recently resumed his place at the bar, after withdrawing from the United States Senate, and Robert J. Ingersoll, whose fame as an orator was almost unrivaled. Judge Lawrence, a capital peace-maker, presided. We could not hope to get a verdict, and the proper commission of Counsel for the defense in such a case was to reduce the adverse verdict to the smallest possible limits. It was in this that the skill of Judge Dillon and his never failing devotion to details made us sure of success; and in the end, after some of the most boisterous storms of speech in support of the most overwhelming volumes of evidence presented against us, we came out with a verdict of only two hundred thousand dollars, or ten per cent. of the claim as presented. And even the judgment entered upon this verdict, was reversed by the General Term upon some of the law questions saved by Judge Dillon's exceptions. I believe that this case afforded a fair example of the fidelity, diligence, and insight which secured him so large a share of success in the litigations with which he was connected.

He brought to bear in the argument of great causes, the unfailing common sense, with which he was largely endowed, and his sound judgment in the construction of statutes, which was with him an unfailing mental characteristic.

It was he who argued for the defendant Freight Association the case of the United States versus Trans-Missouri Freight Association, reported in 166 United States. And it was in this case that he presented the point that the Sherman Anti-trust Act was intended to apply only to those contracts in restraint of interstate or foreign trade or commerce in which the restraint is unreasonable, which after the lapse of twenty years, the Supreme Court appears to have adopted as the rule of reason, so strongly urged by him in the earlier case.

His incessant and overwhelming labors as judge, and subsequently as practitioner at the bar, seem never to have interfered with his readiness to prepare and deliver addresses on suitable occasions, which always involved a close relation with his professional life; and the contributions that he made to legal literature in this way, in addition to Dillon's Digest and Municipal Corporations, of which I have already spoken, were numerous and valuable.

His little book on the Inns of Court and Westminster Hall is a

charming description of those ancient nurseries of the law. He seemed to love them as devotedly as if he had been brought up and had practiced his profession within their walls, and had been perfectly familiar with all their fascinating traditions. I do not know how often he had visited them, but his descriptions are so true and so vivid, as to make one think of him as one who had been called to the bar under their authority. He seemed to feel, as I do, that it is impossible for any American lawyer, cherishing the great and inspiring traditions of the profession, to visit the Inns of Court without bringing away with him new pride in his profession and its wonderful history.

His Commemoration Address on Chief Justice Marshall was one of the finest tributes to that great magistrate, delivered on that notable occasion which celebrated the centenary of the great Chief Justice's accession to the Bench; and what followed showed his undying enthusiasm for the character and memory of that great judge. For, having proposed that a collection should be made and published of all the orations and tributes to Chief Justice Marshall which that occasion produced, and being challenged in reply to prepare and edit them for publication, he cheerfully complied and produced the publication which is in itself a striking biography of the greatest of all American judges. It consists of three volumes with contributions from many of the most prominent members of the bench and bar in all parts of the United States. It is a collection of the greatest value, and must have cost the editor an enormous amount of his most valuable time. It preserves for us the proceedings in all the States together with the splendid eulogies of Horace Binney, Mr. Justice Story, Edward J. Phelps, Chief Justice Waite, and William Henry Rawle. One need not go outside of its pages to find everything that could be said of the career of John Marshall. His introduction alone, consisting of some sixty pages, is a most valuable contribution to the biography.

His volume on *The Laws and Jurisprudence of England and America*, being the series of lectures delivered before Yale University, is a masterpiece as a contribution to the history of the law, and will hold its place in legal literature for generations to come.

But any account of Judge Dillon would be incomplete without a reference, however brief and imperfect, to the sweetness and sanctity of his private life, which was most sacred and beautiful. He was not a club man, nor a frequenter of public gatherings, and the time at his command, which was not absorbed by the stern grasp of his profession, was devoted to the most delightful domestic life. A devoted husband and father, he made his fine home in Davenport, and afterwards his

really splendid residence at Bernardsville in New Jersey, centers of the most unalloyed happiness and mutual devotion.

Professional duty and ambition were the only rivals to this never failing domestic bliss. It is said that in the early part of his career, being asked by his wife why he worked so hard and if he did not think he ought to give more time to his family and friends, his reply was that he had "a reputation to make"; and long after that was achieved, being then asked the same question by the same high authority, his answer again was that he had "a reputation to keep."

Mrs. Dillon was a woman of extraordinary charm and ability, the worthy helpmeet of such a man. They were both duly sensible of this constant conflict between the attractions of his home and the demands of his professional life, and in dedicating to her his Laws and Jurisprudence of England and America in 1894 he thus touchingly addresses her:

"A. P. D.

"The years of professional studies, circuit journeyings, and judicial itinerancies, whereof this book is in some measure the outcome, as well as the time required for its preparation, have been taken from your society and companionship. The only reparation possible is to lay these imperfect fruits upon your lap, as to you, indeed, they justly belong. This formal Dedication serves alike to accredit your title and to manifest my grateful sense of obligation and affectionate regard."

But a terrible calamity awaited him, which was to extinguish all the light of that delightful home and to put to a test all his manhood, courage, and faith. On the second of July, 1898, after an ideal married life of forty-five years, Mrs. Dillon with her daughter sailed from New York on the French steamer *Bourgogne*, intending to visit Nauheim for the benefit of her health which had been gradually failing. On the following Monday morning, two days out from New York, about sixty miles south of Sable Island, the *Bourgogne* came into collision with the *Cromartys*, by which she received a fatal blow, from which, after floating for forty minutes, she sank, with a loss of life of about 550 members, including this wife and daughter, who were so very dear to him.

Any consolation for such an overwhelming loss was utterly impossible, but it shows the heroism and fortitude of the Judge's character that from that time forward, for the fifteen years that remained to him, he found in renewed and never ceasing work the only comfort which

was possible. Some of his most charming addresses and other publications were included in this heroic work.

But most of all he found satisfaction in preparing the story of her life, and gathering the charming letters which she had written to many friends, full of grace and beauty, and making a book, which was printed, not for publication but for distribution among her relatives and friends, which is worthy of a high place among modern biographies. And this was his dedication of the book:

"This inadequate memoir, these scant memorials of the rare woman here commemorated, are affectionately inscribed to her children and grandchildren, in the hope that they and their descendants may thereby be enabled more fully to realize that her life was wholly consecrated to home and duty, and that her name, virtues, and memory are their most precious inheritance and a benediction evermore."

His dauntless courage and his devotion to her memory sustained him bravely in all his subsequent life, and no casual acquaintance would have guessed from his appearance and bearing that he had been the victim of such a fatal blow. He had learned through life how to submit to the inevitable, and he performed his great duties to the end with most elastic and heroic cheerfulness and hope.

Take him for all in all, among the distinguished judges and lawyers and men of America, we shall rarely find his superior.

WILLIAM CROWNINSHIELD ENDICOTT

MEMOIR REPRINTED FROM THE PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS, 1907

Massachusetts cherishes with just pride the character and career of William Crowninshield Endicott, and the Colonial Society, of which he was an active member, is especially interested in honoring and perpetuating his memory. Born in 1826, when John Quincy Adams was President, and dying in 1900, in the fourth year of William McKinley's official term, he lived in the administrations of nineteen presidents of the United States. His seventy-three years covered the most eventful and critical period of the country's history, and during a considerable portion of his life he was engaged in the public service of the State and the Nation, in conspicuous positions, which he filled with great credit to himself and advantage to the community, and always with conscientious fidelity. In all the relations of life he commanded universal confidence by the absolute purity and dignity of his personal character.

A glance at the scenes and the circumstances of his boyhood will shed some light upon the happy development of the man. He inherited a proud name, and with it a just pride of ancestry, which he cherished through life without affectation and without suffering it in the least to impair his democratic sympathies. It was a great distinction to be the descendant and bear the name of the first Governor of Massachusetts, who was sixteen times elected to that most important office, and who stands as a great historical figure, first in time among the founders of a noble State. His sturdy and rugged reputation, by no means fading in the lapse of time, has dominated Salem and the County of Essex down to our own day, and constitutes one of the local treasures. If the portraits of the Governor which have come down to us are to be relied upon, Mr. Endicott in the eighth generation bore a marked resemblance in feature and bearing to this distinguished ancestor. It would have been an excellent thing both for Mr. Endicott and for the State, if he too in his day and generation could have been elected Governor of Massachusetts; and I cannot help thinking that the example and career of the early Governor, of which he must always have borne some impression, was an element in the moulding and development of those qualities which enabled him in after life to fill high office with success.

The first Colonial Governor was not the only ancestor of whom he was justly proud. His lineage in all its strands can be traced back to all that was best in the early history of the Colony. The Crowninshields, the Derbys, the Gardners, the Williamsses, the Putnams, and the Mannings, who had been among its prominent families from the seventeenth century, were of his line, and they had had much to do with the making of Salem and of the State. The Crowninshields and the Derbys in particular had a great part in the development of our early American commerce, when Salem ships, owned and navigated by them, penetrated to the remotest quarters of the globe, and made the little town a great commercial port and her name known the world over. They were pioneers of trade and commerce in the Far East, where they carried in honor, upon ships of their own building, the flag which has now, for a time only let us hope, practically disappeared from the ocean, and they brought home great cargoes which enriched themselves and the place of their residence. Mr. Endicott's maternal grandfather, Jacob Crowninshield, was a very conspicuous man, a prominent member of Congress, and was appointed Secretary of the Navy by President Jefferson, who was a close personal friend,—an honor which he declined for what seems now, in these days of steam and electricity, the very singular reason "that he could not be absent all the year from his business and family." He was a great navigator and merchant and was fully equipped on all questions which would have come before him as Secretary of the Navy, an office to which his brother Benjamin W. Crowninshield, a man of the same quality, was ten years afterwards appointed by President Madison. It was in sympathy with this sea-faring and ship-owning branch of his family that Mr. Endicott in after years was such a firm advocate of the doctrine that the restoration of its once powerful mercantile marine was essential to the true greatness of the United States, and ought to be accomplished at whatever cost. Thus the subject of this memoir came, through many generations, of the best stock and breeding of Massachusetts. As might have been expected, the quality and the fibre of his natural character were worthy of the best nurture and education which his time afforded, and these produced the high-toned and cultivated gentleman, the public-spirited citizen, the wise judge, and the pure and safe statesman whom the world knew.

Salem was a unique and interesting community in those days. She had lost or was fast losing her commercial supremacy, but the descendants of her ambitious navigators and successful merchants were enjoying in the second and third generations the fruits, and the best

fruits, of their success. A highly intelligent and cultivated society had grown up there, with an aristocratic leadership into which the Endicotts naturally came. Wealth, travel, and education had contributed to its culture and progress. There was probably more wealth and there certainly were more college graduates, in proportion to the population, than in any other town of New England. It was a conspicuously intellectual community. A few of the great merchants still lingered among us in advanced years, and the sons and daughters of many who had passed away occupied their places and enjoyed the good results of their fortunes. The professional men, who abounded in numbers and character, had great weight and gave the tone to the civic community. The Essex Bar was still a powerful fraternity and its most distinguished members resided in Salem. Her physicians and clergymen and men of science and learning occupied worthy and influential positions. Horace Mann was arousing enthusiasm for popular education. The atmosphere of the place was decidedly liberal. Harvard College and the Unitarian movement had broken the back of that hateful, dogmatic theology which, in the days of Salem Witchcraft and its high priest Cotton Mather, had disgraced the place and given it an unwholesome reputation. At the same time, there was a distinct individuality about the town. It was shut in and quite apart from other towns and cities, and the life of the place was all contained within itself, so that whatever happened in Salem or ever had happened in Salem was of supreme importance to its citizens. Communication with the outer world was extremely limited. Endicott was eleven years old when the railroad first reached Salem from Boston. The semi-weekly press supplied the local news of the day, but brought very tardy intelligence as to events beyond the limits of Essex County; and so the people of Salem had to be, and were, sufficient unto themselves. The habits of the place were extremely simple. Until the murder of Captain Joseph White, in 1830, it was not uncommon to leave the house door unlocked and unbarred. The police force of the town consisted of two maimed veterans, and there was still a great deference among the people towards the leading citizens.

Fortunate was the boy whose lot was cast in Salem in those days. All his surroundings tended to keep him in the right path, and the facilities for a liberal training were of the best. I remember Endicott, a bright, handsome, and extremely courteous and agreeable boy, in 1840, or thereabouts, when he began to prepare for Harvard at the Latin School, a public school strictly devoted to preparing boys for college, where nothing but Latin, Greek, and Mathematics was taught.

This school has come down from the very earliest days of the Colony. It was founded in 1637 and furnished to the first class that graduated from Harvard, in 1642, at least one man who afterwards became distinguished on both sides of the Atlantic. The discipline was severe and absolutely equal. It was a strictly democratic community, and it is certain that every boy found there his level and learned to realize that all are made of one flesh and one blood. Every year the school sent to Harvard a group of boys well prepared and proud of their nativity, who in numbers and standing held no mean place in the small classes of those days.

Harvard College, when Endicott entered it in 1843, was hardly more than the germ of the great and powerful University which now exists at Cambridge. The whole number of students, less than three hundred, did not equal the number of teachers now employed. There was a mere handful of professors and tutors. The curriculum in the first quarter of the century had not changed much since the days of our fathers. The four old dormitories, Massachusetts, Hollis, Stoughton, and Holworthy, Harvard, University and Gore Halls, and Holden Chapel constituted the entire plant. The method of tuition varied little from that pursued in the preparatory schools, consisting chiefly of learning by rote and reciting lessons, with a very few lectures. Examinations were little more than nominal and were oral; the modern system of cramming, unloading and forgetting, had not come in; the elective system had not begun; the stimulating influences and remarkable facilities now enjoyed were unknown. For all this, it is hardly yet possible to say that the new methods are producing a set of men sounder and abler and more efficient for the service of the community than the old. Comparing the graduates from 1820 to 1850 with those from 1850 to 1880,—while the latter group far excels the former in numbers, it can hardly be said to have produced men superior in quality or in distinction. The social advantages of those days were great, an admirable class feeling prevailed, there was very close friction man with man, and each one found his place. At any rate, Harvard then furnished the best that America afforded, and Endicott got the full benefit of it. He appears not to have been a very hard student, but improved his time in acquiring a knowledge of books and of general literature, which stood him well in hand as a great reader in his subsequent laborious life. Among the meritorious students of the Class, he stood in the third grade and at Commencement he delivered a disquisition on Public Honors in Different Ages. Although he was not a member of the Phi Beta Kappa at graduation, he was, in 1858, elect-

ed into that society of scholars. In the four years of his residence at Cambridge, he acquired an ardent love of the College as a centre of learning and culture, in which his own intellectual life had been nourished, and a high appreciation of its value as one of the chief factors in the promotion of American civilization. This made him through life the devoted servant of his Alma Mater, and the important part which he took in the care of her interests and the development of her usefulness, resources, and influence, entitles him to the grateful recognition of his countrymen, quite as much as the more public service which he rendered in conspicuous official stations.

The actual and rapid development of the ancient College into the great University, which now leads the educational forces of the United States, began in 1869 with the election of President Eliot, who with a courage, wisdom, concentration of purpose and fertility of resource entirely unsurpassed, has conducted its affairs and brought it, by the devotion of a long life to its service, to its present commanding position. During a large part of this long period, Mr. Endicott was honorably connected with the government of Harvard, and by careful and skilful attention to its welfare upheld the arms of the President, and had a full share in the great work of progress which Mr. Eliot designed and accomplished. In 1875 he was elected a member of the Board of Overseers for two years, and again in 1876 for six years more, and a third time in 1883 for a further term of six years. On Commencement Day, 1882, the Degree of Doctor of Laws was conferred upon him "in glad recognition of his attainments, station, and influence,"—an honor which I am sure he enjoyed as much as any distinction which ever came to him. In 1884 he was elected a Fellow of the Corporation, and, withdrawing from the Board of Overseers, as the positions were incompatible, he continued for eleven years, until September, 1895, to discharge the important and responsible duties of a member of the Corporation which really controls the destinies of the University. In recognition of his loyalty he was elected President of the Alumni. Thus for twenty years he served the University with unflinching devotion. The value of his long and close attention to its interests could not be better expressed than by the Resolution passed by his associates on the occasion of his resignation, because of failing health, in 1895,—a resolution which certainly received the cordial approval of all the Alumni:

"The Board desire to record their sense of the high value of Judge Endicott's service to the University, and their regret at losing his support in the discharge of their trust. He brought to the service of

the University an honored name, professional distinction, and a high reputation in the community for impartiality, dignity, and firmness.

"The members of the Board will greatly miss at their meetings not only these rare personal possessions, but also his sincere friendliness and the charm of his courteous, cordial manners."

I have thus surveyed by itself the history of his relations with Harvard from the date of his entry in 1843 until his withdrawal from the Corporation in 1895, a period of more than half a century; and this I have done quite in advance of any reference to his professional and political services, because to my mind it is fully as important as the rest, and because it shows in a clear light what manner of man he was,—a typical Harvard man of the highest grade, who received and enjoyed all the benefits and honors which the College had to bestow, and who, in glad and grateful recognition of the nurture he had received within her walls, revelled in her success and through a long life did all he could to promote it. Whoever knows Massachusetts well, knows that such a man must have been of her very best.

When Mr. Endicott was approaching the end of his college course, the choice of a profession naturally presented itself and the charms of a commercial career were pressed upon him. Great opportunities in Eastern commerce, in which Salem and his friends had still a strong interest, were held out to him, but his tastes lay in the direction of law and literature and the possibilities of political life which the profession of the law might open to him, as it has always been the chief avenue to public life in America. The thirst for wealth which has become such an absorbing and voracious appetite in these last days had never fastened upon him, and he wisely chose the professional career in which he could by no possibility hope to become rich, but for which his natural faculties and inclinations so admirably suited him. Having completed his legal studies with Nathaniel J. Lord, a noted and very accomplished advocate of that day, and at the Harvard Law School, he was admitted to the Bar in Salem in 1850, and immediately began the practice of the profession which requires of those who would win its highest prizes more patience, industry, and self-denial than any other calling; but he had good health, a reasonable ambition, strength of will, and great tenacity of purpose, and soon won his way to a successful practice. There were still giants at the Essex Bar in those days, and some of those great advocates who had won their first fame there and afterwards moved to wider spheres of activity, occasionally returned to share in its conflicts. The local contestants had among them many very powerful men, with whom Mr. Endicott was soon

called to contend, and in a long career of more than twenty years he not only held his own, but gradually and steadily came to the front, so that at the time he was called to the Bench he was without a superior at the Bar of Essex, which he had so long adorned.

During the early years of his practice it was occasionally my privilege to hear him try and argue cases, especially before juries in the Salem Court House. He had not yet come to the full maturity of his professional strength, and was not engaged in the larger cases of which he afterwards commanded a full share, but he possessed and exhibited the prime qualities of successful advocacy. Thorough preparation, unvarying coolness, and great readiness were of course his, but what always seemed to me to be his distinguishing characteristics, were his transparent honesty and fairness and his extreme and uniform courtesy. The tricks of the trade had no charms for him. Both Judges and Juries believed what he said. They knew they could trust him, and so they put their confidence in him. Where he ought to win he won, and I do not believe that he ever regretted losing a case that he ought to have lost. At the same time the charm of his manner, his winning presence, his clear and agreeable voice, and his unruffled calmness conciliated the good-will of all, and made it difficult for more boisterous or less scrupulous advocates to get the better of him; and all the while he was qualifying himself without knowing it for the eminent place to which he was at last unexpectedly called, and became a thorough master of the law. There was no luck in his success at the Bar; there seldom is. Patronage did not help him; there was no patronage. Clients wanted always the man who could best take care of their interests, and gradually they more and more resorted to him. His character told strongly in his favor in the race for success, and his naturally good and sound judgment and common sense, strengthened by study and legal training, made him a favorite professional adviser.

These were twenty-three years of stern and strenuous toil and rigid self-denial, of which the advocate's life is always full, leaving him but little time to indulge in literature which he loved. Reading was his pastime and recreation. There was very little opportunity for sport in those days in Essex County,—sport which does so much in England for the professional man, and is now beginning to do something for all sedentary men in America. The gospel of hard work was still the universal creed in New England. While he was pursuing his law study and in the very earliest years of his professional life, he held a commission from the Governor in the militia of the Commonwealth, as First Lieutenant and afterwards as Captain of the Salem Light In-

fantry, the crack corps of its day; and many a time, with admiring eyes, I have seen him, looking every inch a soldier, proudly marching at the head of his little company, which in those days enjoyed great local fame. Incidentally, as time went on, politics appear to have given him some diversion, and no doubt had his professional labor been less engrossing, might have engaged his serious attention. He served several years in the Common Council of Salem and was one year its President. For many years he was elected or appointed City Solicitor, and four times he was the unsuccessful Democratic candidate for Attorney-General of Massachusetts, and once for Congress in the Essex District. I attach, and I think he attached, but little importance to these political diversions, except as they manifested his public spirit and willingness to serve the State or City when duty called, and the growing and general estimation in which he was held by his fellow-citizens. It was upon his equipment and reputation as a lawyer of the first rank, however, that his subsequent public service rested.

Mr. Endicott's preparation for judicial life, unconscious though it was, and without a thought on his part of ever being called to serve the community in that position, was constant and uninterrupted through the whole twenty-three years of his career at the Bar. The experience of the English Courts, where for centuries it has been the recognized rule to fill vacancies on the Bench by the appointment of the leaders of the Bar, has proved the wisdom of the rule and the success of the system. However improbable it might seem, a priori, that the advocate's contentious habit of mind, persistently and strenuously exercised for half a lifetime, could easily be laid aside and exchanged for the judicial habit and temper, long experience has demonstrated that leading and thoroughly trained advocates have generally become sound and impartial judges. Their previous mental labors have not only made them thorough masters of the law, but have also given them an extensive and far-reaching insight into human affairs in all their variety and complexity. An advocate of Mr. Endicott's keen intelligence and vigor of mind could not possibly spend a long series of years in the conduct of litigation in a homogeneous community like Massachusetts without becoming perfectly familiar with every sort of legal question that could arise among the people, and with the entire range of subjects and facts which the solution of those questions involved. In such a practice as his, too, there was a department of work, which is in its nature judicial,—the giving of professional opinions on every kind of question that could arise in a county of widely diversified business and interests, and here Mr. Endicott excelled. The same self-

reliance and independence of judgment, which, added to his innate spirit of justice, went so far to explain his success at the Bar, made his professional opinions worth having and acting upon. His mind was proof against the insidious temptation which sometimes induces the lawyer to lean towards the opinion that is needed or desired by the party who consults him, and to convince himself unconsciously on the side of his retainer. It was not in his nature and character to yield to such a temptation. His written opinions while he was at the Bar were really judicial, and we are not surprised to learn from the highest authority¹ that "some of [them] upon difficult questions * * * had a weight scarcely less than that accorded to the decisions of [the Supreme Judicial Court.]"

Thus we find Mr. Endicott at the age of forty-six in the very prime of life, full of health and vigor of body and mind, foremost in the forensic arena of his neighborhood, and admirably qualified in mind, character, manners, temper, and experience to be a good and useful Judge. Had he lived in a jurisdiction where the Judiciary is elective by the popular vote, the chances would have been ten to one at least against his ever being made a Judge. He had never curried popular favor or coveted applause, he had been diligent in his business to a degree that made it impossible to keep himself in evidence before the people, even had he desired it; he scorned all the arts of the demagogue, and had never sought or thought of the position. The party to which he had belonged nearly all his life, and to which he conscientiously adhered at great personal sacrifice, was and had long been in a hopeless minority in the Commonwealth whose chief magistrate had the power of appointment; but fortunately for the administration of justice within her limits, Massachusetts has faithfully adhered to that ancient and conservative system, of the appointment of Judges by the head of the State to hold office during good behavior, which for more than two centuries has worked well in England and for more than one has made our Federal Judiciary the stronghold of Justice and kept the judicial name above suspicion and reproach. So, when, in 1873, Governor Washburn, a Republican, appointed Mr. Endicott, a Democrat, without his knowledge or any solicitation on the part of his friends, as the best man that he could find in the Commonwealth for the office, to be one of the Justices of its Supreme Judicial Court, he gave a signal demonstration of the merits of the system, and at the same time commanded the cordial approval of the Bar throughout the State.

¹ Attorney General Knowlton.

Though taken by surprise, Mr. Endicott promptly answered "ready," and immediately took his place in that distinguished tribunal, which from the beginning has been the crowning glory of Massachusetts, and has, perhaps, done more than any other Court except the Supreme Court of the United States to maintain the judicial purity, dignity, and power. His six associates were already eminent and experienced Judges. The work of the Court was incessant and heavy, and to assume at once his full and equal share of its labors called for the full exercise of his best powers. It has always seemed to me that while at the Bar he had considerable reserved power, and did not put forth all his strength. At any rate he did not often make those strenuous and desperate exertions which stern necessity compels from men who know that they must succeed or perish. His circumstances were comfortable and his success and leadership came easily, to a degree which convinces me that in a wider field, where the strife was harder he would still, with more of a struggle, have worked his way to a leading place, similar to that which he had attained at the Essex Bar; but now, in the Court, his judicial duties tested his powers, and demanded his full strength from the beginning. He was armed with the full panoply of justice. He was not one of those Judges who, as often happens under the elective system, have to be educated upon the Bench. He entered at once on a term of arduous labor which lasted without interruption for more than nine years, and to which he applied himself with such an earnest endeavor to do his whole duty, that at last it exhausted his health and strength, and came dangerously near terminating his extremely useful life. In the words of the distinguished advocate² whom I have already quoted:

"From the very beginning he proved himself to be an admirable Judge. His first opinion, printed upon the page following that containing the memorandum of his appointment, * * * showed the hand of a master. With scarcely an unnecessary word or phrase, and yet with a felicity of expression that never failed him, it reached its conclusions in a way that made them appear to be almost axiomatic. It was a model opinion; one of the kind that convinces even the losing side. The standard thus at once reached was consistently maintained throughout the ten years of his service. Not one of his opinions has been over-ruled."

This last statement is a signal testimony to his judicial ability, fidelity, and power of research, for the twenty-two volumes of Re-

² Attorney General Knowlton.

ports of the Court during his tenure of office contain 378 opinions written by him, upon almost every conceivable question of law, many of them involving the study and analysis of intricate and tangled questions of fact, and from first to last bringing before him for review the whole complex and multifold life of the people of a busy and enterprising Commonwealth. This regular and severe work of hearing arguments, attending consultations, and writing opinions, was frequently interspersed with the holding of jury trials in both civil and capital cases, a service for which his admirable temper and long and varied experience as a jury lawyer had specially qualified him. Only those engaged in the profession can justly appreciate the prodigious amount of drudgery, labor, and strain, as well as of intellectual exertion of the highest quality involved in such a life, for one who, like him, was inspired with the earnest purpose to do his whole duty in the best way possible. Of course, many cases were easy of solution, but he must have had constantly on his mind the more difficult ones that required exhausting investigation and deliberate consideration,—always very wearing work. In disposing of these, he must have kept constantly in mind the necessity of living up to the traditions and reputation of the illustrious tribunal of which he was a member. The physical labor thrown upon him was no trifling matter. The age of universal stenographers and typewriters, which enables us now to despatch twice as much business half as well, had not yet fully come, and his son tells us that his opinions were, “for the most part, in his own handwriting.”

Apart from the written results of his continuous and well-sustained industry as they appear in the Reports, the testimony is harmonious and universal to his superior excellence as a Judge. His inherent natural qualities formed the basis on which his judicial character rested. He was healthy-minded and high-minded, and of adequate intellectual force and strength; he was truly learned in the law, and he had an innate sense of justice and a love of fair play which enabled him to hold the scales of justice always even. There was a dignity and repose about him, absolute impartiality, and uncommon courtesy, that made him upon the bench the ideal impersonation of Justice. It was never my good fortune to see him in the discharge of his judicial duties, and I may perhaps be permitted to quote a few words from the very sincere and affectionate tributes that were paid to him at the Bar Meeting, and in the Court immediately after his death, by those who had long been in close contact with him:

"His natural open-mindedness and his essentially judicial temperament were recognized on all hands.

"A more dignified, graceful, and effective presiding magistrate it has never been my fortune to see on the Bench.

"The individual charm that belonged to him, the handsome presence, the refined and expressive countenance, the gracious and genial manner, only his contemporaries and professional associates can justly appreciate."³

"His urbanity and his knowledge of men and of affairs rendered the transaction of business in his Court smooth and expeditious.

"His opinions were sound and his culture and command of language lent them terseness and lucidity."⁴

"To great beauty and natural grace of person were added a dignity of bearing which did not fail to impress all who came before him, and a winning courtesy of manner which attracted and charmed everyone.

"He was the learned, accomplished, high-minded gentleman upon the Bench."⁵

"[In all cases] his judgments will be found * * * satisfactory, his learning adequate, his perception of the real points clear, his grasp firm and strong, his power of statement marked, his style excellent.

"His name will be enrolled amongst those whom the Bar of Massachusetts will evermore hold in respect and honor."⁶

"Above all, he loved justice and right and truth and honor. * * * Such a man may well be said to be born a Judge.

"His sweetness of temper was proof against all irritation. * * * To try a case before him afforded a distinct and peculiar pleasure, due simply to the manner in which the Judge conducted the trial."⁷

"He was a gentleman, in the truest sense of the word. His work left no doubt that he was also a lawyer. And when the gentleman and the lawyer are combined in one the result is the best type of Judge."⁸

Chief-Justice Holmes well portrayed his judicial character:

"I * * * think that he represented in the superlative degree my notion of the proper bearing and conduct of a Judge. Distinguished in person, with the look of race in his countenance which in more ways than one suggested a resemblance to that first Endicott to whom Massachusetts owes so much, he sat without a thought of self, without even the unconscious pride or aloofness which seemed, nay, was his right, serenely absorbed in the problems of the matter in hand, impersonal

³ Hon. Richard Olney.

⁴ Mr. Solomon Lincoln.

⁵ Mr. Lewis S. Dabney.

⁶ Hon. Charles Allen.

⁷ Mr. Causten Browne.

⁸ Attorney General Knowlton.

yet human, the living image of Justice, weighing as if the elements in the balance were dead matter, but discerning and collecting those elements by the help of a noble and tender heart."

Such tributes as these from those who knew him best, uttered with evident truth and sincerity nearly twenty years after he left the bench, indicate how deep and lasting a mark he had left upon the profession. He was an eminently good, wise, and useful Judge, and ranks high in the long list of the members of the Court who have made it so eminent among American tribunals. His heart was in his work and his conscience too, and he appears to have been singularly free from judicial faults that are not uncommon. He had none of that impatience which leads some judges to interfere and take the case out of the hands of counsel, before the trial or argument has fairly begun, as if they knew it all better than those who were responsible for its conduct and had made it the subject of protracted study. He respected the rights of the Bar as carefully as he maintained the dignity and authority of the Court, and was never dictatorial or domineering. His nerves and temper were always well in hand, so that he was never peevish or petulant. He never sought by the exercise of his judicial functions to win applause or attract popular favor, but was content and anxious only to do justice. Remembering the shortness of life and the value of time, he did not overload his opinions with superfluous quotations from authorities and precedents, but expressed his reasons with brevity, clearness, and force, and so carried conviction and left his decisions worthy models for imitation. The one preeminent trait which made him a marked man among his fellows, at the Bar or on the Bench, was his charming courtesy and attractive dignity of manner, which made him a universal favorite in Court, so that whether he was conducting a trial or argument as counsel, or presiding in the tribunal of which he was an ornament, he was a fine example of the finished and perfect gentleman. It was no light measure of praise when the Chief Justice⁹ said of his manners that "his example has prevailed, and that now it is the rule that a lawyer will try his case like a gentleman, without giving up any portion of his energy and force."

I have dwelt at considerable length upon his judicial career, because to my mind the office and the service of the Judge are the highest and noblest that man can exercise upon earth, and in his hands they suffered no detriment. He wore the ermine gracefully and transmitted it as spotless as he received it. Judge Endicott very closely resembled

⁹ Hon. Oliver Wendell Holmes.

the ideal judge as portrayed by Rufus Choate in his celebrated address on the Judicial Tenure:

"A man towards whom the love and trust and affectionate admiration of the people should flow; * * * one to whose benevolent face, and bland and dignified manners, and firm administration of the whole learning of the law, we become accustomed; whom our eyes anxiously, not in vain, explore when we enter the temple of justice; towards whom our attachment and trust grow even with the growth of his own eminent reputation."

The strain of his faithful and unremitting labor, in the tenth year of his service, resulted, as too often happens, in broken health and shattered nerves, and compelled him, against the earnest protest of all his colleagues, to send his resignation to the Governor,¹⁰ whose response well expressed the judgment of the State for which he spoke:

"It is with the greatest reluctance and only upon conviction that your determination is final that I accept your resignation of the office of Justice of the Supreme Judicial Court. I express the unanimous sentiment of the Commonwealth when I say I regret the loss to Massachusetts of your learning and wisdom, and express the hope that you may soon be restored to health and to the judicial service which you have so long adorned."

This remission of labor was timely, and after a year or two of repose and travel he returned to Massachusetts restored in health, with much capacity for future service, though never so robust as of old.

Mr. Endicott was never a politician and with all his charming manner and attractive personality he never cultivated those arts which win popular favor and applause. As we have seen, he had often been a candidate for Attorney-General and once for Congress, but these nominations were not of his own seeking and he probably never lifted his voice or hand to secure votes. His party in the State had long been sadly demoralized, but the nomination of Mr. Cleveland for the Presidency in 1884 roused it to new activity, and its convention at Worcester unanimously insisted upon nominating Mr. Endicott for the high office of Governor. No office could possibly have been more attractive to him, and there was no man in the State who would have more fitly adorned it. It must have touched and awakened, I will not say the desire, but rather the dream which he must have cherished, of the possibility of filling the place which his renowned ancestor had so worthily filled. Nothing could be more captivating than the idea of

¹⁰ Hon. John D. Long.

such an hereditary succession by the will of the people after an interval of seven generations; but whether it was that he distrusted his recovered health, or shrank from the uncongenial pursuit of a hotly contested and extremely doubtful campaign, he at first refused the nomination which was thrust upon him by the Convention in—"merited recognition of his life-long devotion to Democratic principles, his fidelity to all the public trusts he had assumed, and the dignity, honor, and rectitude that had always marked his intercourse with his fellow-men."

But being finally persuaded that his candidacy might help the election of Mr. Cleveland, in whose behalf he was warmly enlisted, he, much against his will, accepted the nomination upon the rare but highly characteristic condition that he should not be required "to take the stump." His acceptance was an acknowledged tribute to the "honesty, fidelity, courage, and patriotism of the national candidate."

Attracted by his loyal devotion to the principles in support of which he had himself been elected, while Endicott had been defeated, Mr. Cleveland, though personally a stranger to him, in considering the composition of his Cabinet, in February, 1885, invited him to Albany and offered him the position of Secretary of War. Upon full consideration of the responsibilities and sacrifices which the position would exact, and in the same spirit in which he had led the party in Massachusetts, he accepted the office, which he filled acceptably and to the public advantage for four years from the fourth of March, 1885. It was well for him that the office in that period of peace and tranquillity did not impose upon him the colossal duties and difficulties that have lately rested upon the stalwart shoulders of his successor, the present incumbent. The routine of the Department in those days, though exacting, was uniformly quiet, and his health and strength proved entirely adequate to the highly creditable and useful discharge of every duty cast upon him.

The only fighting which the United States Army had to do during his administration was in the suppression of Indian outbreaks, and the last of the considerable Indian fights ended happily in 1886 with the final defeat of the Apaches and the capture of their chief, Geronimo, who had given infinite trouble.

He contributed to the Cabinet and Administration of Mr. Cleveland, an element of great refinement and culture, the charm of his attractive personality, social gifts of a high order, great wisdom in counsel, purity of character which commanded the confidence of the approving Nation, and a loyal support and encouragement to all the earnest ef-

forts of his chief for the reform of the public service and the maintenance of the national credit and dignity, and we have the cheerful and emphatic testimony of the present distinguished Secretary of War, that the position which Mr. Endicott held in the Cabinet—

“though foreign to his training, he immediately rendered conspicuous by strict attention to duty, and a keen interest in the Army and its requirements. * * * He initiated many important reforms which, pressed to successful conclusion, enabled him to maintain undiminished that high standard of integrity for which the Department of War has ever been distinguished.”

It would not be useful here to detail or to summarize the many important subjects of a technical nature which engaged his attention as Secretary of War and which have passed into the history of the army and the country; but as indicative of his faithful support of Mr. Cleveland's efforts to promote the stability of the civil service, it is worthy of special notice and remembrance that out of a total of 1619 employees of the War Department and its bureaux, whom he found when he took office, all of whom had been appointed by the opposite political party, he made, in the four years of his tenure of office, only thirteen removals except for cause or for the reduction of the force.

He took a vivid and constant interest in the Academy at West Point, as the invaluable nursery of military education, upon which the good name of our Army and its officers must always depend, and his addresses to its graduating class from year to year were patriotic and stimulating. With persistent energy and zeal he initiated many reorganizations and reforms of bureaux and departments of the Army Service, the beneficial results of which are permanent and of great utility. The Board of Fortification and other Defences, created by an act of Congress on the day before he took office, to devise measures for the defence of the coast and harbors and seaboard cities and which is known as the Endicott Board, cast upon him, as Chairman, most laborious duties, and established the policy according to which our coast defences are now maintained out of large appropriations made for the purpose. His four annual reports to Congress disclose an enormous amount of detail work most faithfully done.

Judge Endicott was a good speaker, and on the few occasions which enlisted his sympathies and on which he permitted himself to be drawn upon for such service, he delivered excellent discourses. His elaborate and sympathetic addresses in 1869, at the dedication of the Museum of the Peabody Academy of Science in Salem, and in 1878, on the two hundred and fiftieth anniversary of the landing of John

Endicott, commanded great attention, and their perusal discloses an intimate acquaintance with the local history of his native city and county and a deep interest in the development of New England. Besides his devotion to Harvard College, his interest in the cause of education was manifested by his service as a Trustee of Groton School and of the Peabody Education Fund.

After his retirement from the Cabinet in 1889, he resumed the practice of his profession in Boston, in a quiet and dignified way. His advice and services were eagerly availed of by many important interests, which he served as long as his waning health permitted, till at last, worn out by his long course of professional and public service, he retired to his country seat at Danvers, where, surrounded by scenes that had been familiar to his great progenitor, and in the enjoyment of all that should accompany old age, he passed the evening of his days in dignified repose.

Such a sketch as this that I have attempted, of one whose career was for the greater part of it conspicuous in the eyes of his fellow-men, might, perhaps, remain without reference to that inner life, known only to his family and his friends and guarded by himself as something too intimate and sacred for other eyes to penetrate. And yet, in his case, the memorial must be very incomplete which fails entirely to notice this side of his existence.

The strategy of a soldier, the invention of an author, the policy of a statesman may be, and often have been, independent of the circumstances of their domestic life and even of their private character; but William Endicott was through all, and above all, a great gentleman; and he could not have been this, had his innermost thoughts and most intimate surroundings been other than they were.

So I will say, in few words, that no man has ever been more beloved by those nearest to him, none has had warmer friendships and kept them longer unchanged, and none has had greater power of attracting and giving sympathy in his intercourse with all sorts and conditions of men. Joined to the reserve, which was so marked a part of his nature, were a keen appreciation of character and a kindly sense of humor that won for him the affection and respect of all with whom he was brought into contact. The old Yankee farmer, the country lawyer, the little tradesman in the town were as much at home with him as the most cultured writer and distinguished jurist whose friendship he had made among the first men of his time both in America and in Europe.

To all alike his dignified simplicity and tolerant humanity equally appealed; and, while the most learned and cultivated found in him a

refined and delicate intelligence, the loving regard of humbler minds was not less surely attracted by his generous sympathy and transparent honesty.

And so he passed away, keeping clean to the end the unstained record of his ancestors, and leaving behind to his family and his friends the memory of a pure, an upright, and an unselfish life. Whether we regard him as lawyer, judge, statesman, or citizen, he commanded the respect and affection of his own generation, and his memory should be handed down to those who come after us as a model for the Americans of the future.

JOHN E. PARSONS

MEMORIAL READ BEFORE THE ASSOCIATION OF THE BAR OF THE CITY
OF NEW YORK, MARCH 14, 1916

When a man has outlived most of his contemporaries and all of those who knew him in boyhood, it is almost impossible, after his death, to find out the history of his childhood and early life, unless he has left upon record some written memoranda about them. When I was preparing a memorial of the late Judge Dillon for the Bar Association, I found great difficulty in this respect in regard to him, and I spoke to Mr. Parsons about this one day when he happened in at my house in Stockbridge. "Well," said he, "there will be nobody alive when I die that has any personal knowledge of my early life, and I think I must put something on paper about it."

The result was that after his death there was found in his desk the following brief autobiographical sketch, and I think it is the best possible introduction for what I have prepared about him, in response to the invitation of this Association, which I greatly valued:

NOTES FOUND IN THE DESK OF MR. JOHN E. PARSONS AFTER HIS
DEATH

"1914, August 28.

"In the course of conversation Mr. Choate said that the Bar Association had asked him to prepare an obituary notice of Judge Dillon and he wished to know whether I could give him any information about Judge Dillon's early life. I was made to think how in case of my death any such information could be obtained about me. I have outlived brothers and sisters. Those of my first cousins who still survive I scarcely know. I feel as if for my children and others who may be interested in me I should make a record of some details.

"My father was born in England. When he was eighteen or nineteen years old he came to New York to join in business his maternal uncle James Hewitt, who was an importing merchant doing business in New York. He here met and married my mother. My mother's father, Ebenezer Clark, was born in Wallingford, Connecticut. He came to New York when a boy, later engaged in business here and married Ann Marselis of an old Dutch New York and New Jersey family. I have understood that he lived first on Broad Street, moved

later to the northeast corner of Wall Street and Broadway, then to the corner of Broadway and Houston Street, and in 1821 he moved to Rye, where he continued to reside until his death in, I think, 1848.

My grandfather owned a parcel of land bounded by Broadway, Leonard Street, Catharine Alley or Lane, and the Freshwater or Collect Pond. In it he built a row of six houses fronting on Leonard Street. In one of the houses on October 24, 1829, I was born. My father had the Englishman's love of the country. Not long after his marriage he purchased an estate at Rye, then and still called Lounsbery, which he made his summer home. He enlarged the house then standing on the place, lived there a large part of the year, and there I was brought up. My father's business compelled him to make visits to England. On one occasion my mother accompanied him. In 1838 he went to England alone, leaving my mother at Lounsbery. Before sailing he took my sister Anna, older, my brother William, younger than myself, and me to Southbury, Connecticut, to live with the family of the Rev. Williams H. Whittemore who had married my mother's sister, and was the minister of the Congregational church there, and to be at school there during his absence. In March (1839) came the news that in the preceding January my father had been lost in the wreck of the packet ship *Pennsylvania* on the coast of Cheshire, returning to New York. My mother was living at Lounsbery at the time. Visiting at the house were friends by the name of Milford. Many years after I made a visit to California. At the Big Tree station, returning from the Yosemite Valley, a Mr. Milford, who was living in California, and had seen my name on the hotel register, introduced himself to me, in the course of conversation referred to his having visited my mother with his sister, and asked me if I had ever heard the story of the white dove. I asked him to tell it to me. He said 'I shot the white dove.' He said that one evening my mother was very much disturbed at a noise outside. He went to ascertain what it was and as he passed thro' the hall took my father's fowling piece which stood there, presently returned with a white dove which he had shot in the trees around the house and told my mother that she would not be troubled any more; she said that she feared it was a presage of ill tidings, and weeks after came the news of my father's death at that time. My father's body was recovered; it was taken charge of by business friends, buried by them in Ardwick Cemetery, Manchester, and a monument was by them erected over his grave.

"My father had an Englishman's abhorrence of negro slavery, connected himself with the abolition movement here, befriended among

others a young negro who at his request dying in England was buried across my father's feet. My father's death left my mother a young and most attractive widow with five children (my sister Anna who later married Jasper E. Corning, older, and my brother, William H., sister Mary, and brother Arthur, younger than I). My father had acquired what for those days was a large fortune; it was invested in his business. As I have understood, his father lived at Cubbington, a parish adjoining Stoneleigh, near Leamington, Warwickshire, moved to Manchester and, as I have assumed, was interested in manufacturing, and died, having had as I think eight living children and two who died young. He must have been quite a young man when he died. My father had become interested with an Orrell family in some kind of manufacturing; in their employment, as I suppose, he became acquainted with two young men by the name of Coates and set them up near Glasgow, Scotland, to make spool cotton thread, which came to this country as 'Parsons Spool Cotton'; it proved a great success and the Coates and their family in Scotland and later in Paterson, New Jersey, made large fortunes. The name continued for some years after my father's death, and from it came a royalty to my uncle, James H. Parsons, which I can remember to have been paid him as late as 1850 and after.

"My father had joined with him in partnership under the firm name of Parsons, Corning & Company, his brother Arthur W., who later married my mother's sister and was father of my cousin Emma Parsons, who died a year ago, and Mr. Edward Corning. Neither had business ability. They set up in business in Philadelphia another brother. My grandfather Clark was a very capable man, had built for himself the charming house opposite the Presbyterian Church at Rye where he lived till his death. He took charge of my mother's affairs. Mr. Corning and my two uncles, neither of whom had means, continued the business, using my father's fortune for the purpose, and before my grandfather could extricate any part of it more than one-half was lost. My mother rented a house on Walker Street near Broadway, between there and St. John's Park, which was then the most select part of the city. Lounsbery was let, and my brother William and I were sent to the school at Rye of Mr. Samuel W. Berrian who had married my father's sister Eliza. In the house next to my mother's lived the Rev. Dr. Thomas DeWitt of the Dutch Reformed Collegiate Church. The acquaintances then formed led to a friendship which continued to the recent death of Mrs. Morris K. Jesup, his last surviving child.

"I remained at Mr. Berrian's school until October, 1844, when as a freshman I entered New York University under Chancellor Theodore Frelinghuysen. My mother had meantime bought a charming extra-width house on Sailors Snug Harbor, lease No. 15 Clinton Place, where our home was until I left college. My mother spent some summers at Lounsbery after the lease expired until 1847, when my grandfather died. Some summers she boarded at Rye, my brother and I being at school there. After the death of my grandfather we spent part of several summers with my grandmother until her death.

"At New York University I had the great advantage of the instruction as Professors by Taylor Lewis in Greek, Elias Loomis in mathematics, Edward A. (?) Johnson in Latin, and in philosophy and English literature Dr. C. S. Henry. I was one of the youngest members of the class, graduated third, in mathematics tied as No. 1, was for one term president of the Philomathean Literary Society, was a member of the Sigma Phi Greek Letter Society. We attended the University Place Presbyterian Church, and it was in that church that were held the Commencement exercises when our class graduated, and I in a silk gown made my Commencement speech.

"What was to be my occupation in life had remained in abeyance. My choice had inclined to being a banker as furnishing the opportunity most quickly of making a fortune. My father's estate had realized to me \$15,000 to \$20,000, quite a sum for those days. No opportunity came. My uncle James had had occasion to employ the law firm of Gerard & Platt. In the autumn of 1848 I determined to try the law, although with no very definite purpose to become a lawyer, if an opportunity offered of being employed in a banker's office. I was perhaps influenced by the fact that through my uncle I was able to be received as a student with Gerard & Platt. Mr. Gerard had a reputation as a trial lawyer, mainly for the defense. There came a time when I took notes of trial for him, and learned his ways. With my preconceived ideas they did not impress me. Judged by the results nothing could be more in the interests of his clients. He took a seat as near as was possible to the jury, established personal relations with them, conducted the trial in a conversational way, and relied upon winning his case before the summing up. Mr. Platt (James A.) was better versed in the law than any lawyer whom I have ever known. He had injured his eyes. I read the reports to him. There were not many in those days, and his rule was to read all, and when unable to do so himself, to have me read them to him. His comments were most instructive. I have never felt more complimented than when I had been trying

cases for a few years he employed me as counsel for the defense in a suit of *Graham v. Schuchardt*, tried in the Queens County Court House with William Fullerton for the plaintiff. I made my opening in a measure a summing up and at the close of the defense challenged Judge Fullerton to let the case go to the jury on the judge's charge. He reluctantly acquiesced. Mr. Platt remonstrated. But I took the responsibility and we succeeded.

"Mr. Gerard's son James W., father of our present Ambassador to Germany, and Thomas T. C. Buckley who became Mr. Gerard's son-in-law, formed a law firm under the name of Gerard & Buckley and had offices with Gerard & Platt then at 79 Nassau Street. Mr. Buckley was a very able trial lawyer. His temper was at times not under control, but if he had lived he would have reached the first rank, as indeed he had done. Not long after I began to try cases I was opposed to Mr. Buckley in a minor case; he spoke of me in a way which was one of the things which encouraged me to become a court lawyer as against an examiner of titles to which I originally inclined. I was a student in the Gerard office until 1851 or 1852. Joseph L. White, who was interested in obtaining a concession for the Nicaragua Transit Canal, was an habitué of the office. He talked the canal, and there came a time when he was expected to return from Europe with important concessions. The shares began to advance. I put about all that I had in them; it turned out that Mr. White had failed, the shares sank out of sight, and I was made to realize that I must work for a living. Charles O'Connor had recently tried the Forrest divorce case; it had established his position as perhaps the ablest member of our Bar; he was associated with James W. Benedict and Andrew Boardman, Benedict & Boardman, as attorneys. I had the opportunity of taking a clerkship with them, and I did so at \$6.00 a week. Mr. O'Connor was no longer with them. Mr. Boardman was a thoroughly trained so-called real-estate lawyer. I was under him and principally employed in the examination of titles. He voluntarily made my \$6.00 a week \$8.00; and when I left would have made me a junior partner. I had come to the conclusion that it was time for me to know whether I was to succeed as a lawyer; I did not feel satisfied to be the tail end of an attorney firm, and after being with Benedict & Boardman something more than a year, I determined to start for myself. My uncle James had an office on the second floor of a building at the southwest corner of William and Pine Streets (opposite No. 52 William). He gave me desk room, and there I hung out my shingle, my only clients

being members of my family, and one or two persons of little importance to whom mortgage investments for them introduced me.

"A year ahead of me at the University was John Gorham Vose. He had become a lawyer and was in partnership with Lorenzo B. Shepard. He was offered a partnership with the firm consisting of Francis B. Cutting and Edward H. Owen, Mr. Cutting being the rival of Mr. O'Connor and his firm having perhaps the most important practice in the city. I had kept up relations with Mr. Vose; he recommended me to Mr. Shepard as his successor; Mr. Shepard offered me the position, and in 1854 was formed the firm of Shepard & Parsons with offices on Nassau Street at the northwest corner of John. This was in 1854. I had been admitted to practice in 1852. Mr. Shepard was quite a young man but had become prominent in public life as a member of the Democratic party. Law practice in those days was on a moderate scale. I estimated that my partnership might mean from one thousand to two thousand a year for me, twice that for Mr. Shepard. I attended to the office and attorney part of the business, Mr. Shepard's choice and talent being for court practice. His nearest personal friends were Abram S. Hewitt and Edward Cooper, who with Mr. Peter Cooper became clients of the firm.

"In 1854 the then District Attorney died. Horatio Seymour was Governor and he appointed Mr. Shepard to succeed him. Mr. Shepard accepted and appointed me to be his assistant. I demurred saying that I had never seen an indictment. He said that I had better learn how to draw one. Francis R. Tillou was Recorder and Welcome R. Beebe City Judge. I had become acquainted with Judge Beebe when attending to such admiralty business as Gerard & Platt had; I went to him for advice; he said 'Accept.' I did and for seven months I was sole Assistant District Attorney, drew all the indictments, and with a few exceptions tried all the cases. I have always regarded this experience as a principal factor in contributing to such success as later came to me as a court lawyer.

"Later Shepard & Parsons moved their offices to 49 Wall Street. In 1856 Mr. Shepard by election became Corporation Counsel of the City. The business of the firm which had increased devolved mainly on me; I had won individual clients, as Mr. Hewitt subsequently told me. Mr. Shepard thought that our division should be three-fifths and two-fifths to me, and the future was reasonably assured when in the fall of 1856 Mr. Shepard died. The office business, such as it was, remained with me, and promised perhaps \$2500 a year."

I greatly value this Memorandum, brief and imperfect as it is, be-

cause it shows how accident controls our professional beginnings, and because it adds the name of another great lawyer to those of O'Connor, Southmayd, and Dillon, who had never entered, nor apparently ever thought of entering, a law school, and yet by their own personal discipline came to the front rank in the profession, and also because it gives a most vivid account of the early life of Mr. Parsons and brings him to the point where he had chosen the forensic department and work in the courts as his mission for life.

The early loss of all his inheritance, which seems to have been for those days considerable, put him upon his mettle, and his careful reading of all the reports, which at that time were few, with and under Mr. Platt, gave him as good a knowledge of the law as, and I think better than, he could have acquired at any law school at that time. He went back to the reports, the real embodiment of the existing law, and mastered them individually in the same way as they were subsequently used collectively under the system which bears the name of Professor Landell.

His early intention seems to have been to become an office lawyer and examiner of titles, but Governor Seymour's appointment of Lorenzo B. Shepard as District Attorney, with whom he was associated as partner, changed entirely his whole line of life, and those few months as the sole Assistant District Attorney in New York, in which he drew all the indictments and tried all the cases, gave him a splendid opening by means of which he had already, at the time his Memorandum leaves us, become conspicuous in the then little city of New York as an accomplished and experienced court lawyer.

In 1857, shortly after the death of Mr. Shepard, Mr. Parsons, then only thirty-eight years old, when on his way to the court house, was stopped on William Street by the late Albon P. Man, at that time one of the most successful and respected business lawyers in New York. Mr. Parsons did not know Mr. Man except by reputation, and, of course, Mr. Man knew him well in the same way, but he never went into court. He said, "You are Mr. Parsons," and on the spot invited Mr. Parsons to become his partner on equal terms. Mr. Parsons accepted, and the firm of Man and Parsons became very conspicuous, and lasted until 1884.

A former law student in their office records that as his first task, after entering it, he was told to look over the records on appeal in some seventy cases that had been tried by Mr. Parsons, and on looking over the register he found that in every case Man & Parsons had succeeded, and represented the respondents on appeal. It is an interest-

ing fact that, shortly before Mr. Man's death, he told a friend that it was one of the regrets of his life that he had never heard Mr. Parsons try a case, nor even seen him in a court room.

Mr. Parsons had great qualities which essentially fitted him for leadership as an advocate—a sound constitution and good health, which is the first necessity for permanent success at the Bar, a very keen intelligence and almost unerring memory, and adequate knowledge of the law, undying tenacity of purpose, undaunted courage under all circumstances, and a power of analysis that enabled him to separate the wheat from the chaff in the facts of every case, and to present at the outset in his opening a clear statement of the facts, which generally won the case, if winning was possible. His original love of mathematics, which came near diverting him from his true mission at the Bar, proved to be a wonderful aid in his forensic practice, for no accounts were too intricate for him readily to unravel. To these great and valuable qualities, there were, as I think, two drawbacks, which modified not the success, but, as it seems to me, the interest of his long professional career. He was somewhat lacking in imagination and absolutely without a sense of humor, which sometimes before a jury put him at a sad disadvantage, and the latter quality, or deficiency, explains to my mind his failure to appreciate one of his great forerunners at the Bar, James W. Gerard, the grandfather of our present successful Ambassador to Germany. As he says in his Memorandum, "with my preconceived ideas, his ways did not impress me," but the trouble was he could not understand them.

In truth Mr. Gerard in his time was one of our great and successful leaders, full of wit and humor, merriment and fun, in all their forms, which fascinated and carried away a jury, and secured him a verdict wherever his cause and his client deserved it. Mr. Gerard was, in fact, one of the most upright, honest, and earnest men that we ever had at the Bar, but Mr. Parsons, who was a rigid realist and a thoroughly trained Calvinist, could not make him out, and seems to have thought his method of trying cases not only undignified, but almost immoral, when he was really the joy and delight of the Bar at that time.

I should be doing great injustice to Mr. Parsons, if I did not insist upon his great strength and purity of character, his conscientiousness and high moral sense, and his strong personality as accounting for his well sustained and ever increasing success in life for the whole fifty years that he was one of the great ornaments of our profession. There was a certain rigid formality in his manner and bearing, a coldness of composition, which kept people at a distance, and a very strenuous in-

sistence upon all the rights of his clients, alike in court and in negotiations, which gave the younger members of the profession, who came in contact with him, a feeling that he was much too severe and unyielding, and made him, as I think, for a long time generally unpopular with them. He certainly was a very stiff antagonist, but I am sure that he was wholly incapable of taking an unfair advantage of anybody, and that he never encroached upon the rights of those with whom he had to deal.

In the early years of his professional life, the administration of justice in our courts was still of a high character. There was a group of leading advocates who gave it a high moral tone, and it was one of Mr. Parsons's great advantages that, when quite young, he came into contact and conflict with many of these great leaders, such men as George Wood and Charles O'Connor, Francis B. Cutting and William Curtis Noyes, William M. Evarts, and a little later James C. Carter and Francis N. Bangs. Such men would have been a credit to any Bar at any period of American or English history, and by observing them and occasionally grappling with them he acquired great facility as a tryer of cases and a conductor of legal business. For some years after his admission to the Bar there was no corruption that I can recall in our courts, but by and by there came a brief period of horrible corruption, which increased with great rapidity and intensity, when the Tweed Ring got into complete and undisputed control of the city of New York, and injected three of its worst and most cunning instruments into our local judiciary. Justice was bought and sold, and this terrible Ring actually dominated the administration of justice, so far as it was conducted by these three judges. The better members of the profession were in a way paralyzed, and it came at last to the breaking point, when clients were advised, never by their counsel but by their friends, to retain certain questionable lawyers and offices, if they hoped to win their cases.

The great body of the profession stood firm for the right, but there were lawyers who cringed and "crooked the pregnant hinges of the knee, that thrift might follow fawning."

It was at this shocking point in our history that the Bar arose in its might, and vindicated its title as the conservator of the Commonwealth. This Association was formed for the rescue and preservation of the profession from the degradation into which it was in danger of falling, and of the courts of justice from the terrible cancer that was actually preying upon their vitals. Mr. Parsons was one of the founders and one of the most active and earnest promoters of this Association,

of whom, I am sorry to say, there are only ten or fifteen left. The Committee of Seventy was formed, which had for its object the overthrow and annihilation of the Tweed Ring and the restoration of the government of the city to the hands of its honest citizens, which was practically accomplished in the election of 1871, all honest citizens uniting in that great effort. It was upon pressure from the Bar Association of the city of New York that the impeachment of the guilty judges was initiated, and by this time Mr. Parsons had attained so great prominence in the profession that he was very properly selected with Judge Van Cott and Mr. Albert Stickney to conduct the prosecution. By the able part that he took in the proceedings he rendered an inestimable service to the people of New York and to the cause of justice everywhere that ought never to be forgotten.

The duties assigned to him in the conduct of the cases were of the greatest importance, and the records bear witness to his close and constant attention, and the very able and earnest manner in which he presented the vital evidence against the accused. It is sufficient to say here that the object which the Bar Association had in view was triumphantly accomplished, that the guilty judges were driven from the Bench, and that the judgment of condemnation, in which the whole profession concurred, was so overwhelming and final that I think we may say with confidence that in the forty-four years that have since elapsed no corruption in the principal courts of this State has ever occurred. It required a great deal of courage, a vastly greater amount of persistent and unremitting toil, and a legal ability of the highest order to bring about this notable historical result, and Mr. Parsons and his associates received the reward of appreciation and applause which they so justly deserved.

From the time of the termination of these most important trials until his final retirement from practice, when he had reached his eightieth year, Mr. Parsons may be properly classed as one of the great leaders of the profession for a period of more than thirty years, and during all this time, until I went to London at the beginning of 1899, it was my good fortune to be his constant and probably his most frequent antagonist in the conduct of important litigations that arose in all our courts, and I rejoice in this opportunity to bear witness to the great ability, the unswerving integrity, and the never failing fidelity with which he conducted his causes alike before the court and the jury. I never knew him to take an unfair advantage of his opponents or of the court, and I can truly say that

in all this long intercourse, sometimes very trying and very strenuous, our mutual respect and esteem were never disturbed.

It was a great element in Mr. Parsons's character that he never lost his temper, for when a lawyer loses his temper he is pretty sure to lose his case, and so it behooved me to keep my temper too, so as never to give him a possible advantage. The nearest that he ever came to showing signs of anger, successfully suppressed, was when, after the close of a long and bitter jury trial, which attracted the attention of the town and afforded great amusement to the readers of the newspapers, a trial in which the feelings of all parties concerned were thoroughly enlisted, and I had happily got a verdict, he heard that I was about to print my summing up. He called upon me and asked if that was so, and when I replied that it was, "Well," he said, "you know if you do that you will be liable to a prosecution for libel." Whereupon I immediately proceeded to print and publish the closing argument.

There was always one advantage which he could not refuse to me. He was so thoroughly methodical in his mental processes, so straightforward and upright, logical, forceful, and exhaustive, that I always knew exactly how he would present his case, and was thus in a measure partly prepared in the difficult task of meeting him, while, I believe, that toward the end of our numerous and long-continued encounters, he did me the honor to say that it had always been difficult to deal with me, because he never knew what I would say next.

Mr. Parsons was the ablest and most accomplished all-round lawyer that I have ever encountered. There was hardly a branch of the law in which he was not well versed; his efforts seemed equally well prepared and effective whether before the court or jury, in a trial at first instance or before the Appellate Court, or Court of Appeals on a final hearing, and I think that a large proportion of the cases of importance during the period that I have indicated, embracing every variety of subject of litigation, were contested between us. There was no branch of the law or of equity in which he was not fully equipped, but outside of court too he was a great lawyer, and I believe was one of the wisest, most sagacious, and safest legal advisers that we ever had. Most advocates who spend their days in court, week after week throughout the year, like to get away from business when court adjourns and take a rest. As Mr. Brady said one day on coming out of the court after a hard day's work, when beset by several clerks from his office: "Mr. Brady, Mr. Smith is waiting for you at the office," or "Mr. Jones is going to be there to see you at five o'clock,"

or "Mr. Robinson has an appointment with you for half-past five." "Oh, have they?" said he. "Well, then the best thing I can do is to go home," and off he went; but Mr. Parsons always went straight from the court to his office and disposed of serious matters without apparent fatigue, but I have known him, for all that, in a state bordering upon exhaustion, and only keeping up with the great burden of his work by sheer force of will, staggering under it though he might. He was a man of singularly well regulated habits and fine control over himself. While the rest of us during recess would hasten over to Delmonico's for a hearty luncheon, he habitually remained in or near the court room, subsisting on a sandwich, or a remainder biscuit, which he had brought from home, and this constituted his only luncheon year in and year out.

I have already spoken of the excellent public service he rendered as a very young man, when for nearly a year he drew all the indictments and tried nearly all the cases in the District Attorney's office; the same office which now under an experienced criminal lawyer employs scores of assistants and clerical men to dispose of the business in the criminal courts. I have also shown how in middle life he rendered a magnificent public service in the cleansing of the Augean stable into which our courts had been converted, but it was reserved for Mr. Parsons in his old age to set a noble example to his professional brethren, by showing with what courage, patience, and fortitude he could bear the burden at the age of eighty years and upwards of a prosecution to which he was subjected by the Federal Government in the pursuit of its theory of government by indictment. He was made a defendant and, of course, his high professional standing made him the most conspicuous defendant in the indictment of the president and directors of the Sugar Company for an alleged criminal violation of the Sherman Act in 1903. He had been from its organization one of the directors of the Sugar Company, and, of course, acted as its counsel. In this capacity it became his professional duty to pass upon a contract into which the company was about to enter and which was referred to him as counsel to put into shape. Most carefully and conscientiously he performed this duty, basing his action upon a clear and plain decision of the Supreme Court of the United States, which up to that time had stood without modification and was certainly the law of the land. By and by efforts were made from time to time by interested parties to make the transaction the basis of a proceeding under the Sherman Act. President Roosevelt, to whom the application was made, referred the matter to Attorney General Moody, who

soon afterward became a Justice of the Supreme Court, and in the meantime had taken no action upon it, and the matter fell into the hands of his successor, Attorney General Bonaparte, who held that he could see no difference between the case as presented and the case which had been decided by the Supreme Court of the United States some years before, to which I will presently refer. He, accordingly, declined to prosecute, but after four years the indictment was found and prosecuted upon new theories of law, by which the decision of the Supreme Court, upon which Mr. Parsons had based his action, had in the meantime been more or less modified.

The indictment of Mr. Parsons in 1909 was a severe blow to him and to the profession of which he was and had been for nearly fifty years a very prominent leader and ornament. In spite of his excellent and long-sustained professional services, his unblemished character, his well-known devotion to the general welfare and the public good, and of his having been the President of this Association, the prosecution was commenced, which, as the event showed, could not be sustained; but government by indictment was then a favorite and popular theory, laws were being passed throughout the Union creating statutory offenses out of acts which in themselves were perfectly upright, and the irresponsible press was clamoring for the indictment and conviction for something or other of "men higher up." The administration at Washington felt it to be its duty to enter upon this prosecution, and to press it with all possible vigor.

The Sherman Act had been passed in 1890. Some years afterward a bill had been filed by the United States against the American Sugar Refining Company, and E. C. Knight and others, charging them with a combination in violation of the Sherman Act, and asking for an injunction restraining the defendants from further and continued violations of the said act of Congress, but the Circuit Court, before whom the case was originally heard, declined upon the pleadings and proofs to grant the relief prayed, and dismissed the bill, and the Circuit Court of Appeals affirmed this decree. The Supreme Court of the United States, before whom the case was argued on appeal by Mr. Johnson and Mr. Parsons himself, in January, 1895, affirmed the decree below, holding specifically that the manufacture, even of one of the prime necessities of life, could not be brought within the condemnation of the Sherman Act, even although its sale in other States was an essential incident. In other words, that manufacture was not commerce, and was not intended to be affected by this act,

It was in the light and under the express authority of this decision that Mr. Parsons approved the transaction into which the company had entered, as one not coming within the purview of the Sherman Act. Great pressure had been brought to bear to induce the Government to proceed against the company and its directors for this transaction, but the Department of Justice consistently adhered to its first decision, made upon a full statement of the case, as it afterwards was presented, that under the decision in the Knight case in 1895, no violation of the Sherman Act was shown, and steadfastly refused to encourage the desired attack upon the Sugar Company.

It is true that in the meantime, but only after the contract complained of had been made upon its authority, the law laid down in the Knight case had been substantially modified by the subsequent decisions of the Supreme Court itself, but this ought not to have deprived the parties accused of the protection which, as I understand the law, they were entitled to receive from that case, because it continued to be the unquestioned law up to the time of the acts which so long afterwards were made the subject of the indictment.

The acts complained of were committed in December, 1903, a date important to be noted. The Knight case was decided nearly nine years before in January, 1895, and had been re-affirmed or cited as authority by the Supreme Court in 1897, 1898, 1899, twice in 1902, and three times in 1903, all of which decisions appeared in the published reports, and it had been recognized and accepted in the meanwhile by the inferior Federal Courts, at least ten times, and still stood as settled law at the time of the act complained of in 1903. Under these circumstances, Mr. Parsons and his associates were entitled, as I think, to have the judge charge the jury that no violation of the act had been shown, and that their verdict must be for the defendants.

The case was not brought to trial until 1912, three years after indictment found, and when that trial did take place, in spite of the most strenuous efforts on the part of the Government and the most unworthy personal abuse heaped upon the head of Mr. Parsons, especially, it was, as I am credibly informed, only by the dissent of a single obstinate juror that the Government was saved from a unanimous verdict of acquittal.

After the trial, friends of some of the defendants, but not including Mr. Parsons, on whose behalf no such appeal was made, appealed to the Attorney General to dismiss the case, and that official, after careful consideration and upon being advised by the District Attorney that the case of the Government in his opinion could never again be

presented so strongly to a future jury, directed that the indictment be dismissed, which was done.

But what a frightful ordeal it was for a man of exalted position, of unblemished character, foremost in his profession, in the church, and in the social world, to have to undergo, to suit the changing theories of the Courts and of the Government! His iron constitution, however, sustained by the consciousness of innocence and by his clear professional opinion that there was no ground for the prosecution, carried him safely through, although two of his associates fell by the way, and died under the mortification of being held up to the world as criminals. What a travesty of justice! And how can we safely practice law, if we are to be punished in the Federal Courts for acting upon the as yet undisputed decisions of the Supreme Court itself?

I had many conferences with Mr. Parsons about the case during those three trying years. Never once did he falter, but with a mind conscious to itself of right, and of the undiminished support and confidence of the great company of his friends, in the profession and out of it, he maintained a marvelous serenity, but what he suffered it is impossible to find words to describe.

It is such tests as this that the best of our profession are sometimes, but, I am happy to say, only rarely, called upon to meet for the sake of the whole fraternity, simply for performing their professional duty and the whole Bar owes Mr. Parsons a debt of gratitude for the courage and fortitude with which he bore it. After the long agony was over, he had the satisfaction of knowing that it had left no smirch upon his great reputation, and that by his heroic stand he had done a great service to his profession. He lived for four years more in the full enjoyment of the regard and esteem of all who knew him.

For one I feel certain that more unreasonable restraint of trade, within the meaning of the Sherman Act, has been committed by the Government itself by its unsustained and unsuccessful attacks upon business than by all the combinations which it has by those attacks attempted to destroy. Under the clause in the Federal Constitution which gives Congress the power to regulate commerce, much has been done to paralyze and destroy it, and the Government is largely responsible for its recent prostrate condition. These unconstitutional excesses reached their climax in a recent presentment by a Federal Grand Jury of a large number of directors in a well-known company, who had long been dead, and had appeared before a higher

tribunal to be tried upon their merits. This human, or shall I say this inhuman prosecution of the dead could have had no possible effect upon the parties charged other than open defamation of character of men who had always in their lives been regarded as blameless. Who wonders that there has already been a marked reaction in the courts against prosecutions for alleged conspiracies in restraint of trade, and that after twenty years of varying administration of the Sherman Act, the Supreme Court of the United States has finally decided, under the lead of its present very able Chief Justice, that it was only against unreasonable restraints of trade that that famous act was aimed. Nothing shows more clearly than the administration of the Sherman Law since its enactment by the Federal Government, how possible it is for both the executive and judiciary departments to be unconsciously swayed by the irresistible flood of popular opinion.

Mr. Parsons was never so busy at the Bar, although the most employed of all its members, as not to have time for good works and for sacrifices for the good of his fellow men. His charity was most unbounded, and I have the best authority for saying that in some years he devoted to it more than half of his very liberal income, and in every year a large proportion. As a trustee of the Cooper Union from its foundation, he rendered a continual service to the cause of education and of art that was extremely valuable, and as a director of the Presbyterian Board of Home Missions, and manager of the American Bible Society, and a member of the Executive Committee of the New York City Mission and Tract Society, he did an immense amount of good. His services in these institutions were never perfunctory, but he was always ready to put in all the work that was needed on his part to promote their success. In his later years he had very much at heart the promotion of the relief of the sufferers in the New York Cancer Hospital (now called the General Memorial Hospital for the Treatment of Cancer and Allied Diseases) and of the Woman's Hospital, of both of whose Boards he was president. He was also president of the Boards of the Cooper Union, and of the Library at Lenox, Mass.

When Mr. Parsons' professional success was permanently established and his means increased, he purchased a considerable estate at Lenox, where he built a fine house, made it his permanent summer residence, exercised a generous hospitality, and carried on farming to a considerable extent. In this he was very earnest and devoted, and I have no doubt that his liberal professional earnings enabled him to carry on farming with great success. It was a great rest and

comfort to him always, and here I think you could see the rigid lines of his character softening and mellowing from time to time. He had had the fortune or misfortune to be brought up early in life as a strict Calvinist, but even this somewhat melted away under the benign influence of country life, and while he always continued to be an elder in the Brick Church in New York, he became and continued for many years until his death a vestryman in the Episcopal church at Lenox, which he greatly enriched by the addition of a handsome church house as a memorial of his first wife. Midway between Lenox and Stockbridge he established also St. Helen's Home as a memorial of one of his daughters who had died in early womanhood. Here he received and supported during every summer successive instalments of Fresh Air Fund Children, many of whom had probably never been out of the city before, so that some of them, as the shades of night came on were overawed with the fear that the heavens were falling because there were no skyscrapers to hold up the sky. Here too his interest and devotion were strongly personal, for he did not merely supply the necessary funds, but often visited the Home in person and addressed the children, and invited his friends to join him in doing so. To know Mr. Parsons thoroughly one had to know him both in summer and winter, at work and at play, for, taking the two together, he rounded out a most estimable and admirable character. At the age of eighty he retired absolutely from his profession, spent a longer season at farming, entered eagerly into all social enjoyments, and was greatly honored and beloved by the entire community.

It would be hard to find in the whole ranks of our profession a more upright and honorable example of true service than the whole history of his life affords, and his name ought to be cherished forever in this Association as one of its most zealous founders and most valuable members and servants.

LEVERETT SALTONSTALL

MEMOIR REPRINTED FROM THE PUBLICATIONS OF THE COLONIAL
SOCIETY OF MASSACHUSETTS, 1899

It is with no little diffidence that I undertake the duty assigned me by the Colonial Society of Massachusetts to write something about our late associate Leverett Saltonstall which shall be worthy of record in its annals, because my close acquaintance with him was limited to a single year in our early lives, and for forty years afterwards our meetings were occasional, although our mutual interest never failed. It was, indeed, a great loss to the Society when the Hon. John Lowell, who, with the loving hand of a lifelong neighbor and intimate friend, had entered upon the performance of this duty, was himself removed from us by death.

Mr. Saltonstall was one of the Founders of the Colonial Society of Massachusetts. At its meeting for organization he was elected one of its Vice Presidents, but he served in this office for one year only, declining a renomination, in 1893, on the score of ill health. At the request of the Society, he prepared the Memoir of the Hon. Frederick Lothrop Ames which is contained in the first volume of its Publications.

The famous saying of Dr. Holmes, in response to the inquiries of an anxious mother, that a child's education should begin at least a hundred years before he was born, was exemplified with double force in the case of Mr. Saltonstall. His education, the formation of his character, the motive power of his life began more than two hundred years before his birth at Salem on the sixteenth of March, 1825. More signally than any other man whom I have known he was actuated and inspired in his life and conduct by a just and honorable pride of ancestry, which went far to color his thoughts and control his actions both in public and in private life, and always to high and honorable ends.

It was my good fortune to be present at the celebration, in Salem, of the two hundred and fiftieth anniversary of the landing of Governor Endicott,—at a scene and in a company which Dean Stanley, who was one of the guests, declared could not be found in any town in England with her thousand years of history. There was the orator of the day, our beloved and honored associate Judge Endicott, the

worthy representative in blood, features, and character of the first Colonial Governor,—that stalwart hero who had 'ever the courage of his Puritan convictions and ruled the little Colony with the sword in one hand and the Bible in the other. On his right sat Robert C. Winthrop, and on his left Saltonstall, tracing their descent to the two pioneers of the great Puritan immigration to the old Bay State,—fellow passengers in the *Arbella* which followed Endicott only a year later,—and who were the leading spirits in the transfer of the Charter to American soil and in laying the foundation of the Commonwealth which was to become, at the close of two centuries, the foremost community not of America only but of the world, in education, intelligence, and character, first in all that goes to make up the physical and moral well-being of the race; while gathered about them were the lineal descendants of four of the leading men in the immigration that preceded Endicott who bore their names and had occupied their places in Salem for eight generations.

Saltonstall could trace his pure English blood, mixed with no foreign strain, not merely to Sir Richard Saltonstall, but, in the widely diverging ascending line, to the Cookes, the Wards, and the Phillipses, to Governor John Leverett, and to many other worthy men of power and dignity in the State who, in succeeding generations, had each, according to his measure, helped to make New England what she was and is, and it is no wonder that he delighted to study their lives, to recall their virtues, and, in life and conduct, to be worthy of his distinguished lineage; and so with him a lofty public spirit, a high and delicate sense of honor, the will to live up to his light wherever it might lead him,—whether we regard them as faculties acquired directly by transmission or studied and imitated for the love he bore to his ancestors,—were necessary and constant traits.

His father, whose name he bore, was conspicuous in Salem and throughout the Commonwealth, not merely as an able lawyer and a wise and patriotic Mayor, legislator, and Congressman, but also, and more than for all his other great virtues, for a warmth and largeness of heart, which went out in all its fulness to those with whom he had to do in every relation of life. I well remember that when he died, in Salem, in 1845, the saying went about among the people who had looked up to him as their leading fellow citizen that Leverett Saltonstall had a heart as big as an ox.

Thus descended and sired, it will not be strange if we find this fortunate child of the Commonwealth a man of unsullied virtue, of large patriotism, ambitious to serve his State and his country, accord-

ing to the ideals of the past, carrying his head high among his fellows, sensitive in a high degree of his own honor, a lover of truth and justice and ardently loyal to his kindred, his friends, and associates ; and such in truth he was.

I will not enter upon the vexed question whether heredity or environment has the greater influence upon the formation of a man's tendencies and character ; but assuming that both are largely responsible, we may note with interest his surroundings from infancy to manhood, and if we find that he was bred as well as he was born, as truly as the boy is father of the man, we shall expect the outcome of a lofty and commanding character.

Salem, his native place and his constant residence from 1825, the date of his birth, until 1844, when he graduated at Harvard, was a peculiar and interesting community, and boyhood spent there left strong and indelible marks upon many of her sons. Its inhabitants were of absolutely pure and unmixed English breed, and chiefly of that sturdy Puritan stock which began with the coming of Endicott and Winthrop, of Saltonstall and Higginson, and continued until the outbreak of civil war in England, and settled along the shores and over the farms of Essex County. Salem had been for two centuries the principal and only considerable town in the County, and hither the most energetic and ambitious of the youth of the County migrated as to the nearest Capital, as Joseph Peabody came from Topsfield, Saltonstall's father from Haverhill, and Rufus Choate from Chebacco. A foreigner was hardly ever seen within the town limits. The days of her commercial supremacy were past. Commerce itself, spreading its sails on larger ships, had already almost abandoned her shallow harbor ; but her enterprising merchants and her hardy navigators had, for almost a century, been exploring the confines of the globe, extending commerce into regions unknown before, and bringing home the spoils of the Indies and of Africa to lay them down at her door. Though Salem ships no longer ploughed the seas as of old, a large share of the wealth that resulted from all this enterprise and adventure still remained in the town, and Saltonstall's ancestors in the maternal line had been among her leading merchants. The whole tone and spirit of the place was still commercial. Her people were justly proud of her history and traditions. Culture and education had grown up to a high standard with the transmitted wealth which was still enjoyed by her chief citizens who constituted a society which was, at least, equal in all that elevates and graces civilized life to that of any city in America. In these respects her resources were

quite sufficient for herself in those days when communication with other cities was difficult, and travel abroad was an almost unknown luxury. In 1837, we went out to Castle Hill with our parents to see the first railroad train come in from Boston.

Manufactures had not yet been thought of, and business having departed the chief industry of the place was education. There were probably more resident Harvard Graduates among her citizens in proportion to the population, than in any other city in the country, and among them many of great eminence. The great depths of orthodoxy had been broken up, and the wonderful and far-reaching influence of Dr. Channing had permeated the religious thought of Massachusetts, and nowhere more thoroughly than in Salem, where the great majority of the educated people had adopted the Unitarian faith. It is to Harvard that this mitigation of the terrors of old beliefs is largely due, and it constitutes one of the greatest services she has ever rendered, which may well be acknowledged now that she has thrown off even the weak trammels of that mild denomination, and opened her doors with absolute freedom and equality to all creeds and all sources of light and knowledge.

It is to this same period also that we trace the beginning of the mighty influence of Horace Mann in arousing the public mind to the importance of more thorough system in the conduct of education in our public schools. His appointment as Secretary of the newly-appointed Board of Education to revise and reorganize the common school system of the State was warmly welcomed by the elder Saltonstall, who was, about this time, elected the first Mayor of Salem, and, in that capacity, took a lively and special interest in her schools. "Rarely have great abilities, unselfish devotion, and brilliant success been so united in a single life" as in this great educational work of Mr. Mann. In such an intellectual community as that of Salem his labors had magical and electric effects; and fortunate were the youth of this epoch who profited by them.

There was another all-pervading influence which operated with peculiar effect upon the youth of this ancient town, and upon none more vividly than upon those who, like the subject of this Memoir, could look back upon a line of ancestors whose lives, in successive generations, were prominently identified with the public life and history of the Colony and the State. Their minds were saturated with the local traditions which Hawthorne was then illustrating by the inimitable charm of his writings; and a passion for local history and illustration—soon afterwards resulting in the foundation of the Essex In-

stitute, which has contributed such valuable results—was everywhere prevalent. To-day every intelligent boy in America takes up the newspaper and makes a morning tour of the globe, learning before breakfast all that is going on “from China to Peru;” but it was not so in the days of which we are speaking. Steam had hardly begun to tell, the telegraph was hardly yet dreamt of, and the telephone, if suggested to the imagination, would have been set down with Salem Witchcraft as an invention of his Satanic Majesty. The semi-weekly Register and Gazette gave us chiefly local news, telling of the events of Boston two days before, of New York a week before, and discussing what had happened in Europe in the previous month. The North American Review was about the only monthly periodical. Thus our attention was concentrated upon home life and home rule, and the past history and current events of Salem and of Essex County were of absorbing importance.

We had our local aristocracy—very marked and commanding and exclusive—in those days, which was naturally led by the Saltonstalls and the Endicotts. Its social life was, for the time, luxurious and splendid; its hospitality unbounded and marked by the charms and graces of wealth and cultivation. Federalism, too, gave the prevailing political tone to the leading members of this wealthy society. The Essex Junto—to which their commercial ancestors had been committed, and which was “the personification of the desire of the local commercial interests for a stronger Federal Union,” led by such men as the Lowells, George Cabot, Theophilus Parsons, Stephen Higginson, and Benjamin Goodhue—had transmitted its extreme Federal ideas to a posterity, which was still keenly alive to the importance of commerce, and to the maintenance of a powerful mercantile marine, as vital to the national prosperity; and the birth of the Whig party, as the natural heir of Federal traditions and doctrines, found here many stalwart champions. The Essex Bar was still powerful by the talents and the number of its leading representatives, of whom Saltonstall’s father was among the foremost.

Reared in such a community, amid such surroundings, and breathing such a social and intellectual atmosphere, we should expect a youth who enjoyed its best influences and associations to give promise of a cultivated, high-toned, and patriotic gentleman.

The Salem Latin School, in which he was prepared for college, was a unique institution. It was maintained by the Town and afterwards by the City at the public expense for the sole purpose of qualifying boys for college, and almost exclusively for Harvard. For

generations it sent forth annually to that Mother of Learning a little group of boys who had figured well in the classes to which they were admitted. It had come down under varying names from the early days of the Colony, and was, or had the credit of being, the first Public School established in Massachusetts, even antedating the foundation of Harvard College. "Schola publica prima" was inscribed upon the wall opposite the master's desk; and the name of George Downing, the second member of the Harvard Class of 1642, and who enjoys, in the Quinquennial Catalogue, these honors—"Knight 1660, Baronet 1663; Ambassador to Netherlands from Cromwell and Charles II.; M. P.," was also there emblazoned as "the first pupil," as a historical incentive to our ambition. In the two centuries that followed, the School may have turned out many a worse scholar, but never a more notorious turn-coat, than Downing. Oliver Carlton, a rigid disciplinarian, but a most thorough and faithful teacher, was the Master and the sole instructor in Saltonstall's time. A single room and a lobby for disciplinary purposes sufficed for all the needs of the School. Here we recited, studied, and suffered. He taught but three things, Latin, Greek, and Mathematics, but he taught them well, and what was not absorbed voluntarily was pounded in. In serious cases of delinquency he spared not the rod,—the real, old-fashioned thing. He was no respecter of persons. His monogram, O. K. O. K. O. K.,—"an awful cut from Oliver Carlton's awful cowhide,"—was tattooed with equal fidelity upon the aristocratic cuticle of a Saltonstall or an Endicott as upon the hide of more democratic members. His avenging wrath fell upon culprits without the least regard to the homes from which they came, or to the wealth or poverty ruling there. It was impartial as death itself:

——— "*æquo pulsat pede pauperum tabernas
Regumque turres.*"

One of Saltonstall's most graceful acts was his appreciative Memoir of this faithful, and always honored and beloved, teacher. In 1840, he entered the Freshman class of Harvard well prepared. No Saltonstall in the nineteenth century could think for a moment of entering any College but Harvard. There his father had graduated, in 1802, and each of his ancestors in five successive generations, beginning with Nathaniel, in 1659, was enrolled among the Alumni. Henry, a son of Sir Richard, was in the first class, of 1642, and others of the name among his collateral kindred were Harvard's sons. An intense filial love of the College, as his true intellectual mother, inspired him from

the day he entered as a Freshman until fifty-four years after when, in Memorial Hall, on Commencement Day, he spoke for the lingering remnant of his Class, and in words of deep feeling, which touched the hearts of all hearers, he glorified the record of his classmates, and at the same time testified the grateful recognition by the Alumni of the matchless services of President Eliot who, on the same day, celebrated the Twenty-fifth anniversary of his remarkable Presidency; and it was with no little pride that he boasted that all his sons had added their names to the illustrious roll of graduates.

The period of his college life, which was bringing rapidly to its close the long and honorable presidency of Josiah Quincy, is fondly looked back upon by the elders among our surviving graduates as the halcyon epoch of its history. No very material change in the curriculum had been introduced since his father's graduation forty-two years before. The size of the classes had not substantially increased above the old average of about sixty members, so that all of a class were necessarily intimate acquaintances, friends for life, brethren by a close tie. The College Faculty, small in numbers, teaching a few things well to all alike, were known through and through by all the students and honored or criticised, applauded or ridiculed, according to their merits. It was still Harvard College only, and the idea of the University had not been conceived.

In view of the varied and multiplied necessities of modern life, the superiority of the new system, as a means of general education for the average of the vast throng of pupils that now crowd her portals, will hardly be disputed by anybody; but as the prestige of any seat of learning must depend, not so much on the number of her graduates, as upon the number and character of great men among her teachers, and especially among her Alumni, it will take another generation yet to determine, whether, for the production of these,—the true jewels in her crown,—the new system surpasses the old in efficiency and strength. Certainly, it will be well for Harvard if she shall develop in her graduates of the present half-century, even with their enlarged numbers, men who, for the honor of the College and the service of the community, shall excel Story, Shaw, Channing, Everett, Prescott, Bancroft, Emerson, Adams, Winthrop, Pierce, Holmes, Motley, Hoar, and Lowell. The discipline and the genius loci which produced such a list of worthies cannot be despised.

Judged by the same standard the Class of 1844 was a great and famous class. Out of a total of sixty-two members it produced four men who have procured, each for himself, a niche in the Temple of

Fame. Dr. John Call Dalton and Professor Benjamin Apthorp Gould, by their contributions to Science, and William Morris Hunt in Art, and Francis Parkman in Historical Literature, bear telling testimony for the nurture of which they were the fruit. Saltonstall's record and standing in college were highly honorable, though we cannot picture him ever as a very hard student. In the social life of the College, which then, even more than now, was a conspicuous factor in moulding and developing personal character, he must have been always a prominent figure, and have exercised a wholesome influence in the direction of all that was true and pure and lovely and of good report. It was here, especially, that his commanding figure, his courtly presence, his cordial greeting, and his loving sympathy would tell and bear fruit.

Six years intervened between his graduation and his admission to the Bar in Boston, but half of these were spent in foreign travel which enriched his mind with varied stores of reminiscences, and made his company and conversation in after life so animating and delightful.

It was my good fortune, after completing the usual course at the Law School, to spend a year as a student in his office, and I have always recurred to that brief period of association with him with great interest and satisfaction. He was then very young in the profession, but he had already acquired a considerable practice, was particularly fond of Court business, and threw himself into what came to him with great energy and ardor, although he had not yet mastered, what some of us never master,—a certain stage fright, which almost universally overwhelms the young practitioner in Court. His highly-strung, nervous temperament rendered him peculiarly susceptible to this forensic malady. A posing question from Chief Justice Shaw, always a terror to tyros, or a hostile manifestation in the jury box, would send him back to his office at the adjournment of Court, in a state of excitement which, for the time being, was a great strain upon his nerves. But this, it will be remembered, was at the outset of his career and was very transient. His self-command soon asserted itself, and he had the faculties and the qualities which would have surely led him, had he persevered, to a leading place at the bar and especially among Jury lawyers. Common-sense is the great faculty for dealing with jurors, and of this pre-requisite he had a full supply; and then he was a first-rate speaker, and his commanding figure and genial presence, and his unwavering fidelity to what was just and fair and honest, would have done the rest. Juries dearly love fair play, and no man in Court or out ever played fairer than Saltonstall. There is one incentive that he lacked, without which, I believe, very few men in the world's

history—you can count them all upon your fingers—ever attained to real and lasting eminence at the Bar. I mean the spur of necessity, for which no substitute in our profession has ever been invented. Success at the Bar demands grinding self-denial; a total sacrifice of ease and other enjoyments; an abandonment of all those things which make life charming, until its attainment becomes itself the supreme charm. It is almost impossible for a man surrounded, as Saltonstall was, with all the enticements and distractions of wealth, culture, and social eminence and the rarest domestic happiness, to turn his back upon all delights and submit for a score of years to the hard labor and drudgery of the law. The old prescription for the young lawyer—"If you've got any money spend it, if your wife's got any spend that, and then work like a dog till you're Lord Chancellor"—had no wisdom or sense for him. There was one other trait that stood in the way of his professional progress. He was too fastidious to submit with patience and equanimity to the associations into which the daily life of the lawyer necessarily brings him. He seemed hardly able to distinguish between personal and professional association, and in the necessary dealing with parties and witnesses, and their too often sordid and mercenary motives and purposes, he felt that he was brought into daily contact with the things he loathed, just as the blood and the pain which shock and distress might drive a sensitive young surgeon from any further prosecution of his profession.

Turning, then, from Mr. Saltonstall's professional career, which, as I think, was altogether too brief—for the high moral standard and lofty tone upon which he always insisted, and of which, while he continued in the profession, he was a notable example, would have exercised a wide and wholesome influence—we come to his public life, as a welcome and favorite orator; as an eminent private citizen, taking a constant and lively interest in all questions that concerned the Commonwealth; and finally as a public officer, ranking among the best examples of the public servant. I find that this ground has been so well covered by Mr. Codman, in his *Memoir*, written shortly after his death for the Massachusetts Historical Society, that it is only at the risk of repetition that I can refer to the subject at all.

He was a florid, forcible, and earnest public speaker, and had that real love of oratory and of handling an audience without which no speaker can hope to satisfy himself or his hearers. The charms of his voice, person, and manner, and his obvious candor and honesty of mind, made his appearance upon any platform most welcome and agreeable, and often aroused genuine enthusiasm. It was, I think, on

those special occasions which involved or celebrated subjects or events most dear to his heart, that he appeared to the best advantage. His enthusiasm for Harvard College knew no bounds, and when he spoke for her it was like listening to a son pleading for the mother who bore him. His services to his Alma Mater were of no mean character. I think it was largely due to the influence of his spirit and advice that his uncle, Charles Sanders, bequeathed to the College the funds for the building of Sanders Theatre, which has become so dear to the Alumni as the scene of all their gala days, and we may be sure that when he drew his check as one of the Sanders Trustees for the payment of that beneficent legacy, his heart exulted with pride unspeakable. He served for three terms on the Board of Overseers, with unfailing and intelligent devotion, and his presence at Commencement was itself always an earnest of his pious loyalty. As President of the Alumni, a post which he filled more than once, he always maintained the grace and dignity of the occasion.

A few quotations from these addresses may not be out of place, to show how he threw his whole heart and soul into such a favorite theme.

At that memorable celebration of 1886, when the College celebrated her Two hundred and fiftieth anniversary in the presence of her guests, —the representatives of all the great institutions of learning at home and abroad,—presiding at the Banquet of the Alumni, he said:

“The growth of the Nation in wealth and population is a miracle, but what sort of a country would it have been to-day, had it not been for the far-seeing wisdom of the fathers in planting this noble College, which has been the mother not only of her graduates, but through them of schools and colleges innumerable all over our land?

“Here was kindled that beacon fire whose burning brands were caught up and carried from hill-top to hill-top to light the way as far as civilization advanced, and America to-day looks up to Harvard and is grateful to the mother of generations of the good and learned for the good work she has done.

“I never enter her walls that my heart is not filled with profound emotion. * * * May the day never dawn when such may cease to be the feeling of her children for our Alma Mater!

“Let us show our sons how we love her, that they, fifty years hence, when we are gathered to our fathers, may repeat the story to their children.”

In 1892, at the Commencement Dinner, he said:

“Truly, we love to recur, upon these anniversaries, to our small beginnings in the never-ceasing wonder that such men and women should

have left comfortable and luxurious homes with deliberate purpose to found a State in the wilderness. May the story never become threadbare! I feel it a great honor to have been called to preside here, especially upon two such interesting anniversaries as those of the foundation of the College and that of the graduation of the first Class. And I hope that as Henry Saltonstall, in 1642, with that first Class of nine, sate at Scholars Ordinary Commons, with the magistrates and elders, and that as all my fathers have in unbroken succession, since, received her benediction, so may my sons' sons and yours, my brothers, in generations to come, seek her blessing, and when within her walls feel, to the very bottom of their hearts, that they are standing upon sacred ground, with a silent prayer for our dear old Alma Mater."

Again, in 1894, when he spoke for his Class in what proved, alas! to be his pathetic farewell address to the College, after dwelling in words of touching and loving memory upon the virtues and the honors of so many of his classmates who had answered to the last call before him, he said:

"Mr. President, I am grateful that my life has been spared till this day. Loving Harvard, as I do, it has been a peculiar privilege to hear the tribute paid to the President of the University for his noble work during the last quarter-century. And on behalf of myself and my veteran Class I desire to thank him. I was Marshal on the occasion of his inauguration, and now stand here, with all Harvard Graduates, to say, 'Well done, good and faithful servant!' No man, since the foundation of the College, has done so much as you, sir. It is a line of good and worthy men who have presided over this ancient University, but you have been given the opportunity, the courage, and the genius to place it upon this commanding height, and to have opened the gates and pointed the way to the higher education in this country."

Happy will it be for Harvard when her sons can warm their hearts at the blaze of such enthusiasm.

So, too, on all those great commemorative celebrations in the various towns of the Commonwealth which his progenitors had had a large share in founding,—Salem, Ipswich, Haverhill, and Watertown,—where his presence and speech were in themselves an inspiration, his fervid and glowing eloquence was replete with incidents of provincial, colonial, and ancestral times, with which his mind was well stocked. In Colonial history he was deeply versed, and had studied it *con amore*. He seemed, in spirit, to have followed his progenitors from their luxurious homes beyond the sea, to have dwelt with them in their more humble habitations in the wilderness, and to have witnessed their

pious undertakings for the good of the Colony from generation to generation; and, with a heart swelling with gratitude and pride, he poured out his thoughts on such occasions to delighted and admiring hearers whom the hour brought into cordial sympathy with his own emotions.

His religious convictions as a Unitarian, after the order of Channing, he maintained to the end of his life, and in breadth and liberality of view he seems to have emulated the wise example of two of his ancestors who, in this respect, were fairly in advance of their age. When Sir Richard, from across the sea, sent a message of indignant protest to Cotton and Wilson, the ruling ministers of Boston, against their cruel and inhuman oppression for opinions' sake, telling them how "it grieved his spirit to hear what sad things are reported daily of your tyranny and persecution, in New England, as that you fine, whip and imprison men for their consciences," and adding, "I hope you do not assume to yourselves infallibility of judgment when the most learned of the Apostles confesseth he knew but in part and saw darkly as through a glass;" and when, in a later generation, another ancestor, who was a judge of the County Court in Salem, refused to sit upon the trial of the alleged Witches, they exhibited a courage and a breadth of mind far in advance of their times. I think we recognize a kindred liberality of spirit and soul in Leverett when we find him, as President of the Unitarian Club, in his address of welcome to the Clergy on behalf of the Laity, in 1884, saying:

"I congratulate you on the present outlook for the field of Liberal Christianity.

"We may now enter the portals of many other denominations and hear of the love of God for his children where formerly the very roof-tree cracked and the rafters groaned under the terrible threats of the wrath of the avenging Deity. The good work is going on, and, thanks to your noble and untiring efforts, it will not cease until, in course of time, the disciples of Christ shall ask of each other more of works and less of creed."

There was one subject of a public nature in which Mr. Saltonstall was far in advance of his age, and on which he did not hesitate to declare, in repeated instances and in emphatic tones, his convictions; and these convictions are directly traceable, I think, to the commercial atmosphere of Salem in which he was bred, I mean the importance and necessity to the national welfare of a powerful mercantile marine, as a nursery of commerce and of seamen, and as the only means of securing to America her full share of the carrying trade of the world.

He remembered the days before the Civil War, when our flag floated proudly on every sea and in every port. He had heard from the lips of father and grandfather of the time when the carrying trade of America vied even with that of Great Britain. He had seen the whole disappear during the War of the Rebellion, when our ships took refuge under foreign flags. He had witnessed what he deemed the stultification of Congress, in not allowing them to come back after the war, and in not permitting every American who can purchase a ship anywhere to put the flag upon it and to receive the protection of the strong arm of the Nation for it, wherever it sails. He had searched in vain in foreign ports for any trace of the Stars and Stripes where they once floated so proudly to the breeze, and had witnessed the miserable spectacle in the chief port of America, of all her vast foreign exports and imports being brought in and carried out by ships floating every flag but ours.

Perhaps, at this interesting time when our Navy has suddenly grown to be the second in the world, and we are beginning to worship Sea Power as the real source of national strength, a few of his wise and far-seeing utterances on this subject it may be appropriate and timely to recall. In his address to the Boston Chamber of Commerce, in 1888, he said:

"We are told that this decay of our shipping has been brought about by natural causes: that other communities can build ships cheaper than America; that steamers have taken the place of sailing vessels; and that the development of our great interior by building railroads and bringing its products to the coast is far better and more profitable than carrying them across the ocean. This is, I doubt not, partly true, and following as it did the destruction of our magnificent merchant fleet or its sale to England during the war, and the refusal of Congress to permit former owners to buy back their ships, together with the imposition of a Tariff tax which put a veto upon building others, it proved an irresistible argument.

"But are we never again to attempt the restoration of our shipping? Lying between the two great oceans are we forever to be dependent upon our rivals to carry our surplus products to South America and the East? What then is to be done? We cannot yet build steamers as cheaply as they are built abroad, and have not the skilled officers to command them, nor can we, under our laws, purchase them abroad. The very mention of such a thing frightens some of our political magnates out of their wits, and is declared to be a deadly thrust at our ship-building interests. But this seems the very height of absurdity. We

import machinery until it can be constructed here as cheaply as the imported article. Ships purchased abroad, placed under our flag, and officered at first, perhaps, by foreigners, would give employment directly and indirectly, to thousands of our people. Our young men would soon learn to command them, our mechanics would repair them, our miners would supply them with coal, and it would not be long before our ship-yards would hum with the busy industry of building them. The world has moved on while we have been asleep in the matter of ships. Is it not high time to bestir ourselves to the necessity of overtaking other nations?

“‘Home markets’ are all very well, but this Republic should not be thus limited in its ambition, and should seek to send to other markets its surplus productions. This can be done, it seems to me, only by a judicious reduction of the Tariff, and the repeal of so much of the Navigation Law as prevents our buying ships abroad for the establishment of an American merchant service.”

The traditions of his maternal ancestors, who followed the sea, rose from the fore-castle to the quarter-deck, and retired to become great ship-owners, inspired these words. They recall the days when the sails of Salem ships whitened every sea, and our proud flag floated to the sunrise from their peaks on the shores of every continent,—the days of her merchant princes, the Derbys, the Grays, and the Crowninshields, the days of the foundation of the East India Marine Museum, which gathered the curious treasures of the farthest East and West, brought home by its own members, who must, for admission to its ranks, have sailed as masters or supercargoes in an American ship round the Cape of Good Hope or Cape Horn. Alas! there are no such men any longer; the Society has dwindled to a half-dozen octogenarians, the last of whom will soon have slipped his last cable. There are no recruits for its ranks, because there are no American ships to make the required voyages.

In the ten years since these words were uttered, and especially in the three years since his death, the world has indeed “moved on,” as he said. If we are to have a great Navy to protect our commerce, we must have a great commerce to protect. If we are to grasp and hold the share of Sea Power that belongs to us, we must have a great merchant service. The American people will not much longer tolerate laws upon our statute book which prohibit the resurrection of this great source of national life and strength. Such words as these will at last be heard, and all who stand in the way of this rising tide of Americanism will be swept aside.

By good rights, a man so gifted as Mr. Saltonstall, and so admirably adapted, as the event proved, for public office, should have been called into the public service at an early period of life. It is to such men of means, and talents, and public spirit, willing to devote their energies, their leisure, and their patriotic spirit to doing the work of the public, that we may hope hereafter to look for the redemption of our Civil Service. Such men may be kept in the background, so far as office is concerned, by party machines and party despots, but their duty and obligation to study public questions, and to make known their deliberate judgment upon them for the public benefit, is always imperative, and Saltonstall recognized and discharged this duty with unflinching fidelity.

Whether we agree or disagree with his opinions and positions declared in his political speeches,—and I have found but little in them with which I could then or at any time since agree,—no one can question the true ring of his patriotic spirit, or the lofty moral purpose which always actuated him. There is no doubt that he would have made a most useful member of Congress or a distinguished Governor of Massachusetts. His character, his conduct, and his talents would have adorned either station, and we must honor and approve the honorable ambition which made such places attractive to him. It has always seemed to me that from 1860 to 1876 he was unfortunately out of his element in the Democratic party of Massachusetts. He seemed like a gold fish in strange and unaccustomed waters; as he could never feel at home with the constituency of his native county of Essex, when it preferred to elect General Butler as its representative in Congress, so he could not co-operate with the party in the State which afterwards made the same doughty soldier, year after year, its candidate for Governor, and finally elected him to that exalted office. It is not to be wondered at that he failed to follow the vast majority of his friends and natural associates into the ranks of the Republican party. Like his eminent father, he was a devout disciple of Webster, and the preservation of the Union, by and under the Constitution, and without the risk of any invasion of its provisions, was the fundamental article of his political creed.

The formation of a Territorial party, pledged to prevent the extension of slavery under the Constitution, was in the judgment of that School the first step toward inevitable disunion. Neither Webster nor any of his immediate followers could see that that other watchword of his, "Liberty and Union, now and forever, one and inseparable," could never be realized except by the utter destruction of Slavery. It

was the far-seeing mind of Lincoln that clearly discerned and declared that a house divided against itself could not possibly stand. It was this view of the conflict between Freedom and Slavery—so irrepressible that both could not continue permanently to exist under the same sovereignty, but one or the other must go to the wall, Constitution or no Constitution—that repelled men who felt as Saltonstall felt from joining the new party. So he stood aloof and resisted, to the best of his power, its first effort to elect Fremont, which fortunately failed, and could not share in its supreme triumph in the subsequent election of Lincoln. But that he was absolutely sincere and honest in his convictions, and at the same time loyal to the core, appeared by his patriotic conduct when war actually came and the deadly assault on the Union was delivered.

Webster did not live to witness the terrible spectacle which he had eloquently deprecated,—the land divided against itself and drenched in fraternal blood—and Lincoln's prophecy proved true to the letter. The Union could not be saved except by that violent breach of the Constitution which was made by the Emancipation Proclamation. But the same political party which finished the war on that issue and restored Liberty and Union together, straightway healed that breach by the new Amendments. In the great questions involved in reconstruction, which divided the country for so many years, the opponents of the Administration stoutly maintained their array, and vigorously, and without discrimination, opposed every measure and every proposition of the dominant power. In this long conflict Saltonstall took a prominent, and always a manly part, and his appearance on the platform was always greeted with welcome and applause. It is pleasant to forget these dead issues on which he wasted so much honest and eloquent breath, and to follow him into the active and highly useful public service to which, at last, in his riper years, he was summoned, and in the conduct of which he displayed great merit, fitness and capacity.

When the people of the United States determined to celebrate the Centennial anniversary of their Independence by an Industrial Exhibition at Philadelphia, in which all the States should be invited to participate, such exhibitions were substantially in their infancy in this country; in fact it was with us an entirely new experiment on any such grand and universal scale. It was to be held under the auspices of the Federal Government, which contributed \$1,500,000 for the purpose, while the private, State, and municipal subscriptions aggregated several times that amount. The successful Expositions of the same

character, in previous decades, in London, Paris, and Vienna challenged America to do its best in this generous rivalry at such a signal epoch in its history. Whether the people of Massachusetts were not alive to the importance and vast extent of the projected enterprise, or were doubtful of its expediency and of its probable success, its Legislature, at the session of 1875, made the wholly inadequate appropriation of \$50,000 to enable its citizens to participate in it; and this seems to have indicated a general apathy among the people of the State in regard to it. But as the event proved, it was most fortunate for the Commonwealth that Governor Gaston selected Mr. Saltonstall as Chief Commissioner for Massachusetts. His appointment was somewhat tardy—in September, 1875, only a few weeks before the final assignment of space for exhibits upon the floor—but the Chief Commissioner, impressed with the importance of the undertaking and of the State's doing herself full justice in such a magnificent competition with her sisters, and convinced that if she did so, her showing would compare well with any other section of the country, put forth all his energies from the receipt of his commission until the close of the Exhibition, and, aided by many public-spirited volunteers, he saved the honor and credit of the State. His personal popularity and wide acquaintance, and his interest in agriculture and education, lent a sanction to the appeals which he made by public addresses and personal influence to enlist popular sympathy and enthusiasm. The result was highly creditable to the State which he represented, and when the Exhibition opened, the fine display of her educational development and of her marine interests and fisheries—always such important elements in her History—attracted great attention. He made a fine Address in Independence Square to the vast multitude which there assembled, on the day before the opening, in response to the call for Massachusetts. His manly presence commanded attention, his magnificent voice reached the outermost circle of the crowd, and the speech was quite worthy of the applause with which it was received. His thought naturally ran in the highly patriotic strain, recalling the great event which was celebrated, and the great men of Massachusetts and Pennsylvania who took part in it together, in Independence Hall, under whose shadow he was speaking.

The thing to be noted in this, his first really public service, is his personal devotion to it as a public trust, and the excellent executive and administrative ability which it called forth. He could not have devoted himself with more zeal, intelligence, and industry to the most lucrative private business than he did to this unaccustomed and gratui-

tous employment. In a man already past fifty, who had led a life of ample leisure, this was very noticeable. Money-making, I believe, had never any special charms for him, but this opportunity to serve his fellow-citizens in a useful and honorable employment he highly enjoyed and improved.

Hardly had he completed these interesting labors, when he was called upon by the Democratic National Committee to perform a most arduous, and certainly distasteful, public service,—to go to Florida and attend the canvassing of the Presidential vote in that State in the disputed election of 1876. The terrible excitement which then prevailed as to the true result of the election can never be forgotten. Looking back now after the lapse of twenty-one years, in the cool after-light of history, it is impossible to deny that the partisans of Mr. Tilden had some grounds for believing that he was entitled to a majority of the electoral vote. Even those of us who then believed, and still believe, the contrary, must admit that. The practical suppression of the negro vote in the whole intervening period, which is now universally understood and admitted, had not then assumed its present definite form, and it was not unnatural for each side honestly to believe that in the disputed States, in districts where their adversaries had control, such suppression or other fraudulent manipulation of the vote had been practised. At any rate, the belief of unfair play was universal among Democrats, and almost as universal among Republicans. In this predicament an imperative desire arose, among the constituted authorities of both parties, that men of tried and incorruptible integrity, representing both sides, should go down and personally witness the local canvass. To such a call from his party Mr. Saltonstall could not well refuse to respond. He went, and seems to have had a most trying time. He returned absolutely convinced that aggravated frauds had been committed, both at the election and in the official canvass, by which the electoral vote of the State was awarded to General Hayes, and he so reported to the Committee which had sent him. But it is not to be forgotten that Saltonstall was a strong partisan—always confessedly so; that in matters where his feelings were enlisted his mind did not act judicially; and that quite as strong a conviction the other way was formed by honest men equally partisan on the other side. Fortunately for both parties, as I think, the truth as to the original facts will never be known, and History is likely to stand by the conclusion of that noble Republican, General Barlow, who was sent upon the same mission by his party, and who was always as fearless as he was honest,—that it remained

doubtful whether the actual vote cast gave a Hayes or a Tilden majority; and this doubt will forever uphold the decision of the Electoral Commission, that both parties and the Nation must abide by the actual return of the State Canvassing Board. It was a most critical period in the history of the United States, when we seemed almost on the verge of civil war again. It was averted by the patriotic and conciliatory spirit of both parties in constituting the tribunal which was to decide the fate of both: but for one, I must admit that the chief meed of praise for magnanimity, both in making up the Commission, and in submitting without question or murmur to its decision, is due to the party to which Saltonstall belonged, which came out the loser of the momentous stake by a strictly party vote of the Commission. At the same time, I believe that the general judgment of the people, which sustained the Republican party in power for the next eight years, was satisfied with the result accomplished.

Mr. Saltonstall's advocacy of a general Treaty of Arbitration with Great Britain, upon the occasion of the visit of Sir Lyon Playfair and other celebrated Englishmen, as the bearers of an Address, signed by their associates in Parliament, in favor of such a treaty, is worthy of record at this time when rulers and people of both nations are in favor of strengthening and fastening the ties of blood and interest and duty which unite us, and especially at the close of a war which, at the time his words were uttered, seemed an absolute impossibility to our generation. At the Banquet given by the Commercial Club of Boston in honor of this British deputation, in 1887, he said:

"The mission of these people, representing as they do 232 members of the British Parliament, will, I believe, be referred to in the future as one of the most interesting events in history, for how can we doubt that it will be entirely successful? The only wonder is that in this period of advanced civilization such a Treaty as is by them advocated should be necessary,—that two nations so near akin as Britain and America, professed followers of the Prince of Peace during all these centuries which have elapsed since he preached the gospel of peace and brotherly love, should feel that war could, for any possible cause, arise between them. Nor do I much believe that Great Britain and America would, without such a Treaty, ever declare war against each other.

"The series of negotiations and compromises which settled the great excitement attending the questions of the Steamer *Caroline*, the North Eastern Boundary, the Oregon Boundary, and, above all, the Arbitration on the Alabama Claims, which set the example to the world of a just and honorable decision by a Court of Arbitration of a great, exciting

question which threatened to involve the two nations in war, point to Arbitration as the sole method of solving all difficulties, when diplomacy and negotiations fail.

"A great Nation of sixty millions of people, pointing to her past achievements in arms, need make no further display of prowess to secure its proper renown among the nations of the world. The telegraph, the press, the post office, the railroad, the steamship, and, more than all, the cable laid by our great Anglo Saxon Race, so link the nations together that it would seem that wars must cease and huge armies return to the work of producing food for themselves and their fellow men. All honor, then, to these bearers of good tidings, heralds of 'Peace on earth, good will toward men.' We pledge them our most zealous and ardent support, nor will we cease our efforts until they are crowned with success."

Here, again, he was decidedly in advance of his time. The Arbitration Treaty negotiated between the two nations failed in the Senate, and only three years ago, upon the occasion of the Venezuela incident, Congress, without a dissenting voice, phrenzied by the hostile message of the President, and backed, as it seemed, by the sentiment of a vast majority of our people, was eager to spring to arms even against Great Britain. It was but a momentary phrenzy, and the easy and good-natured forbearance of the British Government made war impossible. But the great armaments of the world have vastly increased, and are still increasing, and great wars still seem inevitable unless heed shall be given to the proposal of the young Czar of Russia—the last monarch in the world from whom it might have been expected, the ruler of the nation which has the least to lose and the most to gain by war—who now calls all the nations to a Conference for general disarmament and peace.

The eight years that elapsed from his return from Florida until the election of President Cleveland, in 1884, were quiet years for Mr. Saltonstall and, doubtless, the happiest of his life. Finding sufficient occupation in the conduct of the many private trusts which the universal knowledge of his steadfast integrity and fidelity imposed upon him, watching and enjoying to the utmost the development and settlement in life of his children, surrounded by all that could enrich life and embellish it, with ample leisure for the indulgence of his choice and cultivated taste for art and literature, he must have been as happy as the lot of humanity ever admits.

But more stirring and active times were in store for him, and his one enduring claim to historical remembrance is the really great record

which he made as Collector, for three years, of the Port of Boston, to which office he was appointed by Mr. Cleveland, in November, 1885, where he did brave battle for the cause of Civil Service Reform as a champion in the front rank. Up to the time of his appointment he had been chiefly known as a partisan, but he had, nevertheless, constantly and consistently avowed his faith in the absolute necessity of a radical reform of the Civil Service. There was nothing in this inconsistent with his loyalty to party, for not only his own party, but both parties, by their National Platforms, had declared their devotion to this great cause; but Mr. Saltonstall's ruling passion and distinguishing characteristic was absolute honesty, and he believed in holding his party to its solemn vows, and, at all events, would abide by them himself. No one knew this better than President Cleveland and his constitutional advisers, one of whom, Judge Endicott, was his lifelong and intimate friend. In July, 1885, the President sent for Mr. Saltonstall and urged upon him the office of Chief Commissioner of the Civil Service in place of Mr. Dorman B. Eaton, who may justly be regarded as the pioneer and founder of this Reform in America. To succeed such a man in such a position might well be regarded, as it was by Mr. Saltonstall and his friends, not only as a deserved recognition but a very great compliment; but the duties of the office would have compelled his absence from Boston, and the abandonment of trusts and duties there that were, at the time, imperative, and he persuaded the President that it was his duty to decline the office. But Mr. Cleveland was not willing to excuse Mr. Saltonstall from the public service, and his appointment as Collector soon followed. He took the position about public office of any kind, that he would not seek it, would not lift a finger to get it, but that if it came to him unsought, and his private circumstances permitted, he must accept; and he did. Men of all parties loudly approved the appointment. In fact, everybody was delighted with it from its manifest fitness, except only the spoilsmen of his own party who knew that, come what might, he would keep his word, and stand fast by the faith which he had professed. The reason for general satisfaction was well stated by the press,—because "Mr. Saltonstall was one of the cleanest men in public life." The remarks attributed to the new Collector in December, 1885, by the New York Evening Post, the leading advocate of this Reform from the beginning, are worth quoting:

"After twenty-five years the Democracy is in power with the Civil Service Law in force, and a President the very embodiment of Civil Service Reform principles. Now, I go into office with the Civil Service

Law to protect me from the whole Democratic party. Why, they would be upon me from the very hills of Berkshire. Now, I say to the office seekers, 'Gentlemen, there are only a few offices and here are one thousand of you. In regard to the great mass of clerks I have, and can have, no more control than any of the gentlemen before me. I may find a clerk incompetent or unworthy of his trust and discharge him. Can I fill the vacancy as I choose? Not at all. Up comes a Civil Service Commissioner who may say to me, "Here are four men who have passed the examinations and are certified for appointment. Take your choice." Here may be men white or black, rich or poor, native or foreign-born, Democrat or Republican, all equal before the law, and into that vacancy the Collector must or should put the man who is best qualified.' Here is a grand advance. Every citizen who loves his country should support this law, and the party which dares to array itself against it will be lost. Other issues—the Currency or the Tariff—may affect the prosperity of the Nation for a time, but by standing by this law we may do more for the ultimate standard of the Nation among the peoples of the world than in any other and all other ways combined."

The same high authority pronounced this to be the true gospel of Civil Service Reform, and his great glory was that, in his conduct of the office, he carried out this gospel to the letter. When he took office, there were two hundred and forty places in the Custom House which were within the classified lists. In the first six months of his incumbency he removed only ten, and in every instance the vacancies were filled by competitive examinations, and without any regard to the politics of the candidates; and during the same period, of ninety-seven officers who did not come within the rule of classification, and whose places he had a perfect right to fill at his pleasure, or to make room for his party's supporters, he had removed only six, and these for cause, retaining all those who were competent and capable, and had faithfully performed their official duties. Such a record was without a precedent in any other Custom House in the land, and drew marked public attention to Mr. Saltonstall, who, on repeated public occasions, had declared that his conduct was not only required by the law, which he must and would obey, but was entirely in harmony with his own personal convictions as to the principles which the public welfare required. Newspapers of the opposite party made the false charge that he was really serving his party, and was filling vacancies with candidates among those equally qualified who had the strongest party backing.

This charge he manfully declined to notice or deny, until such denial was demanded of him by a local Civil Service Reform Association of which he was a member and officer, when he reluctantly published a most modest, but emphatic, refutation of it. Soon afterwards the cormorants of his own political party, enraged by what they considered an unprecedented retention of the spoils which were their natural right, made a vicious and savage attack upon him, which resulted in a display of true mettle and courage on his part, to the delight of all true friends of Reform and of the country, and placed him at the very front of the champions of the cause which he had so nobly espoused. "What use to be Democrats at all," said the spoilsmen, "if principles so abhorrent to our ancient party practices, and to the Jacksonian theory that to the victors belong the spoils, are to be carried out under our very eyes in the chief Federal establishment in the State?"

A test must be made whether the great party machine of the Commonwealth or the Collector was the stronger power. Accordingly, a sub-committee of its Executive Committee, armed and equipped with all the authority which that august body could confer, waited upon him with the impudent demand "to look over his list of subordinates and see how many of them are Republicans and why they are retained in office." The Collector, with true dignity, but, of course, in his ever courteous and gentlemanly manner, refused to treat with them or grant them the information, if they came as a committee of the Democratic party or of any other political party. He took the ground that for his official conduct he was responsible only to the President and the Secretary of the Treasury, and would recognize no accountability to any one else, not even the great Democratic party, whose creature and subject they erroneously supposed him to be. He took, and held the position that the Civil Service Law was as binding as any other law, and that he was bound by his oath of office to obey it; that if, unfortunately, the law should be repealed, or the Collectorship remitted, by higher authority, to its old status of a party machine, he should feel compelled, by his convictions, to resign the office.

In explanation of his conduct to the public he further said:

"If I can conduct the office for the best interest of the government, and at the same time raise it to the position it should permanently occupy under the Reform Law, I shall consider that I have been of some service to my day and generation. I consider that the very existence of the Republic depends on this or a better law. It has its faults and can be improved, but, on the whole, is efficient, and I have

found it so in its workings. With one or two exceptions I have not drawn a single man from the Civil Service Lists that has not proved not only acceptable, but eminently so, for the position to which he was appointed. The party that succeeds in carrying out and making permanent a thorough reform of the Civil Service, and in redeeming the country from the Spoils System should and will, in my estimation, receive the gratitude of posterity."

The friends of the Reform throughout the country took new hope and courage from this truly magnificent position of the Collector, and it is needless to say that even the managers of his own party were convinced, at least, that it was impregnable, for, when the State Committee reported their grievances to the next State Convention, that body gave them only the cold comfort of renewing the old platitude about Civil Service Reform, with the qualification "that 'offensive partisans' should not be permitted to remain in office."

Mr. Saltonstall continued to discharge his duties as Collector by the same righteous and commanding standard, to the immense satisfaction of the whole country until after the inauguration of President Harrison, who, regarding the office as a political one, and its incumbent as the personal representative of the President in the State, called for his resignation; but Mr. Saltonstall took a different view, and, standing upon the expression in the new President's letter of acceptance "that fidelity and efficiency should be the essential test of appointment, and that only the interests of the public service should suggest removals from office," refused to comply. This unfortunate difference of course terminated in the appointment of a new Collector in his place, but his retirement, especially under such circumstances, attracted universal attention, and called forth the most emphatic encomiums upon his spotless and noble personal character and official record, which were worth far more to him than any office, which must have greatly cheered his subsequent years, and which his children must cherish as a proud memorial,—the most signal of all being a letter signed by nearly two hundred of his fellow citizens of all political parties, who embraced all that was best and bravest in the city where his good work had been done, indorsing his conduct, thanking him for the great service he had rendered to his country, and inviting him to a public dinner, which, however, he felt constrained to decline.

After retiring from office, Mr. Saltonstall spent the remaining years of his life at his delightful home at Chestnut Hill, in absolute domestic felicity, surrounded by all that could make home happy. He lost none

of his interest in public affairs, but there was no further occasion or opportunity for him to take an active part. He held important positions in many charitable associations, to which he was always devoted, and where he exercised great influence for good. He now resumed and completed a great labor of love which for many years had occupied much of his time and thought, the preparation, for private distribution among his kindred and friends, of a truly magnificent book—*The Ancestry and Descendants of Sir Richard Saltonstall of New England*—containing most careful and interesting narratives of the lives and services of the most distinguished members of the family, embellished by their portraits by famous artists, which had been the precious ornaments of his house. It is a valuable contribution to American History as well as to genealogical lore. His design was faithfully executed by his eldest son, after his death, by its publication at the Riverside Press.

My last meeting with him was after his last Commencement Dinner when we shook hands, as he got into his wagon with his sons, all Harvard Alumni, to drive to Chestnut Hill, little thinking that he would no more set foot upon that "sacred ground." Very soon afterwards he was overtaken by a mortal disorder, which he bore for months with that calm resignation and cheerful hope which we should have expected of him after such a life, and in April following he was gathered to his fathers, leaving nothing in his record to regret.

After we have told all that he said, and all that he did, there is much about him that tongue cannot tell or word describe. There was a strong and fascinating personality in Saltonstall, which attracted all with whom he came in contact in every relation of life. The eye must have seen it, the ear must have heard it, the heart must have felt it, to understand what I mean. Huntington's portrait of him in the Custom House, painted at the invitation of the same citizens of Boston who had tendered the banquet which he declined, gives only an imperfect impression of the living man, for though a very good painting, there is quite as much of Huntington as of Saltonstall there. The magic touch of a Rembrandt, a Lawrence or a Copley, or the subtle hand that painted Silence Saltonstall—on whose features handed down through seven generations he loved to dwell—might possibly have transferred the real man to canvas. It may be truly said that everybody respected, honored, and loved him, and that he deserved it all. While he was manly to the very core, his heart was tender and sympathetic as a woman's. Nothing can repair the loss occasioned by his

death in the household of which he was the head and the soul. And each of us who were his friends and associates, as his image rises before us, may ever breathe the constant sigh—

“My [pleasant] neighbor gone before
To that unknown and silent shore,
Shall we not meet as heretofore
Some summer morning?”

CHARLES F. SOUTHMAYD

MEMORIAL READ BEFORE THE ASSOCIATION OF THE BAR OF THE CITY
OF NEW YORK, 1912

Charles F. Southmayd was born in the City of New York on the twenty-seventh day of November, 1824, and died in the same city on the eleventh day of July, 1911, thus spanning the arch of time from the administration of the fifth President of the United States to that of the twenty-sixth, and his death severed one of the very few surviving links between our own busy age and that era of good feeling which closed the first quarter of the nineteenth century.

As he was one of the great lawyers of his time and commanded the unbounded confidence and esteem of all the leaders of the profession, we may well pause for a few minutes to contemplate his career and to consider the great changes which it had witnessed, although to the man of to-day he was only a name and hardly that. But some of us can remember when he was the leading figure in everything that involved sound learning and technical skill in the law. He came of good old New England stock, the first emigrants of the name having landed at Salem, and I find men of his name, which is an unusual one, graduating at Harvard and Yale in the seventeenth and eighteenth centuries, with whom he was doubtless connected. Through his mother he was proud to trace a near connection with the Gouverneurs, the Ogdens, the Kembles, and the Kearneys, although he was the last man ever to speak of such things. He was baptized in St. John's Chapel, which was very near his father's residence on Laight Street near Varick, Nicholas G. Ogden and Edward F. Hammeken being his godfathers, and he always claimed that thereby he had become incorporated into the Church and was entitled to good standing therein for the rest of his life. His school days, which were spent at a private school, seem not to have been much longer than Benjamin Franklin's in Boston, for, at the unripe age of twelve and a half, his teacher announced to his astonished father that he had taught the boy all that he knew and he had thoroughly mastered it, and what to do with him then was the question. Happily, Providence was on the lookout for him. Elisha P. Hurlbut, who afterward became a Judge of the Supreme Court, had a friend who informed him about Charles and of his parents' dilemma, and he asked to see the boy and looked

him over and doubtless examined him to find out what he already knew. Being a phrenologist and phrenology being all the rage at that time, Mr. Hurlbut declared that there was the making of a lawyer inside that head. So he invited his parents to send the boy to him and he would try to make a lawyer of him. Judge Hurlbut was then practicing law in copartnership with Edward H. Owen at 63½ Cedar Street, and about a year afterward he formed a new partnership with Alexander S. Johnson, who, in subsequent years, became a Judge of the Court of Appeals and successor to Ward Hunt as Circuit Judge of the United States for the Second Judicial Circuit, under the firm name of Hurlbut & Johnson at 73 Cedar Street.

With two such men of distinction, skilled in the law and interested in public affairs, both of them, as the event showed, looking forward to judicial life, the boy found his chance and speedily made the most of it. Although he thus actually began the study of the law at a very tender age, he found it most congenial and buckled down to it in earnest. He seems to have had no tuition, outside the office at any rate, except what he may have got by attending Court; but he had wonderful powers of concentration and made such progress and so rapidly mastered the law that, at seventeen, he came to be known in the office as the "Chancellor"; and the story goes that when clients called they were apt to find the two masters in the outer office discussing public questions, and they would say: "Do you want to talk politics? Here we are. But if you've come on law business you will find the Chancellor inside."

In truth, without his knowing it, his legal studies had been conducted on the most approved modern method, the case system. Great praise has justly been accorded to Professor Langdell, who organized and coordinated that method of study in the Harvard Law School, but, in truth, it was the same old method on which Southmayd and Charles O'Connor and Professor Langdell himself had been spontaneously trained—or, rather, had trained themselves: the study and complete mastery of the individual case, as the original source and record of the legal principle involved.

I would by no means disparage or depreciate the generally acknowledged superiority of the legal education now given by the best law schools of the country to aspirants for admission to the Bar, but no one can doubt that the case system, as pursued by Mr. Southmayd and his predecessors prior to the establishment of law schools, in which, by their own unassisted efforts and study, or with the aid of experienced lawyers whose offices they entered, they sought for and found the

original sources of the principles of law in cases actually decided and which they fully mastered, was the best method yet achieved.

Certainly such training was superior to that which prevailed at the Harvard Law School at, and for some time after, the time when Mr. Southmayd was thus making himself a triumphant master of the law.

At that time, no examinations whatever were required to get in, or to get on, or to get out of the Dane Law School, as it was then called. We lingered for the appointed time upon the hard benches of Dane Hall listening, or not listening, daily, for two hours, to lectures more or less inspiring, or more or less benumbing, and received, by lapse of time, at the end of two years of more or less faithful pursuit of this method of training, our degree of LL. B. as a matter of course, and yet, at the same time, there was a growing habit of study, even under that loose system, which resulted in the production of many learned and useful lawyers.

But I doubt whether many of the recipients of that degree, prior to the regular establishment of the Langdell system, could have equaled Mr. Southmayd in his accurate and precise knowledge of the principles of law, as theretofore established by the courts of New York and the Supreme Court of the United States. He could have told you, with absolute correctness, of the law, for instance, established by the almost unanimous voices of the judges of the various courts of New York, who held that it was within the power of the State to grant an exclusive right to navigate within its own waters by vessels propelled by steam, which would have had the effect to limit the commerce of the port of New York to the vessels of Livingston and Fulton, or their assignees,—an almost inconceivable thing, in view of the marvelous development of the power of Congress to regulate commerce as now established.

And he could have told you, with equal accuracy, of every step by which that whole line of decisions was overthrown, at a single blow, by the masterly process of reasoning applied to them by Chief Justice Marshall.

And so he could have told you the whole history of the Dartmouth College case, and how the same great genius vindicated the power of the nation as against laws of states which undertook, in any form, to impair the obligation of contracts in defiance of the provisions of the federal constitution.

It was by the study of such cases, before the questions involved in them were overwhelmed by the infinite number of decisions in which

they are now buried, that he acquired the wonderfully clear and forceful way in which he always handled constitutional questions, as illustrated, for instance, in the Income Tax case.

And in the practice of the law, beginning, as he did, before the introduction of the pernicious Code of Procedure, which has done so much to spoil the practice in this State, he was able to steer his course, in the consideration and decision of questions submitted to him, on grounds of pure principle, without distortion by technical points and considerations.

I consider that this Association and the Association of the Bar of the State of New York could do no better service to the profession than to see what can be done to protect it from the crushing weight of the ever-growing mass of judicial decisions and the ever-growing bulk of the New York Code of Procedure.

It is impossible for the profession here to make much further advance in the future, unless it shall be relieved in both of these respects.

In 1837, when Southmayd, as a boy, began his studies, and even in 1841, when he bore the well-earned title of the Chancellor, there were no such floods of books as those in which the law itself is now thoroughly drowned; there were but few New York reports and still fewer American text-books; and it was quite practicable for a vigorous young mind to master all the leading cases that had been decided here, and that is exactly what Southmayd did.

Our efficient Librarian, Mr. Poole, has, at my request, been so kind as to prepare a list of the printed reports of cases decided in the State of New York up to 1840, by which it appears that instead of the thousands of volumes in which the student at law now has to lose himself, there were, up to 1840, only about eighty volumes of published reports in the State of New York, exclusive of Criminal and Practice Reports, and thirty-nine volumes of the Supreme Court of the United States, so that it was not a difficult matter for even a young student in those days to make himself master of all the important cases that would naturally be cited, and of the principles thereby established. In connection with his studious reading and work in the office, he was a frequent attendant upon the courts, and made himself a finished lawyer. I have no doubt that Coke upon Littleton and Blackstone had come in for a share of his attention; and we may be sure that he knew much of Kent's Commentaries by heart, the second edition being then available and being, as it were, a complete review of his studies up to date. Of equity he early became a master, for his mind was naturally adapted to its principles—so fair, so just, so altogether reasonable and un-

disturbed by the technicalities that were still found so embarrassing in the common law.

We may be sure that, in his clerkship and his subsequent partnership with Judge Johnson, he became a splendid practitioner and a thorough adept in the art of unraveling complicated facts and involved accounts, and in applying to them the settled principles of law. In those days the Law and the courts dealt with fewer subjects than at present, and, in New York City, Trusts, Real Estate, and Commercial Law made up the bulk of the business, and before his name yet appeared in the books, he was engaged in two really great cases which are reported under the names of the leading counsel, but in which Southmayd had a very active hand.

Ogden v. Astor, reported in 4 Sandford's Reports (N. Y. Superior Court) 311, was a very great case for those days, and involved many important and intricate commercial transactions, running through a long series of years. Although his name does not appear, there is good authority for saying that Mr. Southmayd for years was engaged in unraveling the complicated accounts between the parties. The case was commenced by bill filed in January, 1842, against John Jacob Astor and William B. Astor as partners, in behalf of the administrator of Nicholas G. Ogden, whose transactions with the Astors began as far back as 1816. During that period it was claimed that Ogden also was a copartner, and all sorts of obnoxious charges were made in the bill of overcharges, error, omissions, and wrongs, specified as having taken place in the accounts kept by the defendants. This partnership was denied, and the Astors also denied the allegations of fraud, suppression, and concealment, and explained such of the errors alleged as were not positively denied. They claimed also an account stated in 1826 as a complete bar to the suit, Ogden, the testator, having died before that date. The pleadings, together with the proofs and documentary evidence produced, the courts say, would fill more than two volumes of the size of these reports, or 1500 pages. The claims made were very large, and upon a hearing before two judges of the Court, which occupied eleven days in the fall of 1850, a Referee was appointed to restate the accounts.

It does not appear by the printed reports of the case that Mr. Southmayd was in it up to that time, the original argument having been conducted by Charles O'Connor and George Wood for the complainant, and Daniel Lord and Benjamin F. Butler for the defendants. But after this time, Mr. Southmayd was called in by Mr. Daniel Lord for the Astors, and for years appears to have devoted vast attention to

the matter, so that, as I am credibly informed, when it came up in 1855 for consideration before the full bench of the Superior Court, upon the coming in of the Referee's report, Mr. Southmayd had so thoroughly mastered all the intricacies and difficulties of the case that he was entrusted with the responsible duty of opening the case for the defendants. This he did at great length, occupying something like a day and a half; but he made the whole matter so plain, both to his associate, Mr. Lord, and to the distinguished counsel upon the other side, clearing up all the mysteries involved in accounts of so many years, that the case proceeded no further, and the counsel for the plaintiff were satisfied to settle without further argument. The claim, which had been very large at the outset, was reduced to such reasonable dimensions in the settlement, that the Astors recognized the great service that had been done them, and being filled with admiration at the splendid manner in which he had presented their cause, always afterward were wont to resort to Mr. Southmayd for advice and legal service in any serious matter. Not only did John Jacob Astor frequently employ him, but William B. Astor relied upon him absolutely, and made him one of the executors of his will, and thus he secured a most valuable clientage.

Another great commercial case in which, while yet unknown to fame, he was deeply engaged with Judge Johnson, and of which I feel certain that he bore the brunt, was *Iddings v. Bruen*, reported in 4 Sandford's Chancery Reports, 223. This also involved many intricate and complicated questions of fact and law, and occupied several years, being contested by Johnson and Southmayd on one side and by Butler and Evarts on the other. Not long after it was finished, Mr. Johnson was elected to the Court of Appeals, and this left Mr. Southmayd open to other engagements, an opportunity of which Butler and Evarts, having long observed, in the litigation which he had been conducting against them, his great power of labor, his learning, skill, and tenacity of purpose, quickly availed themselves by inviting him to join them on terms which were very soon made equal. Thus, in 1851, was formed the firm of Butler, Evarts & Southmayd, which, with various successions, has continued until this day.

It would not become me to speak of the history of that firm, but, as an indication of how the fortunes of lawyers have changed since its foundation, I may say that when Mr. Evarts invited me to join it in 1859, he wrote me that I might fairly expect that the net income of the firm, exclusive of his own outside counsel fees, would amount to twenty thousand dollars. But I must say that during the whole period

of his connection with it, until he retired at the age of sixty in 1884, Mr. Southmayd was the mainstay of the whole concern. If there was a knotty point of law or practice to be decided, a difficult will, trust or contract to be drawn, an important opinion to be prepared, it was almost always left to him, and he always succeeded—he would never give in till the problem was solved; and as he was known to be always at his desk, clients at all hours flocked about him for advice, which is, I think, the most responsible and difficult part of our whole professional work. And then, too, in consultation he was invaluable. You can imagine what a resource it was to Mr. Evarts or to myself, coming down from Court at the close of a protracted and exciting day, to talk over with him puzzling and unexpected questions that had arisen and get the benefit of his cool and quiet judgment.

He hated to go to Court himself, and only went very rarely on great cases which had arisen out of important opinions given by himself, which it was vital to the interests of his clients, who had acted upon them, to sustain. I remember three such cases, the Delaware & Hudson Canal Co. v. The Pennsylvania Coal Company, reported in 50 N. Y. 250, the Tennessee Bond Case, reported in 114 U. S. 663, and the case of Langdon v. The City of New York, reported in 93 N. Y. 129, in each of which eminent counsel had given an opinion contrary to his own, and they fought it out tooth and nail from start to finish, and in each case Mr. Southmayd was successful all along the line.

The case of Langdon v. The City of New York was one of great public importance. There the City had duly laid out the water line of West Street on the North River. But when the owners abutting on that water line and relying upon it, had acquired very valuable property interests, the City claimed the right, after many years had elapsed, to lay out a further line, several hundred feet outside of the former, over land under water, without making compensation to the owners affected by the change. This would have made their property no longer abutting on the river, with all the natural rights incident thereto, but high and dry interior lots.

This case was argued by Mr. Southmayd with very great earnestness and success, fully establishing the rights of his client, who, again, happened to be one of the daughters of John Jacob Astor; but Mr. Carter, who was opposed to him and represented the City, was so positively convinced of the validity of its claim in the premises, that even after the decision by the Court of Appeals, he is said still to have advised the City to proceed as against other owners, to reassert their orig-

inal claim upon the ground, which was a favorite one with him, that nothing is decided until it is decided right.

In truth, Mr. Southmayd had a perfect genius for the law, and there was no department of it to which he was not fully equal, except only the trial by jury, for which I think he cherished a secret distrust. At any rate, he never cultivated any of the forensic arts which come in play in jury trials and never could have got an impossible verdict.

I remember Mr. Evarts one day, in the early days of my connection with them, coming into my room and throwing down upon my table a bundle of papers, and saying: "Choate, you must try that case." Well, it was a suit upon a Life Insurance Policy, containing that wicked clause that if the insured should die by his own act or hand, sane or insane, the company should not be liable. He and Southmayd both said that it was impossible to get a verdict in the case, because the insured was found dead with a pistol in his right hand, with one barrel discharged and a hole in the roof of his mouth and the bullet in his brain.

Well, as in duty bound, obedient to the orders of my seniors, I went to Brooklyn and tried the case before a jury, Judge Gilbert, who was as humane as he was human, presiding. I never for a moment forgot the poor widow and orphans, to whom that \$12,000 perhaps meant life or death. I tried it on the not impossible theory that the deceased may have been blowing in the pistol to see whether it was loaded and it went off accidentally without any act or hand of his. The Judge, who was full of the milk of human kindness, accepted the theory as a plausible one, and upon it submitted the case to the jury, who found a verdict for the plaintiff for the full amount claimed. Of course, I returned to the office triumphant, but Evarts and Southmayd both refused to believe, and said: "The General Term will lay you out." So, in due course, I argued the case at the General Term, and soon the decision came down—"Judgment affirmed with costs," and again they jeered. But, by and by, the Court of Appeals reversed, saying that the finding of the jury was an incredible one. Was not this a clear case of the usurpation by the Court of Appeals of the function of a jury, whose sole function it is to determine questions of fact? Southmayd smiled again, and my only consolation was that, in obedience to orders, I had done what I could.

So, many years afterward, in the case of *Laidlaw v. Sage*, I got no help from Mr. Southmayd, who had then retired, but was still always with us; the same Court again, as it always seemed to me, came startlingly near usurping the function of the jury. Two juries had

successively decided upon positive evidence, contradicted only by the defendant, that on sight of the dynamiter about to drop his bag, Sage had moved the plaintiff from a position of less danger into the direct path of the explosion, so as to be a shield to his own person. The Court of Appeals, however, as I cannot help thinking, retried the question of fact, and in spite of the concurrent verdicts of two juries, in whom rested the only legal power to decide it, they reversed the hard-earned judgment, on the ground that it was impossible, in the case of such an explosion, to decide that the place to which the plaintiff was moved was more dangerous than his original position. At least nine judges of the General Term had sustained the verdicts for the plaintiff, and were finally overruled by five judges only of the Court of Appeals. Was this within the constitutional power of that Court?

I do not believe that Mr. Southmayd ever undertook the trial of a jury case, where he would have been indeed a fish out of water. But in all legal questions he was supreme, and no lawyer in this city ever enjoyed more absolutely the confidence of his clients. As the business grew and great questions, interstate and international, arose, his professional reputation rose higher and higher, until, as I have heard, the bankers of Holland would not take an issue of bonds under a railroad mortgage unless Southmayd said it was all right, and the great lawyers of the city sought his opinion upon questions that arose in their own practice.

With many eccentricities, as will presently appear, he had an absolutely honest and straight mind, and with unerring instinct went right to the root of the matter submitted, stripped off everything that was superfluous and irrelevant and decided it upon some impregnable proposition of law.

As a draftsman in his best days he was, I think, without an equal. He seemed to be able to provide for every possible contingency, so keen and acute, and, at the same time, so far reaching was his mental vision. But in his later years this habit grew upon him to an almost disabling extent. So that sometimes you had to follow him through sentences whole pages long in his effort to provide for contingencies that would probably never happen.

In addition to great learning and inexhaustible power of labor, untiring patience and common sense, he had the great and unspeakable gift of character, which is more than all the rest combined in the formation of a great lawyer, stooping to nothing, tolerating nothing small or mean or low, maintaining always the highest standard of per-

sonal and professional conduct, and putting everything to the test of his own good and clear conscience.

It was in recognition of his eminent position at the Bar and great learning that Yale University, in 1884, conferred upon him the degree of LL. D., which he most highly appreciated.

He uniformly refused, for himself and for the firm, to take any pecuniary interest in any matter that was entrusted to his or their professional charge, believing that it tended to professional degeneration, and that clients could only be properly served by lawyers who had no personal interest in the matter involved to advance or protect. Of contingent fees in any form he had a special horror, and regarded the change of statute which made them possible as a serious damage to the profession, and the judicial iniquities, the exposure of which led to the formation of this Association, made him one of the most enthusiastic and zealous of its original members. This Bar Association, in fact, has never had or lost a member who reflected upon it greater honor. If Mr. Evarts were alive to-day, I am sure that he would join with me in declaring that much of our professional success and repute was due to his support, his assistance, his inspiration.

For myself, I can give no better illustration of this than in the celebrated Income Tax case, in which was accomplished what was at the time regarded, at home and abroad, as the almost impossible achievement of overthrowing, in the Supreme Court, the entire scheme of an Income Tax embodied in an act of Congress. I might almost say with entire truth that it was Southmayd, who never went near the Court, who won the case. He was then seventy years old; he had retired from practice ten years before, and all that time he had refrained from any legal labor. In fact, as he claimed, he had ceased to be an attorney at law, and when he had occasion to put his name to a brief, he always signed "Charles F. Southmayd in person."

What he regarded as the iniquity of the Income Tax aroused all his old-time energy. By this time he had an ample income of his own which was affected, and he had a strong idea of the right of property being at the foundation of civilized government. Other men have five senses, but he had a sixth—the sense of property—very keen and very powerful; and he also had an abiding allegiance to the Constitution under which the country had so long prospered, and an abhorrence of any violation of it. So, when he heard that I was to be in the case, he volunteered to prepare a brief, which proved, when completed, to be the keystone of the whole argument, and, indeed, of the decision which overthrew the Act of Congress. The Constitution had provided

that direct taxes should be apportioned among the states according to their respective numbers, but this Act had levied all taxes upon income, from whatever source derived, indiscriminately upon all alike, without such apportionment.

To his clear mind, whatever else might be disputed, a tax on land was certainly a direct tax within the meaning of the Constitution, and a tax upon the income of land could by no possibility be distinguished from a tax on the land itself, for it was a tax on the land from which the rent was derived, and was therefore necessarily a direct tax; a tax upon the income of accumulated personal property could not be distinguished in principle from the tax on rents; and these all being found to be direct taxes, and therefore unconstitutionally levied, the Court in annulling them must find that Congress without them would not have enacted the rest of the tax, and therefore must declare the whole Act void.

This was the whole argument in a nutshell, and it all rested upon his first proposition, which was absolutely unanswerable then and is unanswerable now, and can never be answered, except by an amendment of the Constitution, which I, for one, hope will never be carried through, because it will throw almost the whole burden of every Federal Income Tax upon a very few of the larger States. However that may be, it was his masterful brief that drove the entering wedge which by its cleavage demolished the Act, while the rest of us who appeared in Court, and argued the cause to its final conclusions, on the foundation which he had laid, won an undue share of the glory. I have heard from the Clerk's office that all the judges called for extra copies of his brief, but for none of the others.

Mr. Southmayd retired from practice at sixty, being afraid, as he told me long afterward, that if he continued, he might make some mistake, which I really believe that up to that time he had not done—at any rate he had made none that anybody else had found out.

His professional life from beginning to end had been a signal success, and had brought him ample rewards. But necessarily, from the way in which it was begun and continued, it had cut him off from everything else. Beginning the study of it at twelve, and never relaxing the earnest pursuit of it, he lost his youth altogether, an irreparable loss to any man in any walk of life. Outside of the law, he had almost no interests—none of those bright gleams and dreams and illusions of boyhood which, for most of us, sparkle at the threshold, and brighten all the rest of our lives, lighten our burdens and help us to forget our woes—none of those joyful reminiscences and early

friendships that light us on our way. Withdrawn from social life, he had but few friends, but with them he was always so genial and gentle that it was ever a thousand pities that he hadn't a hundred times as many. Shut into the deep and narrow canyon of professional study and labor, he hardly knew what was going on outside of it, and had no other interest, no hobby, no possibility or capacity for sport. But he did enjoy his work, and I am not sure that the keenest professional sportsman ever gets half as much pleasure and satisfaction as he did out of that.

Mr. Southmayd was never married, and led a truly solitary life. Doubtless in his earlier years he must have had some romantic sensations and experiences and perhaps disappointments. But, as the rolling stream of Time bore him along, as the walls of his narrow life began to close in upon him, and his natural love of accumulation grew, he seemed more and more to regard women as painfully expensive luxuries which might as well be dispensed with. "Your women folks will be the ruin of you yet," he used to say to me in a half-joking, half-serious way. Of course there was nothing personal intended. It was merely a concrete expression of his general and abstract dread of cost. But I was bound to defend my own fireside, and always answered him in kind in some way, which pleased him mightily.

His later life was full of apprehensions. When a man retires at sixty from very active practice, with no native resources to fall back upon, no hobby to ride, no studies to pursue, his thoughts necessarily turn in upon himself and prey upon his inner consciousness, and so it was with him. No sooner was one apprehension dispelled, than others equally groundless came in various and shifting forms—apprehensions for his health and life, for his property and, at last, even for his personal liberty. The ever-growing list of misdemeanors, created by statute, disturbed him, and he even employed counsel to watch for such statutes introduced into the Legislature—man-traps, as he called them—lest he might, without knowing it, commit offenses which might involve the penalty of imprisonment.

Thus, as his professional life began too early, so it ended too early and too abruptly, and he lost the great satisfaction of continuing to the end his usefulness to society which had once been so great.

Of course he was always a *laudator temporis acti*. Never changing himself (and I hardly observed any change in his appearance, his dress, his manners, or mode of conversation from the time I first knew him in 1855), he hardly realized that the world was changing all the time as it rushed by him. The judges of to-day he compared with

Chancellor Kent, and Chief Justice Marshall with Justice Nelson and Judge Oakley, and the lawyers of to-day with Daniel Lord, George Wood, Charles O'Connor and William Curtis Noyes. He couldn't at all keep pace with the hustle and bustle of modern New York, or with the rapidly changing customs and habits of the profession.

He was really the most conservative man I ever knew, and, of course, prejudices grew upon him as years rolled on. Modern improvements had no charms for him, but his aversion to new methods was always mingled with much pleasantry, which indicated a consciousness in himself of falling behind the age. Perhaps no better illustration of this was presented than in his attitude toward new modes of locomotion and travel as they came pressing fast upon each other. His pet aversion was the elevated railroad, and it was his favorite boast to his dying day that he had never traveled upon it. When it was first constructed, he declared that he would never go upon it until the Court of Appeals should decide that its owners were bound to pay damages to the abutting property owners. The failure to provide expressly for this in the original charter shocked that keen sense of property of which I have spoken. Well, it took long years of severe litigation to establish this liability, and in the meantime he had moved out of Ninth Street, where he had lived for a quarter of a century, giving the quaint reason for moving that death had visited every house but his in the block.

But at last the Court of Appeals decided, as he thought they ought, that such liability was necessarily implied in the act, though not expressed, and so compelled the company to pay many millions of dollars in damages to the abutting owners. Meanwhile he had traveled daily all the long journey of four miles from Forty-seventh Street to the office in the Sixth Avenue surface cars; and I said to him: "Come, now, the Court has decided as you wanted them to; get on the Elevated Road with me and shorten your journey home by half an hour." "No," said he, "it's a fraud, anyway, and I never will ride on it," and he never did, but continued his slow transit by the Sixth Avenue surface cars. But at last this came to an end. For one cold November day, as he entered the car, seeing something unusual under the seat, he asked the conductor what it was, and being answered "a stove," he stopped the car and quit the line: "Never could ride with a stove in the car." He then took refuge in the Fourth Avenue car, which he liked much better: "Better cars, better air, better people." But this didn't last very long, for one day, standing on the corner awaiting a

car, he saw one coming without any horses—an electric motor—and that he could not stand.

He never could tolerate motors—never once rode in an automobile—thought severe penalties ought to be visited upon their owners. And thus, at last, he was driven to take refuge in cabs, and here, too, his eccentricity was made manifest, for although he had an excellent pair of horses, coachman, and carriage of his own, he never would drive up and down in it. And when I asked him why not, he said because of the common law rule of "*respondeat superior*": "If I hire a cab and an accident happens, I incur no liability. That falls upon the owner."

His quaintness was always tinged with a sense of humor. Having laid the foundation of his own ample fortune in strict economy and unflagging industry, he used to say that every young lawyer ought to begin by laying aside all of his professional income, which he himself had been so situated as to be able pretty nearly to do. "But," said I, "you surely don't really mean the whole of it. Wouldn't half do? The man must live." "Oh, that doesn't follow," said he; "if he'll only follow my rule, he will soon be able to live upon the income of his income."

I think one could have almost told his calling as he walked the streets—a solicitor laden with many precious secrets. Matthew Arnold, who made his acquaintance the summer that he spent in Stockbridge, was perfectly delighted with him, and greatly enjoyed his company, saying that he reminded him for all the world of an old-fashioned English solicitor dug out of Dickens or Trollope or Thackeray, and he certainly was all that, with a vast deal of skill and learning besides. In the quiet confidence of the office, he was quite a match for Evarts in quickness and repartee, and it was a rare treat for the youngsters, in the occasional intervals when there was nothing more serious to do, to hear them chaffing each other in very merry trim.

When the statute was passed in March, 1898, requiring attorneys and counselors-at-law in the courts of New York to file an affidavit not only that they had been duly and regularly licensed and admitted to practice as attorneys and counselors-at-law, but that they had taken the constitutional oath of office, which was to be a prerequisite of their being permitted to practice thereafter, and making it a misdemeanor to hold one's self out as an attorney at law without having taken and filed the constitutional oath required, Mr. Southmayd was put in a curious quandary, because there was no jurat affixed to the Roll which he had signed on being admitted to practice as an attorney, and he

could not distinctly recollect having taken such oath. And so, in an elaborate affidavit of many pages, he made and filed an unanswerable argument to show that he must have taken such oath at the time of his admission.

By this it appears that he was licensed and admitted to practice at the June Term of the Supreme Court held at Albany in 1846, which was fifty-two years before the date of his affidavit. He has strong reason to believe and does confidently believe that he did thereupon subscribe and take the constitutional oath of office. He recollects signing the Roll of attorneys upon that occasion, and that the reason of its being so impressed upon him as to be now recollected is, as he believes, that he recollects the circumstance of having, after he signed, or when he was about to sign, the Roll, looked back upon it and observed the signatures of certain persons who had subsequently become prominent members of the Bar.

He recollects having attended in Court with the other persons who were examined for admission with him, and that the Chief Justice addressed to the young gentlemen who then were, or were about to be, admitted, some words of courtesy to wish them success in their profession, or to some such general effect, and, under the circumstances, he believes and feels quite confident that the candidates for admission thus attended with the view and for the purpose of taking the oath in open court as legally requisite, and perhaps for having their licenses delivered to them, and that he, as did others, did then take such oath in open court in conformity with the form of oath subscribed on the Roll.

The fact that no jurat is attached to the Roll or subscribed oath he feels and believes to be accounted for by the circumstance that the oath was required to be taken not before the Clerk, but in open court, as a witness would be sworn, and therefore he deposes and says that he has no practical, reasonable, and substantial doubt that he must have subscribed and taken and did subscribe and take, upon his said admission, as an attorney of the Supreme Court, the constitutional oath, although he feels bound to state that he does not, after the lapse of more than fifty years, recollect as mere facts and state as occurrences within his memory, either his subscribing or taking such oath, and could not now state the same upon oath, even to the extent that he has hereinbefore so stated, were it not for the reliance upon the information now obtained from the Clerk and the Clerk's office and the other circumstances above referred to; and the further circumstance that he

does not think that his license as said attorney would have been given out to him without his having subscribed and taken the oath required.

He further deposes that he cannot take the oath required by the Act of 1898, stating in fact his admission to have been as an attorney and counselor-at-law in the courts of record of this State, for the reason that his admission aforesaid was merely as an attorney of the Supreme Court, and that as the law stood at the time of his said admission as an attorney of the Supreme Court, the practitioners in the Court of Chancery, called solicitors, were to be appointed and licensed in the Court of Chancery, and that solicitors and counselors licensed in the Court of Chancery were to be authorized to practice as such in all the courts of equity.

He further deposes that accordingly, in the same month in which he was admitted as an attorney of the Supreme Court, he was also admitted as a solicitor in Chancery, and received his license from Chancellor Walworth under the seal of the Chancery Court. He is very careful to insert, in his affidavit, a certified copy of the order in Chancery for his admission as such solicitor, but takes care to correct the same by stating that although the caption of the order was at Albany, his real appearance before the Chancellor for the purpose of being admitted was at Saratoga Springs, to which place he recollects going from Albany for that purpose, and that it must have been at Saratoga Springs that the Chancellor admitted him and signed the license and administered the oath as in open court, though it was not at any regular stated term. He thinks that it was then regarded as a fixed rule or principle that the Court of Chancery was open before the Chancellor as its sole Judge whenever he so pleased, and he supposes that the Register drew up and entered the order under some sufficient indication or direction from the Chancellor; but still it may be that he is mistaken in relation to his recollections or impressions as aforesaid in relation to points of practice in the Court of Chancery, which was abolished more than fifty years before the making of his affidavit. He further feels justified in saying in his affidavit, as he now does, that he subscribed and took the constitutional oath of office as solicitor in Chancery, although at this time, so long subsequent, he cannot recollect as mere facts and could not state on oath as an occurrence or occurrences within his memory, either his subscribing or taking the said oath. He thinks that the Register as Clerk of the Court would not have given, and is quite confident that he would not have received, such a certificate as is indorsed upon the license, if it had been untrue; and that he went from Albany to Saratoga Springs for the purpose

of attending before the Chancellor there and doing what was necessary to obtain his admission as solicitor, and entitle him to practice thereunder, and he does not doubt that he knew what was so necessary and acted accordingly; and upon the premises aforesaid he deposes and says that he was admitted as aforesaid to the best of his knowledge and belief, duly and regularly so admitted, as a solicitor of the Court of Chancery; but that although he has spent very much time in searching for and endeavoring to find his license as attorney of the Supreme Court, he has not been able to find it, although very desirous to do so. He completes his argument by affidavit by stating that under and by virtue of the Act of May 12, 1847, commonly called the Judiciary Act, which provided that every person who should be a solicitor in Chancery or attorney in the Supreme Court of this State, on the first Monday of July then next, should be entitled to practice as attorney, solicitor, and counselor in all the courts of this State; wherefore he assumes that he acquired the right so to practice.

This affidavit is a striking illustration of Mr. Southmayd's extreme conscientiousness and unwillingness to state, especially under oath, any fact which was not to his own knowledge exactly so, and this characteristic conscientiousness in fact marked his whole conduct in life, and sometimes put him to great inconvenience.

His will, made in August, 1899, is not only holographic, but almost autobiographic in its fullness and particularity. Written in his own hand on fifty-seven pages of foolscap paper, it sets forth with extreme particularity many incidents of his life, and recalls and provides handsomely for the children of his deceased partners; remembers even his remote relatives, such as daughters of deceased cousins, second cousins, as he rates it, and second or third cousins or otherwise, as the proper rating may properly be, and leaves considerable legacies to the New York Law Institute and to the Association of the Bar of the City of New York.

"Take him for all in all, we ne'er shall look upon his like again"—a great lawyer—an absolutely unique character—an honor to our profession for sixty years. I owe him more than I can tell, and am glad to transmit to those who did not know him, this quite imperfect picture of the man.

It is a grateful thing, indeed, for one who has joined "the innumerable caravan that journeys toward the silent halls of death" to catch far in advance a bright and last glimpse of a once renowned leader, and to leave a clear impression of his character, to those who are marching behind in the same procession.



II

FORENSIC SPEECHES AND ARGUMENTS

INTRODUCTION

BY WILLIAM V. ROWE*

Picture the infinite variety in Mr. Choate's work as an illustration of the old methods and the old general practice, under which students unconsciously grew into well-equipped lawyers. * * * He ranged from the military case of General Fitz John Porter at West Point which re-established General Porter's status, or the naval case of Captain McCalla at the Brooklyn Navy Yard, in the morning, to charitable advice to a widow as to her husband's estate, or the conduct of a charitable case of partnership accounting for an impecunious client, in the evening, with incidental preparation, in later years, for the Second Hague Conference, or the argument of the great constitutional questions in the Income Tax Cases before the Supreme Court of the United States. In this way, for forty years and more, his days and nights were filled, for the nine months of the year during which he never spared himself. The other three months were given almost wholly to his family, his friends, and his summer holiday. The gospel of hard work—of full preparation and "preparedness"—ruled his life, and was the key to his success. A legal genius unwilling to work hard is bound to be a failure. Happy in the ever-changing aspects of his work, Mr. Choate's life was really a glorification of labor. In great measure, that must be true of all real lawyers,—they "work hard, live well, and die poor." Mr. Choate met fate and defeated her,—he did not "die poor." One week, for example, would be devoted by him to a case in the law of sales involving an alleged breach of warranty in a sale of East Indian coffee; the next to a building-contract case between the late Richard M. Hunt, the famous architect, and Mrs. Paran Stevens, the wife of an equally famous hotel proprietor, in which case "the house that Jack built" and "the maiden all forlorn" played a prominent part before the jury. A notorious divorce case, involving the whole law of common-law marriage, in which he made a beautiful child his "Exhibit A," would be succeeded by an ordinary commercial case of conditional sale, or involving a promise for the benefit of a third party, or a case covering the most difficult points in the law of bills and notes, and in that of general assignments and bankruptcy, or by a stockholders' suit to test the validity of the lease of the Air Line Railroad by the

* Excerpts from an article entitled *Joseph H. Choate and Right Training for the Bar*, published in *Case and Comment*, September, 1917. Mr. Rowe was long and intimately associated with Mr. Choate in practice.

New Haven,—the first step in New Haven's expansion. The last phases of the Credit Mobilier litigation, involving in a stockholder's accounting suit in the Federal court the contract for the construction of the Union Pacific Railroad, would be followed by the important series of cases of stock-sale contracts against Collis P. Huntington, covering the whole history of the construction of the Central Pacific and the relations of the "Big Four," Collis P. Huntington, Mark Hopkins, Leland Stanford, and Charles Crocker. As Mr. Choate described their relations, "If Huntington took snuff in New York, Hopkins sneezed in San Francisco." Roscoe Conkling, who was the chief opposing counsel in these so-called "Huntington Cases," never ceased to express his appreciation and gratitude for the tribute and compliment which Mr. Choate paid him on one of the trials. It was Senator Conkling's first appearance at the bar, following his retirement from his somewhat tempestuous career in politics and in the United States Senate. Mr. Choate, with that inimitable grace and courtesy of which he was at all times in command, welcomed his eminent friend back to the bar,—“a man who has come through the fire and smoke of the greatest political battles of our time with absolutely no taint upon his garments.” It was in his summing up in the first trial of those cases that Mr. Choate made his startling application to Senator Conkling of the familiar quotation from "Hamlet" —

See, what a grace was seated on this brow:
Hyperion's curls; the front of Jove himself;
An eye like Mars to threaten and command—
A combination and a form indeed,
Where every god did seem to set his seal,
To give the world assurance of a man.

The aptness of the quotation and the full force of the compliment can be understood only by those who remember the great impressiveness of the Conkling "front" and the "curls" gracefully falling on the "brow," a manly "combination," in perfect "form!"

As soon as Mr. Choate had finished a several months' trial of an action for libel, involving and vindicating the integrity and value of the Cesnola collection of Cypriote antiquities in the Metropolitan Museum of Art,—a trial in which he was opposed by Francis N. Bangs, one of America's strong and very eminent lawyers, and in which, in an amusing application of "A Midsummer Night's Dream," he told the jury that they must not be alarmed by the roaring noise they had heard; for, after all, it was "not a real lion, but only Bangs, the lawyer,"—he was at once called into legislative hearings on bills for the benefit of

the Museum of Natural History, and was obliged to represent the interests of the West Shore, the North River Construction Company, and the New York Central Railroad, in suits to foreclose the mortgage of the West Shore Railway and to restrain, on complaint of a stockholder, the lease of the West Shore by the Central. In the *Cesnola Case* he had really developed the whole scene with Bottom from "*A Midsummer Night's Dream*," for the benefit of the jury, and that calls to mind an anecdote which is not altogether out of place, for it illustrates the charming and sunshiny geniality of his personal atmosphere; and his approachable and inviting manner, dignified but warm, as well as his constant display of striking versatility and all-around qualities when in action.

At a certain well-known Swiss Hotel, during one of his summer holidays in Switzerland, he had just finished that distressing and gastronomically-disappointing task, a table d'hôte dinner on the Swiss plan, when he was heartily greeted by an English gentleman who had sat at the opposite end of the table. The Englishman said: "We have been observing you, as an American, with much interest, and I want to ask you a very impertinent question, if I may. What are you by occupation or profession? Won't you be good enough to tell me, because my wife says you are a clergyman, my daughter insists you are an actor, and I say you are a lawyer. We can't all be right." "Yes, you can," instantly retorted Mr. Choate, "I am something of all three,—three in one. I preach a good deal, act a little, and practice more or less law,—which means that I am an American lawyer. Tell your wife and daughter you all guessed right."

The New York Central cases would hardly be closed before Mr. Choate might find it necessary to plunge into the hearings in the long controversy between Lord Dunraven and the New York Yacht Club over the famous international yacht race between "*Defender*" and "*Valkyrie III.*," in which the action of the yacht club had been criticized by the English challenger, and these hearings would perhaps be followed by the trial of the extraordinary case of *Laidlaw v. Russell Sage*, arising out of the dynamiting of Russell Sage and his alleged attempt to use the plaintiff as a shield, and presenting novel questions in the law of assault and trespass. Incidentally, it may be noted that this was the only case in which Mr. Choate was ever known to overcross-examine,—a common professional fault. His indignation had been so excited by the circumstances of the case that his cross-examination actually turned inside out the "vest" and other personal garments of the defendant, the original history and condition of which the cross-

examination fully exposed to the public gaze. In the years between 1880 and 1895 he was frequently employed in successful pioneer work in so-called Elevated Railroad Cases, which were actions at law, condemnation proceedings, and suits in equity, brought to recover heavy damages arising out of the construction of the New York system of elevated railroads through and over the public streets, and which involved wholly novel questions in the law of easements relating to the rights of abutting owners to light, air, and access,—cases in which Mr. Evarts and Mr. Choate were at times both engaged, and in which frequently arose the most difficult conceivable questions of title, including the title to old Dutch streets as affected by the civil law.

At the same time, he was occupied for years with the defense of the Standard Oil Companies and the so-called Standard Oil Trust, in the famous "Anti-trust Law" suits, including the cases attacking the Texas and Ohio Anti-trust Laws, and other cases covering the usual difficult, but at that time quite novel, Anti-trust Law questions, and in cases involving the valuation of oil properties, alleged breaches of warranty, building contracts, and many other matters, with constant legislative and congressional investigations. All this work was varied by great will contests, long drawn out, and great will construction suits, in the surrogates' or probate courts and through the medium of equity and partition suits, involving the Cruger, Vanderbilt, A. T. Stewart, Samuel J. Tilden, Hoyt, Drake, Hopkins-Searles, Vassar, Vanderpoel, and almost innumerable other wills which came before him year by year, presenting extremely important and embarrassing questions in the law relating to testamentary instruments and trusts and their construction, and covering all phases of insanity issues and the law of undue influence and testamentary capacity. This class of litigation included jury trials and the most carefully prepared cases on appeal in the higher courts. Landlord and tenant cases, arising, perhaps in the form of ejectment suits for one of the Astor estates, would be followed by the important case against the Canada Southern Railway, testing before the Supreme Court of the United States the rights of domestic purchasers and holders of foreign railway company bonds, or the Brooklyn Bridge Case, before the same court, involving the right to build and maintain the great and necessary structures connecting New York and Brooklyn, or the Stanford University Case, from California, also before the Supreme Court, in which the United States sought to recover many millions from the Leland Stanford estate, the success of which suit would have deprived the University of a large part of its endowment, and in which case Mr. Choate's successful ap-

peal for the University resembled Webster's appeal for Dartmouth College; and this, in turn, might be succeeded by the Bell Telephone Case, involving the entire Bell telephone patent.

His work before the Supreme Court of the United States in all these years was continuous. The *Behring Sea Case* before that court, in which he appeared for the Canadian government, and which involved the right of the United States to seize and condemn Canadian and other vessels in Behring Sea, was matched in importance by the *New York Indians Case*, which had to do with the Indians' right to lands on their summary removal to limited reservations in other parts of the country; and these cases would no sooner be finished than he would be called into the case of the *Pullman Palace Car Company* against the *Central Transportation Company*, involving a great contract of lease, or the *Southern Pacific Land Grant Case*, the *Chinese Exclusion Cases*, the *Alcohol-in-the-Arts Case*, involving rebates of millions of dollars under the tariff laws, or the *Massachusetts Fisheries Case* (*Manchester v. Massachusetts*), relating to the state's right to protect fisheries in arms of the sea within or beyond the 3-mile limit. He would hardly have finished such a long series of cases before the Supreme Court before he would be called into an admiralty collision suit for the *White Star Line*, developing novel and abstruse problems in hydraulics and suction-action, in the case of overtaking ships of varying tonnage and draught, or suits presenting equally novel and complicated bill of lading problems arising out of the fire on the *Inman Line* pier and the destruction of the cargo of the steamship *Egypt* of the old *National Line*. While these cases were under way, he would, perhaps, be consulting with Mr. Evarts over the trial and argument of cases involving the whole common law of covenants and conditions subsequent as applied to deeds of property abutting on portions of the old *Bloomington Road*, as affected, in turn, by *New York's* great *Riverside Park Improvement*, or would be preparing to argue before the Supreme Court of the United States or elsewhere the great constitutional questions in the *Income Tax Cases*, the *Reciprocal and Retaliatory Taxation Cases* against insurance companies, the *Kansas Prohibition Law Cases*, the *California Irrigation Law Cases*, and the *Neagle Case*, this last involving the assault by Judge Terry, of California, on Mr. Justice Field, which raised the whole question of the power of the Supreme Court to protect itself and its officers within the jurisdiction of a state; or, after arguing in Washington the constitutionality of the Federal and state inheritance taxes, we might find him called in to his triumphant and spirited vindication of the rights of the bar, as against

aggressions of the bench, in the contempt proceedings instituted by Recorder Smyth of New York, against Mr. Goff (afterwards recorder, and now Mr. Justice Goff, of the New York Supreme Court).—a peculiarly satisfactory and successful experience for Mr. Choate, in which he made one of his most forceful, eloquent, and convincing appeals to judicial as well as to human nature. While advising with Mr. Evarts as to the replevin action by the Turkish government, for which they were acting, to recover a consignment of rifles, he might find himself in the midst of the preparation for the trial of the greatest action for deceit (in the form of a suit in equity for an accounting) ever brought in New York,—the controversy between the Banque-Franco-Egyptienne, of Paris, and various leading New York bankers over the sale of the old New York, Boston, & Montreal bonds.—or might be considering with his other partner, Mr. Southmayd, the firm's opinion as to a railroad reorganization plan. One week would find him occupied in the New York Court of Appeals with the so-called Maynard Election Fraud Cases and the cases involving the inheritance taxes under the Vassar will, with other questions affecting Vassar College, and the next week would see him before the Interstate Commerce Commission, representing the Orange County Farmers of New York, in a long and successful controversy with all the railroads centering in New York and Jersey City over the freight rates on New York city's milk supply. The very next week, in turn, he would himself represent the same railroads, or some of them, before that Commission or before a congressional or legislative committee, on a question of rates, of regulation, or of taxation.

While he was settling the membership law for clubs and exchanges in what was practically the pioneer American litigation on that subject, in the famous cases of *Loubat v. Union Club* and *Hutchinson v. New York Stock Exchange* he was also settling important features of the law of arbitration in a great building contract case. After a prodigious winter's work in will contests, and various important arguments before the Court of Appeals in New York and the Supreme Court at Washington, he devoted the entire summer and fall of the year 1894 to the work of the New York Constitutional Convention, of which he was President, and whose proposed constitution, due chiefly to his personal advocacy, was fully and triumphantly adopted by the people of the state, and is still in existence and serviceable. From that work his normal activities would drive him, perhaps, into an intricate partnership accounting with the estate of Paran Stevens, over a complicated hotel business, or into a long trial of a jury case, in which

he appeared on behalf of the Western Union Telegraph Company and Jay Gould, involving questions of contract and tort in its relations with the old Bankers & Merchants Company and other telegraph companies,—one of the trials in these cases furnishing us with the only instance (due in part to extraordinary heat in the month of June) in which Mr. Choate's voice was ever known to weaken through huskiness. Following these, he was liable at any time to be drawn into the accountings of the executors and trustees under the Astor and various other wills, or to be called upon to advise in relation to the last professional service of Mr. Evarts, rendered to the High Court of Chancery of England in its capacity as guardian of infants. For many years he found himself employed before the Court of Claims or special commissions, or before the Supreme Court of the United States, in the Berdan Arms Case and other difficult cases, and in the claims arising out of the Alabama Awards, and, later in the Spanish Treaty Claims, followed by many extraordinary drawback and other revenue cases, some of which went to the Supreme Court. And, to cap the climax, he was occasionally, as we have heretofore pointed out, called into great patent cases; for example, that involving the whole Bell telephone patent. As evidence of his complete mastery of the problems of intensively specialized modern business law, reference may be made to his successful handling, following his return from the English Ambassadorship, of the various controversies arising out of the receivership and proposed readjustment and reorganization of the affairs of the Third Avenue Railway Company of New York.

The superb quality of his moral and physical courage, built up from his early training and associations, a courage without which no lawyer is fit for his profession—always ignoring mere popular clamor and the passing temper of courts and all the political party-feeling of the moment—he constantly manifested in his service at the bar and in his continuous work for the public welfare: witness his experiences during the Draft Riots of Civil War days and, later, in promoting the prosecutions of the Tweed Ring; his work in converting the people to a favorable view of the beneficial, but sometimes radical changes introduced by the New York Constitutional Convention of 1894; his independent candidacy for the United States senatorship, against Thomas C. Platt and the Republican party machine; his exposures of Prussian and other hypocrisies at the second Hague Conference of 1907; his patriotic war speeches and devoted war services, literally unto death, during the last two years of his life; his championship of the rights of the bar in this very Goff Case, already called to

mind; his defense of the national courts and the national power, in defiance of alleged state rights, in the Neagle Case, to which we have just referred—a case undertaken at the earnest request of his old friend, Mr. Justice Field, of the Supreme Court; his appearances in criminal cases (sometimes a distasteful task, but always for the service of the ends of justice), in defense for example, of indicted “Tobacco Trust” magnates and Tammany politicians, and in the election fraud cases against Judge Maynard; his repeated appearance for the unpopular so-called “Standard Oil Trust” and “Tobacco Trust”; his constant protection of the law itself, the rights of the bar and the proper dignity of the judicial office—for which, naturally, he never could exhibit or feel anything but the highest veneration and respect—against the assaults and encroachments of untrained savage natures or small minds in high judicial place; and, finally, in that behalf, who can ever forget—certainly no one within the sound of his voice—such episodes as that in which, with stern face and a characteristic mesmerizing flash of the eye, he appeared to rebuke a well-known judge, who persisted in refusing to hold a case and in taking Mr. Choate’s default (which was promptly opened in due course, without terms), when he was actually engaged in a pending trial in another court—“Your Honor insists that you have called this case and set it for trial, to proceed notwithstanding my engagement. Very well, you may have the physical power, but you have neither the legal nor the moral right to do that” (in his relations with that particular judge there was some estrangement for several years, and the judge eventually apologized); or that other instance, in which he was forced to correct the weak, ill-mannered, prejudicial habit of a strong natured presiding judge, who, ignoring the presence and argument of counsel, frequently turned his back and carried on an animated discussion with his associates on the bench—a proceeding which so annoyed Mr. Choate during the argument of the Tilden Will Case that he stopped short, and, not hearing any noise, the learned judge looked around, whereupon Mr. Choate said with tremendous emphasis—“Now, if Your Honor please, under your time allowance, I have just forty minutes in which to close the argument of this very difficult and vitally important case, and I must insist upon having Your Honor’s undivided attention during every moment of that time.” His keen sense of justice and fairness touched to the quick, the judge responded immediately—“You have it, sir”—and then sat bolt upright, with fixed attention, during the entire argument. And Mr. Choate won his case.

MARTINEZ v. DEL VALLE

CLOSING ADDRESS FOR THE DEFENDANT IN THE NEW YORK SUPREME COURT, NEW YORK CITY, NOVEMBER 23, 1876

STATEMENT

This celebrated suit for \$50,000 damages for seduction and breach of promise of marriage was brought by Miss Eugénie Martinez, twenty-one years old, against Juan Del Valle, a middle-aged Cuban banker, the father of four children. On January 14, 1875, the plaintiff slipped and fell on the ice in front of the Gilsey House, at the corner of Twenty-ninth Street and Broadway, New York. Del Valle, a total stranger to her, rushed to her assistance, and took her to her home in a carriage. There he met her mother, whose permission he received to call. Later the plaintiff went to the Hotel Royal where she lived under an assumed name for five weeks. On June 1, 1875, Del Valle took a country house near Poughkeepsie, and Miss Martinez was engaged by him to serve in the capacity of housekeeper at \$100 a month. On September 6, she returned to her home, threatening to bring suit for breach of promise of marriage. Del Valle's offer of \$20,000 to keep the matter out of court was refused.

The trial, which lasted one week, was heard by Judge Donohue and a jury, in the Oyer and Terminer court room. The plaintiff was represented by William A. Beach, one of the most experienced trial lawyers at the Bar, and just then, to use Mr. Wellman's comment, "fresh from his nine days' oration in the Henry Ward Beecher case." He was sometimes referred to as the "Hamlet of the American Bar." This was Mr. Choate's first breach of promise case. The public was eager to attend and to get a glimpse of the plaintiff, who was described as having "raven black hair and melting eyes shadowed by long, graceful lashes, the complexion of a peach, and a form ravishing to contemplate." The closing scenes of the trial were tense with excitement, for, as a newspaper writer said at the time, "however amiable counsel in long-enduring cases may be by nature, the approach of the closing arguments sets them off in deadly hostility against each other, probably lest the mimic battle should be too merely mimic to beguile the simpleness of the jurymen even, let alone disappointing the warlike feelings of parties opposed." The counsel were granted two and one-half hours each for summing up, and Mr. Choate had to bring his speech to an abrupt close at the end of his allotted time. As printed below, the speech is considerably abbreviated.

The jury was locked up for twenty-six hours. Several of the jurymen voted for large damages, but finally they returned a verdict for the plaintiff, and assessed the damages at fifty dollars. While technically this was not a victory for Mr. Choate, "the paltry damages awarded," says Mr. Strong, "secured for his client an unquestionable victory and established Mr. Choate's position as one of the greatest jury lawyers that have appeared at the New York Bar." Mr. Wellman devotes pages 205 to 262 of his "Art of Cross-Examination" to this case.

I must congratulate you, gentlemen of the jury, on your prospect of a speedy release. I don't know how experienced you have heretofore

been in these matters of breach of promise and seduction. It is my first venture, and I confess an unpleasant and disagreeable duty, and the painful incidents of the trial have weighed upon me, as I believe they have upon you. A few hours more, fortunately limited by the wise rule of the Court to five hours in all! We are apt, we lawyers, to run along like the brook, forever. My learned friend, especially, has been engaged in causes where it seemed as if the case never could end because of the seeming impossibility of terminating his speech. I want, in the first place, gentlemen, to put you on your guard against a most natural sympathy with a woman of the appearance presented by this fair plaintiff. There are some feelings that no man is proof against, and I think one of them is sympathy, compassion, pity, human feeling for a woman who presents herself as she has in this case. For one, I confess that I pity her with all my heart. I would not place a feather's weight of calumny or injustice upon her—so far as my duty to my client would permit, would shield her from that torrent of evidence which she has herself poured out here. Some of you gentlemen while she was on the stand—especially you, Mr. Foreman, and your immediate neighbors of the panel—have been exposed to the full blaze of her charms at short range for a very long time; you can't but have been sensible of it. I don't know how it has happened, whether it was in the scheme of Providence, or merely what we call luck, that the oldest men in the jury have been brought by their places upon the panel the most nearly into contact with the fair plaintiff. I have a right to caution you against this most natural human sympathy. It has been said to me many times during the progress of this trial, "Mr. Choate, you have a good case—a perfectly clear case—but there's one obstacle in it that you can't overcome, and that is, that there is a beautiful woman in the case against you, which will be too much for any jury." Now, gentlemen, I know you are sworn to try this case upon your oaths, and I know that I need only mention this danger to have you steel your hearts and your consciences against it, so that the men of New York and the women of New York shall not say that there is no chance for justice for a man against a beautiful woman.

I want to warn you, too, against the seductive eloquence and power of the learned counsel whom she has enlisted in her cause—one of the veterans of our bar, a gentleman of whose talents and achievements the whole profession is proud, in all the branches of what I may call sexual litigation without a peer or a rival, from his long experience. Gentlemen, you can no more help being swayed by his

eloquence than the rocks and the trees could help following the lyre of Orpheus. But remember that it is one of the essential elements of a case like this that the fair plaintiff should succeed in enlisting the sympathies of some brave and gallant champion at the bar. If she could persuade him, as she seems to have done here, of the merits of her case she knew full well that he would enlist in it with an ardor which no money could buy, a combination of pity and of eloquence that would dare any facts that might be brought before the jury. In presenting the facts of my case I first ask your attention to a remark that fell from the plaintiff under oath upon the stand that she had not brought this suit for money. "Not one cent" did she desire at your hands, not one; but that her sole object was to establish her character. Ah, gentlemen, I think if that was her object the case might well stop here. Has not her character been established in a way that no further progress of the case or of time can ever wipe out? We sit here trying causes like this under the telescope eye of the whole world. The trumpet-tongued press takes up every word, and it is read next morning throughout the land. Now, with pain and sorrow, I say has not this lady, by her own evidence and her sister's, established her character? Her case depends upon her sworn word alone, and what is her picture as painted by herself?

She said that it was her misfortune from nine years old to twenty to be under the strict, rigid discipline of one whom she has depicted as one of the most startling monsters ever on exhibition in any court of justice; that she was brought up in the very house of impurity, exposed not only to impure approaches but to constant threats of violence and murder, in case she dared to pursue the ordinary course and fate of woman and contract a marriage. While this family was without means, while this singular stepfather was without occupation or resources he quietly acquiesced in all expenses being paid by the female members of his family without ever asking whence the money came. That family was without religion, without church, without God. Thus you find her at the time she met the defendant—not a mere, inexperienced young girl but already an adept in the ways of New York life. Already had she acquired an alias; already have we established the habit on her part of receiving secretly, under the assumed name "Howard," letters from various men. She fell in with this supposed rich Cuban. Upon her own evidence nothing can be clearer than never did a privateer upon the Spanish Main give chase to and board a homeward-bound Indiaman with more vigor than that with which this family proposed to board this rich Cuban and

make capture of him. He was a big bonanza to them in their distress. She was an innocent girl, and she was willing to go to Solari's over and over again to take private lunches with a gentleman, of meats and of wine, in private rooms, alone. Without a word of remonstrance on her part she was willing to go—knowing all the effects of such a step upon an unmarried woman in this community—to a hotel under an assumed name, and there remain indefinitely. She says she thought it was "only for a few days." Gentlemen, would you have one of your sisters or daughters go for "a few days" under an assumed name and live alone at a hotel? Is not that excuse something like the wet-nurse's excuse when questioned sharply about her baby, that "it was only a very little one?" She says she was in the habit of receiving gentlemen in her room while combing her hair, and that she surrendered herself to the seducer without a gesture or a word of remonstrance or opposition, although within call of a score of people who would have come to her rescue. So I say that her character has been established. But unfortunately we have her sworn complaint, which says that the suit is for money—\$50,000 damages. There is one thing that the press has not been able to take up; that no reporter is adequate to repeat, and that is the appearance of this fair and beautiful woman upon the stand here. Gentlemen, have you seen her blush? (The gentlemen look at her. She does not blush.) Have you seen one symptom of distress (pausing to examine the fair plaintiff's face at the shortest range possible for symptoms of distress) upon her sharp and intelligent features? Not one. There was, in a critical point of her examination, a breaking-down, or a breaking-up, as I should prefer to call it. Her handkerchief was applied to her eyes. There was as loud a call for "Water! water" from my learned friend and his amiable junior (Mr. Brown), as if the judge's bench was about to be wrapped in flame. But it turned out to be only an eclipse by handkerchief, that she had been shedding dry tears all the time, not a muscle of her face was disturbed, and she advanced to the end of the examination with sparkling eye and tripping tongue, and thus continued to the end of the case! The great masters of English fiction have loved nothing better than to depict the appearance in court of these wounded and bleeding victims of seduction when they come to be arrayed before the gaze of the world.

You cannot have forgotten how Walter Scott and George Eliot have portrayed them sitting through the ordeal of their trials,—the very pictures of crushed and bleeding innocence, withering under the blight that had fallen upon them from Heaven, or risen upon them from

Hell. Never able so much as to raise their eyes to the radiant dignity of the Bench, seeming to bear mere existence as a burden and a sorrow. But, gentlemen, our future novelist, if he will listen and learn from what has been exhibited here, will have a wholly different picture to paint. He will not omit the bright and fascinating smile, sparkling eye and undisturbed composure from the beginning to the end of the terrible ordeal. Did you observe—a little incident which made my blood run cold—with what zest and keen enjoyment she detailed to you, putting them into the mouth of my client, to be sure, all those more than questionable stories of smut and indecency with which she entertained this court-room without turning a hair. Now, one of these stories I happened to recognize. It was invented—not by the fair plaintiff or foul defendant (the story of the childless Spanish lady to whose aid Del Valle came), but it comes out of the “Decameron” of Boccaccio, written 500 years ago, where, as I suspect, the fair plaintiff found it in the course of that supplementary education completed after she was twelve and before she was fourteen under the directions of her stepfather.

Have you any doubt in your minds what judgment you should pronounce upon her veracity? When she had given me contradictory answers to the same question, I asked her why she had not in the first instance answered correctly. “Because she didn’t think it a fair question to put to a lady,” and upon my further questioning her that “she didn’t want to tell.” She has been upon the stand this morning and stakes her oath against the oaths of twelve—of fourteen—witnesses on our part. Is her oath broad enough to spread over such a surface as that without becoming so thin as absolutely to disappear? “Every man’s hand against her,” my learned friend will say. Every man’s oath and every woman’s against her, I say, and her oath against them all! Her stepfather she said was always kind and gentle, and never guilty of the slightest harshness or severity to them except in the matter of threatening to shoot them and their possible husbands. Her statement to Mrs. Quackenbos gives the absolute lie—I am sorry to use such strong words to so fair a female (bending over said female and trying to look under her bonnet) to what she has said upon the stand. She has undertaken to prove an express promise of marriage within three weeks after her first acquaintance with Mr. Del Valle. You haven’t got to “reconcile evidence” here. It can’t be reconciled. She says there was and he says there wasn’t. She says the ring was an engagement-ring. Given on the heels of a promise of marriage, what else could it mean? The ring was bought on January 15, the

day after she fell in the street. She says that during the next two weeks he was constantly at her house. We show by her own letters that he was ill and did not see her till the 26th. The mother might have testified to these visits. Oh, how I wish that mother (turning to her) had ventured upon the stand! She knew whether or not the plaintiff was confined to the house after that fall; she who sits here, and whom you have observed with so much interest. Why was she not called to the stand to turn the wavering balance of this testimony? I say the plaintiff was an adept in the ways of New York life. She says to him in her letter of January 22, "A line addressed to Miss Howard, care of J. Krank, will reach me." Here we tread upon the toes of this plaintiff's veracity again. She says she didn't write the letter. I say it is in her handwriting. Don't you know what a woman with an alias is in this city of New York? I'd like to know—any of you that have daughters—how much money in solid gold would you take to have it established to-morrow that your daughter or your sister or your wife was a woman with an alias.

I come to a serious crime in this case. She has fabricated a letter—the first they brought forward—purporting to break off the engagement between them on account of the "compromise" which made a private marriage necessary, and to return the ring. There was no such letter and no such "compromise," as we have proved. The defendant is a foreigner—none the worse for that, as I think—entitled to just as good a hearing. He don't speak the language. He speaks broken English—broken into very small fragments so far as I can make out. He was here, a stranger in this city, not an Anglo-Saxon man with Anglo-Saxon ideas, skilled in the ways of this metropolis—not to be measured by the standard of one of us who have been through these mills before. You observed his manner and his testimony. Did you find him contradicting himself? or contradicted by anybody else? There had been no promise of marriage at Twenty-ninth street and Broadway. Now I want to say a word of warning to any Good Samaritan—if there are any on the jury—against this habit of going to the rescue of fallen women upon the sidewalks. I don't think my client will ever do it again. I don't think anybody connected with the administration of justice at this trial will go to the relief of any of our fair and fallen sisters.

I know the parable of the Good Samaritan is held up as an example for Christian conduct and action to all good people, but, gentlemen, it does not apply to this case, because it was 'a certain man' who went down to Jericho and fell among thieves, and not a woman, and the

Good Samaritan himself was of the same sex, and there is not a word of injunction upon any of us to go to the rescue of a person of the other sex if she slips upon the ice. Why, gentlemen, this is an historical trick of the "nymphs of the pave." Hundreds of times has it been practiced upon the verdant and inexperienced stranger in our great city. My client came from a country where, I believe, there is a greater freedom and easier acquaintance between the sexes. The attraction between him and the plaintiff was reciprocal. They acted on the same standard, whatever it was. I am not quite charitable enough to think that that was all on the part of this fair plaintiff. I think she saw that there was a chance for a grand strike there, and in all her earlier acquaintance it was the hope, the prospect of capturing this rich Cuban. Well, he was attracted and pleased. She could speak his language fluently, and he liked nothing better.

And so they—went to Solari's. Well, gentlemen, I do not know anything about Solari's except what is shown here upon the evidence. So far as I can make out, however, people go to Solari's for all sorts of purposes. Men go there with ladies, ladies with ladies, men with men, theatre parties, family parties, *matinée* parties,—all sorts of parties,—and these parties went there together. But under the developments of this case, Solari's assumes new importance and acquires a new fame. It is no longer a mere restaurant. It is no longer a mere place of refreshment for the body, where you can get meat and wine and whatever is pleasant for the inner mind; it now attains celebrity as a new school of learning, patronized, brought into notice, by my client and the fair plaintiff as a place where you can go to drink of the Fountain of Knowledge. They had a "Guide to Conversation."

I think the fair plaintiff said that there were "digressions" there. They ate and drank,—she thinks they ate and drank for two hours at a time, but I compelled her to say that there was an intermediate "digression." What there was in the digressions does not exactly appear; for one thing, there was this "Guide to Conversation," but there were limits even to the regions to which this Guide led them, for they both agreed that it did not bring them even to the vestibule of Criminal Conversation, which is a very important point to consider in connection with the history of these meetings at Solari's. The parts of speech struggled out of Spanish into English and back from English into Spanish, but they never reached any questionable interpretations. They prepared for the theatre a stock of phrases to follow the rising of the curtain, and some of them are marked on the margin:

"This theatre is very beautiful." "Who performs the principal character?" "This one has a disagreeable voice; his action is stiff." "Who is that actress who has just peeped from behind the scenes?" "Why do they always look young upon the stage?" So they pursued that study; it was mutual improvement, I have no doubt. I think, however, gentlemen, from what you have heard, from the sentiment which has made itself manifest in this court-room whenever anything was mentioned as to the character of Solari's, you will bear me out when I say I think it is not the place for a lady and gentleman to go together for courtship with a view to matrimony. Now, from what you know of it, if you had made the acquaintance of a young woman whom you honored and desired to marry, would any of you, gentlemen, go to Solari's to do your courtship? We all say no; every jurymen will say no; and will you not judge the defendant as you judge yourselves; that it is the last place mentioned upon this evidence into which any man would take an intended bride, or into which any young woman would go with an intended husband for courtship with a view to matrimony?

I call your attention now to the fact that she followed him up very faithfully, and did not lose sight of him after the 26th of January for more than two or three days together; and it was a chase well sustained and successfully carried out on her part. You see what an immense advantage it was for her and this family if they could make this consolidated Virginia, in the form of my client, their own. They had no visible means of support, and he hove into sight, a craft laden, as they supposed, with treasure for themselves. To break the force of the suggestion of mercenary motives, what do they say? Oh, she could not marry or think of such a thing, because this stepfather had threatened to shoot her and her husband if she should ever marry. In all else he was dear, good, kind and tender, but on that point he was inflexible. Do you believe that?—believe that this stepfather was such an idiot as she describes him? What did he do when it is said he was told she was engaged to Mr. Del Valle? He went to Mr. Cevallos for reference, and when Mr. Cevallos said he was rich, but that as to his morals it was quite another thing, this stepfather did not talk about shooting, but immediately assented. And this brings me to say that this humbug story about the stepfather is disproved by nothing so thoroughly as by the stepfather's conduct. They say they kept it secret from him until August. What did he do then? Why, when he found out that Mr. Del Valle was rich and *im-moral*, he laid aside all opposition to the marriage and all ideas of shooting,

went to Poughkeepsie, and spent the day with the parties and congratulated them. There was no trouble with the stepfather, and if the stepfather should reappear on earth and come into court, I believe all three of these parties (turning to them with a pleasant smile) would tremble as Macbeth did at the sight of the ghost of Banquo.

If there had been this engagement the world would have heard of it, wouldn't it? I don't mean *The World* newspaper, which hears of everything, but the world surrounding the Henriques-Martinez family; instead of nobody's knowing that she had captured the prize until she brought it into court for condemnation. Don't you suppose that the secret would have leaked out? That somebody would have seen them together, or have seen some symptom of an engagement to marry between them? No; but one thing leaked out, and that is about this unhappy Cramer. He, it is said, offered the plaintiff marriage three weeks after she says she became engaged to Mr. Del Valle, and she rejected him. What sort of young lady is this? Engaged to Mr. Del Valle, and her mother and sister know it, and Mr. Del Valle comes there courting, and Cramer comes along and he makes love to her, proposes for her hand, and she rejects him. Does that look like an engagement to Mr. Del Valle? What I wish now to point out to you is that she did not act as if she was engaged to Mr. Del Valle. Don't you suppose Cramer would have smelt a rat if it were so, and Del Valle was coming there every day, as they say, and going to *matinées* and to Solari's for lunches and digression? Cramer would not have hung on that hope if, and the family knew it, she was engaged to Del Valle. They would have stood at the corners and proclaimed it to the whole community of Fifty-sixth street if they had captured Del Valle. Did you see the paper they brought in about Cramer, to prove on her part that she had not been tender towards him because she didn't make his acquaintance until the last of February? What then? I happened to remember that the story about Mr. Del Valle's engagement to her happened three weeks after Cramer offered himself, though they said it happened three weeks before.

I am not going to distress you or entertain this audience with the disgusting details of this letter of March 15. It is a letter revealing what she calls the atrocious persecution of her stepfather. Did it ever occur to you that this also might be a dodge? I don't know whether it is true or not. If it is true, why, it accounts for her misfortune, for the vicious influences under which she has been brought up. But suppose it is not true. Then how do these three ladies appear before you? How does this mother explain it if it is not true? and if it is

true, how do you explain the visits of the father to the daughter with the mother, when they were there in Poughkeepsie, absolutely unprotected from any designs that the stepfather might have? Well, I don't care whether it is true or not, and my learned friend may expatiate to you all day to-morrow on whatever theory he may. I simply want to speak of it as a landmark in this case. It was intended to move his feelings, and, gentlemen, addressed to a man who read it and believed it, it would move a heart of stone. Whether it is true or not, this was the manner in which it was used. Did it move? Of course it did. The defendant is indiscreet, imprudent in many things; but one thing—he is a generous hearted man and soft-hearted. Now, what was that writing for? Why, to give her a new step forward in her scheme. She wanted to get into his house. She never spoke on that subject with him before. Then she brought it up daily in conversations which they had together. Now about this letter written the 15th of March. Do you think such a letter as that would have been written by a lady to a man who had become engaged to her six weeks before? Ah, gentlemen, it don't hang together. If this young lady, untried in the ways of men, had given her heart to this generous pupil, as she says she did six weeks before, she could not have kept it secret from him till the 15th of March. Why, in that mutual outpouring which refuses the medium of secrets she would have unbosomed that one secret of her life long before, and not by letter. He did believe the letter, and finally, well if your mother consent, when I get a house you shall come there as a refuge from what is offered you at home. Then came the revelation of the 21st of April, when they went to Central Park. Do you think my client invented all that? Where is the inventive genius in this case? There can be no two such geniuses in one case. There was renewed the story of her stepfather's persecution, and she said she had left home and gone to Mrs. Sidney's. That lady says she did not sleep there and did not bring her trunk for two weeks, while Mr. Del Valle was given to understand she had already fled.

Then comes the going to the Hotel Royal. She says he enticed her there. Do you believe it? I put it to your judgment as men, if you were engaged to a sweet young lady (bringing his face around the corner of the plaintiff's bonnet again), unsophisticated in the ways of the world, knowing nothing of men, or the dangers or perils that threaten young women as they move about in this community without a protector, would you propose to her, being your betrothed, to go to a hotel in New York and there reside indefinitely

at your expense under an assumed name? I am now addressing myself to the real question in this case—whether there was a promise of marriage or not. Then, how does the young lady act? Perfectly green and verdant, knows nothing of what is what or who is who; but she has a mother (turning to that mother) devoted, affectionate, loving and tender, who is versed in the ways of this world, with a stepfather of rigid discipline; and she goes there to this hotel under the assumed name of Livingston, as she says, without the least objection. I put it to you, would a man take the betrothed of his heart, the woman who was going to be his wife, and the mother of the children he already had and those he expected to have hereafter, take her to a hotel in New York to live a longer or shorter period under an assumed name? She had a name under which she claimed the blood of all the Howards before, and now she claimed alliance with the noble stock of the Livingstons. She says she went to the Hotel Royal at the instigation of Del Valle. We say not. What was the attraction there? There was a clerk of that hotel named Frederick Hammond who registered her name. And now we come to a melancholy part of this story. Two employés of the hotel say they found her closeted with Hammond, sitting on the bed. That shows why she went to the Hotel Royal. And the letters with F. H. on them were received by her from him in 1874. Then she went to Poughkeepsie.

Now as to the salary of \$100 a month. It is contrary to the common instincts of mankind, an outrage upon the common instincts of mankind and womankind, when a betrothal has taken place between a fair and unsophisticated girl and a man of any description, that during the time between the betrothal and the wedding ceremony he should take her to his house and she consent to go on a salary of \$100 a month in a menial service. Then as to the charge of seduction under promise of marriage. What is the evidence? That Mr. Del Valle, from the day of his first acquaintance, on the 14th of January, down to the 6th of June, was in his conduct perfectly proper, chaste, tender and pure. That is the evidence, both parties positively agreeing. No matter what impure minds might suggest as possible or probable, that is a settled fact in this case. What followed? Why, all the time that he had opportunity and inducement; all the time that there was room for passionate attraction and excitement, while they were alone together, both under the influence of wine taken cordially, genially and joyfully, when they were in a private room at Solari's, free to choose where they would go, he never thought of it, never moved towards it, never suggested it. If he had strength of mind to refrain then, as

she says he did, when she was removed to his own house in the country, surrounded by six or seven servants, in the immediate contact of his own children, and under the right of his honorable protection as her employer, would it occur? Gentlemen of the jury, this is not a story of Lucretia and Tarquin, who came with his sword. Oh, no, there was not any sword. They conversed together. There is not a word as to what was said, and after a while, the story is, he unbuckled her belt and then it was all over! On the unloosening of her belt, she went all to pieces! Gentlemen, my question to you, which I want you to take to the jury room and answer, is whether, under such circumstances, by the mere undoing of that hook and eye, and the unloosening of that belt, a woman would go all to pieces unless there was something of a very loose woman behind the belt! All the household was there. Why did she not cry out? Why did she not raise that gentle-tempered voice of hers a little? A silent seduction, by her own story! She says, in evidence of her unhappiness, that Celia two days afterwards said something about the compromise, and she was dreadfully agonized and unhappy from that time forward. But the letter of her sister Adele describes her as being happy as a queen, and she went out horseback riding at 5 o'clock in the morning. We find that at this time, by the testimony of Celia and others, instead of showing herself to be a crushed victim of man's lustful passions, she was exhibiting that gay and hilarious disposition which manifested itself by what my client so forcibly termed her academic postures. Everybody testifies that she was happy. Here is her little sister Adele (turning to that young lady, who received the attention with a little pout), who's sat here through this whole trial. She's enjoyed herself immensely. She's had a splendid time; and when she gets back, writes a letter to Eugénie telling her how glad they all were at home that she was so happy.

[The Judge cut Mr. Choate off shortly here at the expiration of his two hours and a half.]

THE PARAN STEVENS CASE

CLOSING ADDRESS FOR THE PLAINTIFF IN THE CASE OF RICHARD M.
HUNT v. MARIETTA R. STEVENS, EXECUTRIX, ET AL., NEW YORK
SUPERIOR COURT, NEW YORK, JANUARY 17, 1878

STATEMENT

On July 27, 1870, a contract was made by Paran Stevens and Richard M. Hunt, by which the latter, as architect, agreed to "prepare the necessary drawings, superintend and construct" an apartment house to be erected on lots bounded by West Twenty-seventh Street, Fifth Avenue and Broadway, New York City, for the sum of \$15,000 to be paid in three installments: \$5,000 on October 1, 1870, \$5,000 on May 1, 1871, and \$5,000 on completion of the work. The two first installments were paid on the dates specified. On March 21, 1872, Mr. Hunt reported the building to be completed and rendered his bill for the remaining \$5,000.

In the meantime, in June, 1871, Mr. Stevens employed Mr. Hunt to prepare drawings and superintend the construction of another apartment house at 1160 Broadway. As part payment for this service, Mr. Stevens paid Hunt, on October 20, 1871, the sum of \$300.

On April 27, 1872, Mr. Stevens died leaving a will by which his widow, Mrs. Marietta Stevens, his son-in-law, John L. Melcher, and Charles G. Stevens were appointed executors. The will was probated on May 31, 1872. Work on the apartment house at 1160 Broadway was finished on September 17, 1872, the cost of construction being \$44,000.

No payments having been made to Mr. Hunt by the executors, he began suit on November 25, 1873, asking judgment for the \$5,000 due on the contract of July 27, 1870, and for \$1,020 due on the Broadway apartment house, with interest. The attorneys of record were Evarts, Southmayd and Choate, for the plaintiff, and Man and Parsons, for the defendants. The case was heard in the Superior Court of the City of New York before Judge Charles F. Sanford and a jury, January 9 to 17, 1878, and resulted in a verdict of \$8,438.14 for the plaintiff.

Mr. Hunt was an architect of international reputation, having been employed to construct the Pavillon de la Bibliothèque, connecting the Tuilleries and the Louvre, Paris. In the United States, notable examples of his work are the W. K. Vanderbilt house, formerly on the corner of Fifth Avenue and Fifty-second Street, New York, the Lenox Library, and the pedestal of the Statue of Liberty. He considered the Stevens case to be important as affecting his professional reputation and the legal status of all architects. Not only for these reasons, but because of the social prominence of Mrs. Stevens, and because of Mr. Choate's method of handling the case, the trial was followed with interest and amusement by the general public.

John E. Parsons, who summed up for Mrs. Stevens, was of the opinion, as may be seen in Mr. Choate's memorial of Parsons, printed in this volume, that the publication of Choate's closing address would subject him to a prosecution for libel. Mr. Choate's use of the facts of Mrs. Stevens' career to ridicule her social aspirations, and his adaptation to the case of the nursery rhyme, "The House that Jack Built," have often been cited as

examples of his skill before a jury. In his life of Choate, Theron G. Strong says that, after the trial, "Mrs. Stevens poured out the vials of her wrath on Mr. Choate, and started upon what she called a 'crusade' against him, and secured the publication in one or two society journals of caustic criticisms on his conduct. She was, Mr. Choate told me, very indignant at the time, but, he added, 'we became good friends afterwards—so good that she used to invite me to her house.'"

May it please the Court and Gentlemen of the Jury:

In a practice in the trial of causes in these courts extending over twenty years, I must say that this is the most unscrupulous and hypocritical defense that I ever heard presented to a court and jury, and this you can test by comparing your own recollection of the evidence with the broad claims which have now been made at the close of the case, on behalf of Mrs. Stevens.

Perhaps you may think these are hard words by which to characterize this defense, but I propose, as far as my time will permit, to prove the aptness of both.

In the first place, I call your attention to the situation here in regard to work done on 1160 Broadway, which is as good an illustration of the character and spirit of the defense as anything that appears in the case. You know now that when the answer in this case was prepared Mr. Melcher or Mrs. Stevens, one or the other of them, had in their possession Mr. Hunt's receipt for \$300 on account of work done on 1160 Broadway, being expressed to be on account of an agreement to do it for three per cent. on the cost of the building. They found amongst the papers of Mr. Stevens, of which they took possession upon his death, this receipt, and they had also a letter written by Mr. Hunt to Mr. Melcher in regard to the amount of the bill, and containing a copy of it.

Now, when they came to frame their answer, they knew from the receipt and the letter that Mr. Hunt had agreed with Mr. Stevens to do that work on 1160 Broadway for three per cent. on about \$44,000, the cost of the building. They knew that Mr. Stevens, being dead, and the agreement not being in writing, Mr. Hunt could not be permitted to go upon the stand and prove it by his own testimony, because the law prohibits a party from making out a case against a dead man in that way, so they swore thus, and I read from their answer to that part of the claim: "The defendants further allege that they are informed and believe that the services rendered by the plaintiff in and about the drawings for, and the erection of, the last mentioned building (1160 Broadway), were rendered by him

under an arrangement with the said Paran Stevens that he would make no charge therefor, but that he would include the same in the amount to be paid him, under his aforesaid agreement in respect to the said apartment house."

That is sworn to, gentlemen. I do not think you ever saw a clearer case of false swearing than that, in the light of the information which was then in their possession, in the shape of the receipted bill of Mr. Hunt, expressly approved by Mr. Stevens, when he paid the \$300 on account of it. By the very terms of the receipt itself, there is a contradiction of the position which they assume, and which they swear they believe to be true. There is no abatement whatever, by the terms of that receipt, of the original agreement in regard to that work; and yet Mr. Melcher comes forward and swears that he believes that the work which was done by Mr. Hunt upon 1160 Broadway was upon the agreement that he would not charge anything for it, because he had a contract for the apartment house.

Mr. Parsons: Why don't you read the whole of the answer?

Mr. Choate: My time is short; I have only read the part that is material. When we come to this trial they have that receipt and that letter in their possession. What do they do? We offer to prove the agreement with Mr. Stevens. They say no; you can't prove that, because Mr. Stevens is dead. Then we called upon them to produce that receipted bill, which Mr. Hunt knew they had, and the receipted bill was not forthcoming. They did not appear ever to have heard of it. Then they compelled us to amend our complaint and to strike out the allegation of the agreement that we could not prove, and to make a claim of what the work was reasonably worth according to the usual practice of architects; and then at last, by the merest chance, when Mr. Melcher was on the stand, we succeeded in getting from him, and out of his possession, the very bill that proved the contract.

Mr. Parsons: You asked for it, and it was produced.

Mr. Choate: I asked for it when it was material to my case, and when it was in your hands, and it was not produced. So much for 1160 Broadway.

And now, in the light of that little episode, we come to the apartment house. And first, who are these parties? My client, Mr. Hunt, has been well and sufficiently introduced to you by my learned friend. I put him upon the stand in the performance of my duty, and very briefly he told his story, and for two days my learned friend cross-examined him with all the force and ingenuity of which he is the renowned master, and I leave it to you, gentlemen, to say whether he did

not answer every question like an honest, an intelligent, a skillful, and a faithful man. You have seen exactly what manner of man he is. He is at least incapable of concealment, and has proved that he has nothing to conceal. Now, who have we on the other side? I did not intend to say anything about Mrs. Stevens, but my friend has pointed to her as the champion of this defense, and I cannot resist the temptation to call attention to her attitude in it. He says that a verdict by you, that Mr. Hunt is a skillful architect and faithfully performed his duty and did all that he agreed to do, is going to mortify and humiliate Mrs. Stevens. How is that, gentlemen? How can it mortify or humiliate Mrs. Stevens or any defendant for the plaintiff to prove that he faithfully performed his contract? Certainly not on any sane principle of justice or of right that can be applied to the case here. But if this defense is conducted with dishonest motives and by improper means, then and then only can its defeat be said to mortify or humiliate its authors. Now, Mrs. Stevens is a very eminent historical personage whom all mankind, in a certain sense, are permitted to admire. She is one of the queens in the social world, both of this city and Newport, the centre of fashion and frivolity. No great social event can be complete without her presence and participation. Princes and grand dukes have followed in her train, and royalty itself has crooked its elbow to afford a resting place for her gloved hand. Occupying, as she does, this exalted position in the social sphere, the vulgar crowd of lawyers and judges and jurymen can stand at a distance and wonder and admire. But then, gentlemen, if, in climbing to the top of this gilded ladder of fashion she brushes aside a mechanic at every round as she rises, if she hardens her heart against the claims of the laboring classes whom she has left behind her in her ascent; if, while she is enjoying all this glory she is leaving unpaid the bills of honest claimants, why is she to wonder, why is anybody to wonder that the mechanics, the laborers, the builders, the architects, look together to their rights, and feel and show some interest when one of them is seeking to recover from her his honest dues? That, perhaps, is sufficient to account for this crowd of listeners, to whom Mr. Parsons has alluded as manifesting an interest in the result of this suit, and whom he has unjustly charged with conspiring against her. Is she not given to litigation? Why, yesterday it was Mr. Gilman's turn; to-day it is Mr. Hunt's, and to-morrow, for you have heard the papers in the suit read, it is to be Mr. Paul's, the builder's. Not one of them gets his money from her without suing for it. Now, then, if the claims are due, it is not going to mortify and humiliate her to have the jury say so, is it? And if

they are not due there is no danger of the jury saying so. And so, it seems to me, that my learned friend confessed the whole secret as to the nature of this defense, when he said that it would mortify and humiliate Mrs. Stevens if an honest man like Mr. Hunt, claiming his honest dues, were to get a verdict in his favor.

Now, what is the question here? I do not think it is the mortification and humiliation of the defendant. My learned friend was quite right when he said that one of the claims which would be asserted here was, that in this suit was involved the reputation and fair name of this gentleman, who has been on trial before you for the last eight days. When there is no legitimate defense it is often very easy to frighten professional men out of the profits and reward of their labor. How so? Why their calculation, gentlemen, on the other side was that, rather than submit the question of his professional skill and reputation to a jury of his fellow-citizens, rather than have so delicate a question publicly discussed in a court of justice, fearing that something may turn up on the trial, some little piece of neglect or carelessness, which might redound to his discredit, he would prefer not to bring an action for what is justly due him. —They run their chances in that regard upon the other side, and so they hold out the threat that, "If you sue us, we will say what we have said in the other cases, that all the fault was yours." So they stated to Mr. Gilman and Mr. Paul, and so they stated in their answer to Mr. Hunt.

The money involved in this case is nothing, except as an index of your estimate of his professional integrity and skill, and the necessity of having a verdict for every cent of his claim, which verdict will be your judgment upon the architect himself. An architect's name is not for a day; and if not for all time it approximates nearly to that. This man's name is going down to posterity, indelibly stamped upon these great buildings that he has constructed in this city; the Delaware & Hudson Canal Company's building; this very Stevens Apartment House; the Tribune building, which you see from that window; and the Lennox Library, the fairest edifice that graces the fairest part of the city, all, as you have heard, the products of his gifted brain.

Mrs. Stevens' theory was, that with the reputation he has acquired, rather than risk it for the paltry sum of money involved in this case, rather than run the risk of having his name smirched, and of having the newspapers or the jury say, "This man didn't understand his business. This man was no more of an architect than Crooks, the journeyman"—as Mr. Parsons has so happily styled him—he would submit to lose the balance that was due him for the work he had faithfully

performed. I am glad that one man has had the courage to face that shameful defense, and to submit his work, his character and himself to the test of your verdict. That is all there is involved in this case.

Who were the parties to this contract? There was Paran Stevens, of whom we have learned something in the history of this case. I shall not say anything more about Mr. Hunt, since his introduction, so clear and satisfactory, that resulted from my learned friend's cross-examination of him. From what we have seen of Mr. Stevens, he was no fool. He was a very shrewd old gentleman. He had not kept a hotel for a quarter or half a century for nothing. He had not identified his name with the Tremont House, and the Revere House in Boston, and with the Fifth Avenue Hotel in New York, without learning a great deal about buildings. He had built a great many of his own, and the proof shows that he was always constructing and reconstructing them. Now, I insist that he drove a hard bargain with Mr. Hunt. He knew all about architects; he had employed them before, and he knew very well what to do. He knew how architects were employed; he knew that the usual and regular compensation was five per cent. on the whole cost, and that when he paid an architect five per cent. he left the construction entirely to the architect, and so he says "I want you to do it for three per cent.," and finally the agreement was made that, in consideration of Mr. Hunt's not being compelled to give his entire attention and care to the construction of the building, he should receive \$15,000. His compensation at five per cent. on \$500,000 would have been \$25,000, but by this arrangement Mr. Stevens takes \$10,000 from Mr. Hunt's compensation, and gives it to Mr. Paul, his chosen builder, on the condition and with the understanding that, by reason of this reduction, from \$25,000 which Mr. Hunt ought regularly to have received, to \$15,000, which he did receive, Mr. Paul was to be the superintendent and clerk of the works, and save Mr. Hunt the time and trouble of that superintendence. That is the language and meaning of the contract. Then Mr. Stevens makes an agreement with Mr. Paul, which shows you exactly what his understanding of the matter was. I do not doubt but that all of you twelve gentlemen of the jury fully understand the terms of that contract. Mr. Hunt was to be saved the time and trouble that Mr. Paul was to give for the \$10,000 he was being paid by Mr. Stevens. Paul was to make the purchases; he was to be responsible for the material which was used; he was to see that every man employed upon the building, in every department, did his work properly and faithfully. I do not say that Mr. Hunt was to do nothing. He was still as architect in a gen-

eral way to superintend the construction of the building, but with that qualification and that limitation—that he was not to do what Paul was to be paid for doing, and what he himself gave up \$10,000 to be relieved from doing. He was not to be a daily inspector of the work in its details. He was not to see that every stone and every brick was properly laid, and that the mortar was properly applied. Not at all, but he was to superintend the construction, to see that the building proceeded generally according to the design, and that the architectural effect that he as an architect was responsible for, was produced as the work advanced. So they went to work in the construction of this building with that understanding and arrangement.

I shall endeavor to follow the points made by my friend upon the other side, one by one, as I have not the time to elaborate upon the testimony which has been offered. In the first place I will come to this matter of the party wall. Gentlemen, you do not doubt, and no one else doubts, that it was against the protest of Mr. Hunt that that party wall was used without being shored up and underpinned, and without having the same substantial foundation that was placed by Mr. Hunt under all the rest of the building. My learned friend says there is not a particle of evidence as to that fact. I cannot have any patience with such a misapprehension of the evidence, and though my time is short, I must read some of the testimony of Mr. Paul upon that subject, only to meet this assertion of the defendants' counsel.

In the first place, however, there were two documents bearing upon this point. They were the original specifications prepared by Mr. Hunt, and given by him to Mr. Stevens. At first, what did these specifications state? Why, that this party wall should be shored up and underpinned in the way that has been described upon the stand. Then you have shortly afterwards a substitution, in the terms prescribed by Mr. Stevens, and in the second and final contract with the masons hired by him, in which it is expressly declared that "*the shoring up and underpinning is not included in the present contract; it will be done by the owner.*" But there is more. Mr. Stevens being dead, they knew that Mr. Hunt would not be able to prove by his own testimony that Mr. Stevens ordered this to be done independently of the specifications and contract. They thought that because Mr. Stevens was dead they could easily take refuge behind his gravestone. Fortunately, gentlemen, Mr. Paul survives to the time of the trial, and I will read what Mr. Paul said upon that subject. My learned friend has said that there was no evidence to show that Mr. Stevens directed this work to go on without underpinning the party wall. Is not this another

proof of what I said at the outset, in regard to the injustice and insincerity of this defense? I read to you from Mr. Paul's testimony, at page 168:

"Q. Do you remember your attention being called by Mr. Hunt, or by the plans and specifications, to the necessity of shoring up and laying a new foundation for the party wall? A. It was spoken of.

"State what the conversation was.

"(Objected to.)

"Q. Did you have any conversation with Paran Stevens about it? A. Yes. Q. When and where did that take place? A. I think it was at the Fifth Avenue Hotel, on the occasion of his visit, when he came from Newport, about the time they were putting in the foundation."

There was no foundation, you will remember, put in under the party wall, as Mr. Paul afterwards fully explained. That referred to the foundation under the other sides of the building.

"The question came up about that party wall foundation. Q. State fully what was said. A. Mr. Stevens said he desired to purchase that property, but that Mr. Moeller asked him an extravagant price, which he was not willing to pay."

Now, gentlemen, you see the shrewdness of Mr. Stevens. He wanted to freeze out Moeller, and when he should get him well walled in to compel him to take a cheaper price for his house on the other side of the party wall.

"He said that probably if he went on, as we began to shut him in, he might come to his terms, and he asked me in reference to that foundation, and I told him that of course I could not tell, but it would probably settle some, but whether it would settle more than the new foundation would pack, I was not able to say. Q. Who decided whether the party wall should be underpinned or not; what was said about whether or not that should be done? A. We went on with our exterior walls on Fifth avenue and Twenty-Seventh street, etc., until we came to the party wall on the old foundation, and then Mr. Stevens asked my opinion about it. I told him that I thought after having sounded in the trenches for hard bottom, that my judgment was that it would settle, but not more than the new foundation would pack, and he said, 'Go on.'"

I have said that this was an unscrupulous and hypocritical defense. In the face of such evidence as that, what do you think of a party who will come forward at the close of the case and still assert that the responsibility of building up that party wall without underpinning, was upon Mr. Hunt? Why, it was against his earnest protest that it

was built in this manner, and if the direful consequences which they so much lament have ensued, the responsibility, according to the uncontradicted evidence, must rest upon Mr. Stevens himself, and not in the least degree upon Mr. Hunt. Can you have any doubt, gentlemen, upon the evidence, that all that happened to the Fifth avenue front was due to this improper use of the party wall, thus insisted upon by Mr. Stevens against the better judgment of Hunt, and was the necessary consequence of the weakness of the connection which the architect was thus reluctantly compelled to make with it?

I pass from that subject. We have had a great deal of evidence about driving piles, and we have seen that there has been a great deal of conflict in the testimony of witnesses upon this point, which I shall not try to reconcile, the effect of driving piles being, as one witness has said, to harden the soil around them; and as another witness has said, to soften the soil around them; and the witnesses have talked mysteriously and variously about the "suction." One witness has said that the effect of driving piles is to draw the earth down; another witness says the effect is to raise it up. It seems to me, however, that it is plain enough to the common sense of all of us, that, with a pile-driver working like a battering-ram at the roots of a foundation, the necessary consequence must be to carry it down. I will not enter into a conflict of wits with my learned friend, on the scientific theory of suction, or hope to equal him in the ingenuity and persistency with which he tried to raise a confusion between the witnesses upon these points. With all his ingenuity on cross-examination, he has succeeded in showing that the effect of driving these piles in immediate contact with the foundation of this building of Hunt's and with the party wall, was to carry them down. How could it possibly be otherwise? Whether that result came about by hardening the soil or softening the soil, it is not necessary to inquire. That problem is like that of the man who had a concussion of the brain. There were many eminent doctors called in, and they had a consultation upon his case. One doctor said: "The man is unconscious; he is probably ruined for life; but it is by *softening* of the tissues of the brain; that is what has resulted from the concussion, and has destroyed his life." Another doctor said: "Yes, he is unconscious; he is done for for life; but I do not agree with my brother that it is softening of the tissues of the brain; the concussion is caused by the *hardening* of the tissues of the brain." But the concussion exists none the less, and the man is agreed on all hands to be as good as dead. Isn't that an exact illustration of the pile-driving question in this case? There has been a concussion and the walls will not stand;

there has been a driving of piles at the foundation of the party wall and the wall went down, and carried down with it the Fifth avenue front. I have not time to carry you all through the details of that. One thing is clear, that Mr. Hunt never intended that this party wall should be treated in this way. You heard what Mr. Raht said on that subject and you became convinced, I think, that it was in contemplation at the first that whenever Mr. Stevens determined to build the addition it was with the proviso upon Mr. Hunt's part that the walls of any such addition should be carried longitudinally or upon girders, and not rest upon that party wall. The wall stood with only that hair crack in the second pier on the Fifth avenue side, which did no harm and is agreed by everybody to have been of no consequence, until the piles had been driven right alongside of Mr. Hunt's foundations, and there had been inserted, contrary to Mr. Hunt's judgment, on the south side of the party wall, the eight tiers of beams to support this immense new building on that side. Then Mr. Crooks for the first time and Mr. Gilman for the first time discovered that the crack had widened and that the Fifth avenue wall had settled. The responsibility for the settling of the Fifth avenue wall lies with Mr. Stevens. He took the responsibility of deciding in the first place that the party wall could be used without underpinning, and then when the crack began to show itself in consequence, he expressly countermanded Mr. Hunt's renewed orders to underpin the party wall. If you can charge that to Mr. Hunt you can charge him also with the settling of the party wall; otherwise you must find that the responsibility rests with Mr. Stevens, and not with the plaintiff, for all the consequences that followed, however serious they may have been.

I come now to another illustration of the unscrupulousness and treachery of this defense, and that is in the matter of the heating apparatus. In the face of the evidence that has been given upon this trial, and of the contract, they still come forward and to the very end assert that Mr. Hunt is responsible for the putting in of the heating apparatus. It is important, gentlemen, because it covers the subject of their complaint, both of the inadequacy of the heating arrangements and of the water-pipes freezing and bursting. In the first place it was not decided, until the building was more than half way up, whether they should put up a heating apparatus which worked by the system of indirect radiation or an apparatus which worked by the system of direct radiation or coils in the rooms. Mr. Hunt testifies that he had nothing to do with deciding that question. Gentlemen, do you suppose that Mr. Stevens, having been the manager of all these hotels,

and the owner of all these great buildings, didn't know what system of heating he wanted? He knew perfectly well the difference between direct and indirect radiation; and another thing, which you will not forget, is that about two months before the contract was made his thoughts were already on this precise subject, and you find him, in his letter of May 7th to Mr. Hunt, inquiring which would be best. Now, Mr. Hunt did not undertake to say which would be best, and he didn't undertake to determine the matter at all, but he left it for Mr. Stevens to determine. Fortunately, gentlemen, Mr. Paul, who is a perfect apostle of the truth in this case, is a witness also in regard to this matter. What does Paul say? Why Paul says, that he was confined to his bed by sickness on the 9th of February, 1871. You know that the foundations were then laid and the walls were half up, and at that time he was told by Mr. Stevens that he was going to decide upon a heating apparatus. He did something about it through Mr. Hunt, of course. He got Bearup & Carraher's specifications for this particular heating apparatus, a mystery probably which you don't understand; but Paron Stevens, who had kept the Fifth avenue Hotel and the Revere House, understood it perfectly. It was in anticipation of his visit to Mr. Paul in his carriage, on the 9th of February, that he sent these specifications up a few days before with a note requesting Mr. Paul to examine them, and Mr. Paul did examine these specifications, and he tells of the conversation that took place between Mr. Stevens and himself, when Mr. Stevens visited him in his carriage.

You recollect Mr. Paul's testimony on that subject. I will, however, recall it precisely to your minds. Mr. Paul had been in his room for three days and he had had ample opportunity to examine these specifications. In that conversation, Mr. Stevens said: "Well, Mr. Paul, what do you think of the heating apparatus, as shown by Bearup & Carraher's specifications?" Mr. Paul says: "Well, I don't know; the other will be a good deal more effectual, won't it? I think it will be a good deal more effectual and cheaper." "Well," said Mr. Stevens, "but that necessitates having these ugly coils in the rooms where I am to have my first-class tenants, for I am not going to have any other but first-class people in my house, and they will not like such coils in the rooms." "On the whole," says he, "I have determined not to have them; they don't comport with the elegance of the house." So we find that about three or four weeks after that announcement of his decision in favor of this system of indirect radiation, he, in his own handwriting, prepared the contract with Bearup & Carraher, and they sign it, agreeing to put in this much-abused heating apparatus. Now,

I think it will take a dozen counsel of the eminence and ingenuity of my learned friend, talking to you to the crack of doom, in the face of the evidence on this subject, to persuade you to attribute to Mr. Hunt, the responsibility for that apparatus, and for any of the consequences that ensued from its use. So I pass from that subject.

I have called your attention, gentlemen, to the insincerity of the defendants, in the face of this evidence, in still continuing to demand that you put the responsibility for that heating apparatus upon Mr. Hunt. But one word more. Mr. Melcher, who sits there with his feet cocked up in the faces of the jury, and crouching ignominiously under the shelter of his mother-in-law—Mr. Melcher knew very well, when he instructed his counsel to make this defense and to impose the responsibility of the failure of this heating apparatus upon Mr. Hunt, that after Mr. Stevens died, and he came into possession, some complaint was made about the heat, and he called Mr. Hunt's attention to it. He says he called upon Mr. Hunt in relation to it, and he swears that all that Mr. Hunt did was to shrug his shoulders by way of reply.

Now, I suppose it cannot be disputed that it is one of the inalienable rights of man in this country to shrug his shoulders when and where he pleases. The sting of Mr. Melcher's testimony, however, was to insinuate that Mr. Hunt refused to do anything when thus called upon. Now, gentlemen, you will remember that Mr. Melcher was confronted with certain letters, very much to his surprise, I have no doubt. He testified that he was in the habit of destroying his letters, but Mr. Hunt, a careful business man, did not destroy his, and it was very fortunate for him he did not. You will remember a letter was produced written by Mr. Melcher to Mr. Hunt in regard to this matter of the heating apparatus, and you will also remember the reply of Mr. Hunt to Mr. Melcher, that Mr. Nason, at an expense of \$1,300, would put additional coils into these rooms on the Broadway side, and that he would thus insure the means by which heat could be supplied in all the rooms where cold was complained of, and Mr. Melcher would not have it done; and yet Melcher has the bare-faced audacity to stand before you and endeavor to put the responsibility of the continued use of that heating apparatus in the building upon Mr. Hunt. In this connection, I will call your attention to another matter, which seems to have fallen out of this case, and which has not been noticed by my friend upon the other side, but which is another evidence of the unscrupulousness and hypocrisy of this defense. You know that during the first days of the trial, in endeavoring to show the defects in Mr. Hunt's plans, something was said about a fire being discovered in the

building, and a vigorous attempt was made to show that it came from the beams being too near the fire-places. There never was actually a fire there, but there was a fire alarm. It seems that some coal fell out of the grate and scorched the floor, and the floor was torn up and it was found that the beams were laid right under the fire-place, and that the fire was built upon the beams, and therefore they argued that was an evidence of one of the defects alleged to have been committed in Mr. Hunt's plans. It is fortunate for Mr. Hunt that he has preserved everything, and it is fortunate that he was able to set the evidence right on that point. It turned out to be the fact that Mr. Hunt had constructed the fire-place as it ought to be. The fire-places were properly removed from the beams in his original plans. It seems that this room in which the fire occurred was one of the rooms with the dormer windows, and, when the plans were made, the only place where a fire-place was possible in the room was where it projected a little under this mansard side, but yet it was safe and answered every purpose. It didn't comport, however, to use a favorite word of Mr. Stevens, with the rest of the building. He went in there and saw the way it was arranged, and he said: "Who did this? Who put the fire-place in such a position as that in my building? It looks like a dog-kennel." Mr. Paul said: "Mr. Hunt did that." Mr. Stevens said: "Didn't Mr. Hunt know any better than that?" Mr. Paul said: "That is the only place where it can be put in with safety, and with no danger of fire." Mr. Stevens said, "I don't care about that; my tenants will not like it; I will not have it there." When it was built it was in the proper place; it was put in the room so that there could be no danger from fire, but it projected a little and it did not please the eye and the taste of Mr. Stevens, and Mr. Stevens told Mr. Paul to have it taken out and moved back, and, when that was done, the fire-place came directly over the beams. That is Mr. Paul's testimony upon the subject, gentlemen, and it is uncontradicted; at the same time you will remember he said to Mr. Paul, "I want that fire-place taken out;" and he told Mr. Paul where he wanted it put, at the same time saying, "I am going to heat this building by indirect radiation and there will not be any fires in these rooms." Do you remember that? Mr. Paul was sick in his room at the time this subject of the heating apparatus was discussed between himself and Mr. Stevens, and he has told you that one reason why Mr. Stevens determined to have the system of indirect radiation introduced into the building was that Mr. Bearup, its constructor, had guaranteed its efficiency; and yet, in the face of all this evidence, it was sought to be impressed upon you that Mr. Hunt was responsible

for the fire in the room in the mansard as well as for the heating apparatus.

One of the consequences which followed the failure of this heating apparatus to perform its work, and the responsibility of which also is sought to be imposed upon Mr. Hunt, was the freezing and bursting of the water-pipes. This followed of course, as a natural result, because, if the building had been well heated, the water-pipes would not have frozen. But, gentlemen, I think you will bear me out in the assertion that the fact that the water-pipes froze cannot be set up as a claim of any deficiency in Mr. Hunt's plans. There has been a good deal said about the freezing of these water-pipes, but I have not heard any proof of any damage occasioned thereby. The pipes freeze in my house when the weather is very cold, and I have no doubt they freeze in yours. It is not an unusual thing in this city for such an occurrence as that to happen in extreme weather. I think I shall have to find out who was the architect of my house, and make out my bill against him for the freezing of my pipes, and employ my learned friend to collect it, if this principle is to be maintained in your verdict. That would be just as sensible as the attempt which is here made to fasten upon Mr. Hunt the responsibility for the freezing and bursting of these pipes, from which, so far as the evidence goes, there has not been any damage. There is no proof that a dollar of expense was imposed upon the proprietor of this building by the freezing of these pipes. There has been a good deal said, also, in regard to carrying up these supply pipes on the outer walls. Mr. Stevens approved the plans that Mr. Hunt had exhibited to him with slots on the outer walls to carry up the water-pipes. Mr. Stevens, from his connection with these great hotels and other buildings, knew very well, the difficulties of supplying water in a building of this kind. He knew it was necessary either to carry up the coils on the outer wall or to carry them up on the inner wall, with horizontal pipes between the floors and ceilings, all through the building. He knew the advantages and the disadvantages of both systems, and, when he approved Mr. Hunt's plans, he knew precisely what the system was that was designed to be applied.

I will ask the learned Court to charge, and I have no doubt he will charge, that, in a matter of that kind, having consulted Mr. Hunt in regard to plans for the erection of the building, and having had those plans shown to him, in which Mr. Hunt had chosen to carry up the supply pipes through slots in the outer wall, rather than to introduce the water through horizontal pipes between the ceiling and the floor, and run the risk, in case of bursting, of injury to the ceilings and the

walls, that Mr. Hunt's judgment was final. If you consult an architect, gentlemen, in regard to the plans of a building and accept his plan, you take his judgment, don't you, on all points that are fair matters of judgment? It is the same in principle with the employment of all professional men. If you call in a doctor, you take his advice, do you not, and stand by it. I am sick and call in a doctor, and he gives me ipecac, and it has the necessary and usual results. Another doctor comes in and says, "Why, if I had been here, I would not have given you ipecac," and he declares that I ought to have been treated to a dose of castor-oil, the two doctors attacking the disease in exactly opposite directions. Now, will you say that I am authorized to sue my doctor for malpractice? I call him in and I take his judgment; I take his prescription; I take his physic and the operation is final, is it not? So it is with the lawyer. You have a hard case, and you retain a lawyer to try it. You employ him because you hear that he is very able and gifted in cross-examination. Witnesses are put upon the stand by the other side, and he browbeats and bullyrags them by the day together, and don't get anything out of them, but they come out stronger under his cross-examination than they did under the direct, as introduced by the counsel on the other side. He thus succeeds in demonstrating and establishing the claims of your adversary, and the result is that you lose your case. Another lawyer comes along and says, "If I had been trying that case, I should have let those witnesses alone, because any one could tell that they were honest from looking at them, and that they were telling the truth; so the more I cross-examined them the more I would damage my case." Now, are you, who lose your case, to sue your lawyer for malpractice, or refuse to pay his bill? I trow not. You retained him, and you accepted his judgment, and his judgment was final. You took him with all his arts and devices; you took him with all his power of cross-examination, and you must take the consequences. You have got the benefit of it and the reward of it.

The position which they have the hardihood to assume in regard to these water-pipes, is also most ridiculous, because the testimony is that, if these water-pipes had been properly boxed and felted, as Mr. Hunt directed they should be, there would not have been this freezing. As I stated before, there is not a particle of evidence that there was one dollar of expense entailed upon the estate by the freezing of the pipes. It exists only in the fertile imagination of Mr. Parsons. The evidence is that, if these pipes had been properly boxed and felted, they would not have frozen. Now, it is clearly proved by Mr. Hunt's letter, which

has been read in evidence, that, before there was any freezing or before there was the least trouble on that score, he instructed Mr. Paul, the chosen superintendent of Mr. Stevens, to have them all boxed and felled, and it was not done.

I leave the water pipes where they are. My friends upon the other side are perfectly welcome to anything that they can make out of that feature of the case. My friend mentioned the fact of the rats running all through the building. There is no witness who said anything about rats, except Mr. Crooks. Now, I hardly know what to say about the rats. But, as I am following in the footsteps of the defendant's counsel, I must say something. I heard my children in the nursery this morning trying to teach the baby the story of "The house that Jack built," and I could not but be struck by its complete application to this case, and it seemed for the moment that they must have been down at court hearing the discussions in this case, for we have here an exact parallel of all the features of that ancient story. For

"Here is the lady all forlorn."

There is no question as to who is meant by that.

"That milked the cow with the crumpled horn?"

That is the Stevens estate, somewhat crumpled, but not crippled I hope, by the panic that followed immediately after the death of Mr. Stevens.

"That tossed the dog——"

I shall not for a moment think of likening my learned friend to that noble and faithful animal, although the Stevens estate has tossed him, as you see, in the way of its creditors, mechanics, superintendents, architects, contractors and laborers, who come to collect their claims, and you see how well he has done his work, for he it is

"That worried the cat,"

that is Crooks. For has he not so worried poor Crooks and Gilman in their lawsuit with Mrs. Stevens, as to bring them over to her side in this? And Crooks was the cat,

"That caught the rat,

That ate the malt

That lay in the house that *Hunt* built."

Now, gentlemen, I come to the matter of the trouble on the Twenty-Seventh street and Broadway side. And I think you have seen the insincerity and dishonesty of that part of the case also. Some of you are tradesmen, some mechanics and skilled artificers in the line of your

various callings. Suppose your work were to be called in question, is it a fair thing between man and man to have your work and your skill criticised and tested by the judgment of a journeyman imported from the other side of the water? (For my friend Mr. Parsons has very correctly described Mr. Crooks by that word.) Crooks knows but very little about the science of architecture, and his best boast and experience is that he built the City Hall in Kingston. Now Kingston is about the three hundred and sixty-fifth city in the Union, and I suppose that its City Hall ranks in proportion to the importance of the city. I think they ought at least to have called an honest critic, but they called Mr. Crooks, and put him upon the stand, and he undertakes to give you the impression that it was necessary to take out those ashlar arches and the adjacent stone and brickwork that formed the ornamentation above the arches on Twenty-Seventh street and all along Broadway. He remembers that the brick arches underneath, twelve inches deep, had to be taken out. You, no doubt, remember his testimony upon that point; but let me read you what he says; I have made a memorandum of it. He says: "The brick arches underneath were taken out, and the arches were full of brickbats, and he directed the work to be done." Don't it look very much like a job put up on Mrs. Stevens by Mr. Crooks? I think you will see it in a moment. He says in his evidence:

"Q. Something has been said in the testimony for the plaintiff about a relieving arch which was behind the face arch? A. That is the arch they refer to as the brick arch.

"Q. When the repairs were being made to cure these difficulties was the face arch removed so as to expose the relieving arch? A. Yes; all the work was taken down.

"Q. Were the relieving arches themselves taken down? A. Yes.

"Q. How did you find the relieving arches to be when taken down? A. I found them to be very badly filled, the joints were very wide and seemed to be filled in with broken bricks."

Now, when Mr. Weeks, the builder, who did the work under the direction of Mr. Crooks, was on the stand yesterday morning, he says that only one of them, according to his recollection, was taken down, and that was the one that was badly cracked, because there was a crack in the party-wall directly opposite upon the other side. He says he don't recollect about any other one of those arches on the Twenty-Seventh street side being taken out. Mr. Parsons then comes to the rescue, supported by Mr. Melcher and Mrs. Stevens, and he says: "Mr. Weeks, don't you remember taking down an arch on Broadway

where there was an iron girder?" That was not the case, as we know, because there was not any arch there, as Mr. Weeks admitted a minute afterwards. Now this is important in two or three aspects besides showing that it was a job put up by Mr. Crooks on Mrs. Stevens. It shows what reliance you can place upon the judgment and the memory of Mr. Crooks after the admissions of Mr. Weeks, a responsible builder, who was called in to do the work. It shows how much faith you can place upon the judgment and the integrity of Mr. Crooks. Mr. Crooks advised that all these arches should be taken down while Mr. Hunt was sick in Europe. I cannot help thinking of Æsop's fable of the lion and the donkey. You know the lion was sick, and the donkey put on the lion's skin and went around roaring to see whom he could frighten. Mr. Hunt was sick in Europe and there was Mr. Crooks' chance. Now, in April, 1874, we have it from Mr. Dudley's testimony—and I stand away from in front of him so that you can recall his image—make up your minds by looking at him whether he is a man to be believed or not—that he went there and measured the worst of these arches and found that it had bulged just one inch. He says there might have been bulging elsewhere, but this one was the worst. Now, when Mr. Crooks examined that arch twenty-eight days afterwards, how do you account for the fact that it was bulged two and a half inches according to his statement? Why, it was two years in bulging one inch and he swears that it had bulged one and a half inches more in twenty-seven days! He wants the job of making these repairs and alterations, and so he says they are all just as bad as the worst ones, and they must all be taken out and replaced. You must put in needles, turn out the occupants of the rooms, and make all these changes at an expense of \$15,000, upon which his commission was five per cent. Gentlemen, was it necessary? I believe in Mr. Weeks' honesty and integrity, when he admits that it was not necessary to remove certainly one-third of these arches and stone-work, but that it was done, as he says, "*in anticipation of a possible future settlement.*" What do you think of that, gentlemen; taking down arches in anticipation of a possible future settlement? Isn't that a put up job? That is what I call it. It is very much like whipping a boy on Monday morning for the offences that he may possibly commit all the week; or taking a ten-fold dose of medicine when you start upon a journey, for fear that you may be sick as you proceed. I do not think it necessary to dwell much longer upon the subject of these ashlar arches, even if I had the time; though a great deal might be said upon that point.

There is another aspect in which I call your attention to the insincerity of this defence. My learned friend, in both of the arguments which he has had the privilege of addressing to the jury, has stated that he does not question Mr. Hunt's professional reputation and skill, and yet, at every step of this trial in the evidence and the argument, they have sought to raise the impression of some defect in his plans, to find some flaw in the joints of his armor, and to point out some lack of professional skill. You recollect the evidence that they offered, attempting to show that his plans were not perfect. You remember how urgently they sought, by the testimony they offered, to impress upon your minds the fact that the bulging of these arches was proof of defective plans. The mason who laid them testified that he laid them as well as he could. Other witnesses have testified that there is always more or less bulging of these arches when there is a settlement, and I am sure we have proved to your satisfaction, gentlemen, who is responsible for that settlement. We rely upon the evidence as it has been given before you.

The evidence is that the bulging of these arches has arisen from some defective workmanship, or from some unknown cause. Who was responsible for the defective workmanship was not obvious at the time when the work was done. Mr. Hunt's plans were carefully and skillfully prepared. They were submitted to Mr. Stevens, and approved by him. Mr. Stevens employed Mr. Paul, paying him \$10,000 to superintend the construction of the building, according to the plans and specifications prepared by Mr. Hunt. Mr. Paul was the trusted servant and employe of Mr. Stevens.

He was specially employed by Mr. Stevens for the very purpose of preventing any defective workmanship upon the building. Mr. Stevens seems to have had the most implicit and absolute confidence in him, and relied upon him to prevent any such consequence as subsequently resulted.

It may have been caused by a settlement of the building, but one thing is certain that, upon the evidence adduced here upon this trial, it cannot be chargeable to any negligence or any want of skill or care on the part of Mr. Hunt.

Now, a great deal more might be said, and ought to be said, but I think I am safe in leaving Mr. Hunt in your hands. There is a great deal of cunning calculation upon the other side in all their dissimulation, and their insincerity. They say to themselves, the jury may give Mr. Hunt a nominal verdict, or they may make a deduction from his

bill on account of the damages we claim to have suffered, or possibly they may disagree.

That is one of the chances that these speculators in jury trials take. I say to you, gentlemen, don't disagree; don't let us all have wasted our time and trouble for the last two weeks; don't deduct one dollar or one cent from his bill; but send him out of this court with as clean, as fair, as unclouded a reputation as he brought into it.

FITZ JOHN PORTER CASE

CLOSING ARGUMENT FOR THE PETITIONER, FITZ JOHN PORTER, BEFORE THE ADVISORY BOARD OF OFFICERS AT WEST POINT,
JANUARY 10 AND 11, 1879

STATEMENT

When the American Civil War broke out, Fitz John Porter had already had a distinguished military career. Born in 1822 at Portsmouth, New Hampshire, he was the son of Captain John Porter, U. S. N., and a nephew of Commander David Porter, who was in command of the Frigate Essex during the war of 1812. Having graduated from West Point Military Academy in 1845, he served in the war against Mexico in 1846, and was brevetted for gallant and meritorious conduct.

In May, 1861, President Lincoln commissioned Porter Colonel in the Regular Army, and in August of the same year he was made Brigadier General of Volunteers. His services to the cause of the North in the early conflicts between the States were so notable that after the Peninsula Campaign he was, in July, 1862, brevetted Brigadier General in the Regular Army and Major General of Volunteers. At Antietam he commanded the centre of the line, and followed the enemy into Virginia. Suddenly, without warning, he was, on November 12, 1862, in the presence of the enemy, relieved from duty, and a military commission was appointed to examine into charges made against him by General Pope. Subsequently this order was revoked and a court-martial ordered. At this court-martial, presided over by Major General Hunter, and comprising also Major General Hitchcock, and Brigadiers General King, Prentiss, Ricketts, Carey, Garfield, Buford and Hough, the three chief witnesses for the prosecution were Major General John Pope, Brigadier General Benjamin S. Roberts, and Lieutenant Colonel Thomas C. H. Smith. Porter was defended by Reverdy Johnson and by Charles Eames.

On January 10, 1863, the court-martial convicted Porter of disobedience of orders and treasonable inactivity in the presence of the enemy, dismissed him from the service and declared him to be forever disqualified from holding any office of honor or profit under the United States. On January 12, the record was placed in President Lincoln's hands, and on January 21, in consequence of a review of the proceedings, findings and sentence made by Judge Advocate General Holt, the President approved the sentence.

General Porter never ceased to protest his innocence, and his chief counsel, Reverdy Johnson, in July, 1863, published an elaborate reply to the review of the case that had been submitted to President Lincoln by Judge Advocate General Holt. When the Comte de Paris published his History of the War of Rebellion, he threw a very favorable light on Porter's military achievements, thus emphasizing the injustice of the sentence. Porter's ceaseless protests finally induced President Hayes to appoint an advisory board of officers to examine into the findings of the court-martial of 1863 and to report on them. The board was made up of Major General John M. Schofield, Brigadier General A. H. Terry, and Colonel George W. Getty, with Major Asa B. Gardiner as Judge Advocate and Recorder. It met in June, 1878, and was in session until March 19, 1879. On January 10 and 11, 1879,

Mr. Choate, chief counsel for General Porter, made the closing address printed below.* With him were associated Anson Maltby and John C. Bullitt. The findings of the board completely vindicated General Porter. It was not until 1886, however, that Congress passed a bill restoring him to his rank in the Army, neglecting even then to reimburse him for back pay. After his retirement from the Army, General Porter served the City of New York successively as Commissioner of Public Works, Police Commissioner and Fire Commissioner. He died on May 21, 1901.

Mr. Choate donated his services as counsel for General Porter. He once said that he considered this his most important case and greatest victory, because of the great weight of influence against Porter, and the difficulty, after such a lapse of time, of gathering the true facts and putting them before the Court.

If the Board please I will, as briefly as I can, conclude the argument on the part of the petitioner, and reply, so far as it may seem necessary, to what has been presented on the part of the Government. I say as briefly as I may, for I have been reminded of the advice that was given by Doctor Breckenridge to a class to whom he was lecturing, on the subject of the efficacy of prayer, as compared with its length, when he said: "Young gentlemen, I beg you to remember that the Lord knows something."

I am going to argue this case upon the assumption that this Board knows something of the evidence which has been taken, and which they have been engaged in receiving and examining for a period of six months, and especially something of the laws of war and of the rules of military conduct. We, who represent General Porter, pretend to know very little of the latter subject, and confide entirely in the ample knowledge of the whole subject which this Board possesses.

At the outset, I wish to express our obligations to the learned Recorder, for the ingenious and instructive argument which, for the last two days, he has been laying before the Board. It is exactly that which we could have wished should be done, namely: that the strongest argument that could possibly be made upon all the facts should be presented to the Board on behalf of the Government, before you proceed to decide upon the evidence. In my judgment, the best argument which could be made on behalf of the Government, from the facts presented, has now been made.

More than that, we owe a considerable obligation to the Recorder for the diligence which he has manifested in searching for and procuring evidence supposed to be adverse to the cause of General Porter. A large part of it consists, in my view, of matter very strongly favorable to

* On account of the length of this address, portions of the testimony and documents quoted in support of Mr. Choate's arguments are omitted.

the cause of the petitioner, and matter which we never could have found by any search or power on our part. He has gone further than the mere gathering of facts. Every rumor, every suspicion, yes, I may say, every piece of scandal detrimental to the interest or conduct of General Porter, in relation to the events of the 27th and 29th of August, 1862, has now been presented before you. And if, as I hope, notwithstanding all this, your judgment shall arrive at a conclusion favorable to his cause, it must always be said that the search has been fully exhausted, and that everything that could possibly be brought into the balance against him has been thrown in.

As it seems to me, much of the closing argument of the Recorder has relieved us of a great deal of responsibility and anxiety and labor, because, upon the main question of this case, as I have always regarded it, namely: the conduct of General Porter on the afternoon of the 29th of August, he has now seen fit to present, for the first time, an entirely new view, something altogether different from all that has heretofore been claimed, and not only different, but absolutely antagonistic to it. If we may accept him as the authorized mouth-piece of the Government, or of the prosecution, or of the adverse side which we are to resist or that is to resist us, so that we may take the propositions that he now presents, as final against us, we may dismiss from our minds all the claims that have heretofore been made in relation to the decisive events of that important day. For when we come to discuss that part of the case, I think we shall be able to demonstrate to the Board, that the claim of fault on the part of General Porter as now presented, is not what General McDowell claimed, either on the former trial or upon this examination. It is not what General Pope claimed, either then or in any of the numerous and varied presentations of the case, that he has since made. It not only is not the same, but is absolutely hostile and repugnant to all those. And, if what he now insists upon does not bear the test of examination, that branch of the case will be entirely ended.

We are entirely satisfied with the view that the Recorder has presented; but in what light it places those two great generals, who have, up to this time, stood in the attitude of accuser and of champion of the accuser, it is not for me to say. It does seem to me, however, that it has been a little ungrateful on the part of the learned Recorder, for he had a full view of the results of what he was presenting and of its necessary effects; ungrateful, for instance, to Gen'l McDowell, who, according to his statements made upon oath in this investigation,

has aided the Recorder in this case, and composed for his consideration and use in the preparation of it, somewhere from six to twenty written and printed papers. The general intimated at Governor's Island that he thought he was on trial. I did not then understand the true purport of the remark. But now it appears that he was on trial in the mind of the representative of the government, and that by him he has been tried and found wanting. He has thrown him overboard in this case, and turned him out of Court with the utmost ignominy, as I think I shall demonstrate to you. And so of General Pope; one would have supposed that the representative of the government, now presenting this case for final consideration, would have found in some of the many, the almost countless publications of General Pope on this subject, hostile to General Porter, an inkling of the claim that he has now made. But he, too, is treated with contempt and scorn by this prosecution, as I shall show. Now, it will be my unexpected duty, which I shall perform with alacrity, to defend these generals; and I shall be glad that while defending General Porter I can defend General McDowell, also, from what seems to me to be the attempt at complete stultification, which is made against him by the learned Recorder. Whatever grievances we may have against that gentleman, however much we may have reason to complain of his attitude in the previous stages of this case, I do not think anyone on our part has ever dared to suggest, or would be willing to intimate that he was guilty of the stupidity and ignorance which is inevitably fixed upon him, if you feel called upon to adopt the view of the learned Recorder, presented the day before yesterday for the first time in the whole history of this case. By what motive is he actuated? Is it to ascertain the truth? Does he believe now, as his argument necessarily concludes, that all the charges that were made on that branch of the case before the court-martial, and upon which General Porter was condemned, that all these serious charges of sixteen years ago were invalid? Does he desire to bring General McDowell into disrepute? Does he wish to convert this controversy into a third Bull Run for that distinguished general, as if two would not suffice? I shall, in its proper place, ask the careful attention of this Board to the view which he has set forth, because, as it impresses my mind, it stamps this whole prosecution with contempt, and demands for it the scorn of every intelligent and honest man.

Again, the learned Recorder said—an unnecessary straw thrown into the scale against General Porter—that he had personally changed his mind as to the petitioner's guilt or innocence; that, having come to

this investigation with views favorable to General Porter, he, upon an examination of the case, had been compelled to change his mind. Well, we shall have to bear that. I do not think that it was necessary, in his official capacity, that he should seek to put that additional burden upon General Porter's back. Nor did it seem to me that the reasons that he gave for the change of his views were reasonable, or worthy of any consideration. You will recollect that he enumerated the causes for his change of mind. But as he has done this, it may not be improper for me to acknowledge also, a change of mind in regard to the case. For I must confess, almost with shame, that for more than fifteen years I was one of those heedless and unthinking millions who took it for granted that General Porter was guilty. Not guilty, if you please, of the atrocious crimes of which he was convicted, because I never knew the exact nature of these charges: but guilty of something heinous and derogatory to his character as a soldier. I had taken it for granted, as I believe the millions of the inhabitants of this country had, that a court-martial consisting of nine eminent generals sitting in judgment upon their peer, could not have found him guilty and put upon him the brand of infamy, which is conveyed by their sentence, unless he had really committed some fearful crime. When he came to ask me to act for him in a professional capacity, I was obliged to tell him so; and he said, with a manliness, which I shall never forget, that he would not ask me to act for him unless upon an examination of the record, and upon the facts that he had to present, I was satisfied of his innocence, and further even than that, for he added, that if after taking his case, I should find, as it proceeded, and was developed, any reason to believe him guilty, I should be at liberty to abandon it. Well, I examined the record. I found that the case had not been half tried; that the trial had taken place in the midst of the frightful excitement of war, when party and sectional passions were at their utmost height, when the disasters in which the war had involved the country had saturated the minds of the people—and of almost all the soldiers of the country with alarm and indignation. I found that there were circumstances most unfavorable to justice in the surroundings and in the composition of the Court which tried him. I found that one half of the main witnesses cognizant of the facts, had not been accessible to him or to the Court at the time of the trial. I found that the most able and learned jurists of the country, in examining the case, had pronounced that even upon the record as it stood, there was no evidence fairly, upon the acknowledged principles of justice, to sustain the conviction. A

personal study of the record satisfied me of his innocence, and when I came to examine his new evidence, not only did it demonstrate that he was not guilty, but that for the very acts and omissions to act with which he was charged, he was entitled to the very highest merit and commendation. So, it seemed to me, to be not only a high professional service, but an urgent public duty to enter into his defence, and to stand by him as long as he needed support. I say a public duty, as well as a professional service, because, in my view, this is not General Porter's case alone; it is the case of the whole army; it is the case of every honest soldier who marches under our flag! Yes, it is the case of all the people of this country, for blighting as was the stigma which was placed upon him, it rests upon the army and the country, too. I think I shall show you that there never has been a soldier exposed to such shame and humiliation, and there never has been an army suffering from such a brand as this; and if it is undeserved by him and by the army, why, as the President has said, it is time that it was reviewed and removed.

The learned Recorder has further said that he did not regard the fact that General Porter had been for sixteen years besieging the Executive Department at Washington for relief as a circumstance entitled to any consideration. But I do. I think that is the first, great, convincing argument of innocence which presents itself upon the threshold of this case before you look into the evidence. Why, what could have borne him up during all these sixteen years? Could guilt have done it? Suppose him to have been guilty of the crimes with which he was charged, should we ever have heard of the case any more, should we ever have heard of General Porter any more, except as bearing his shame to his grave, as best he might? No; a guilty man would never ask for a re-examination of the charges, knowing only too well, that if one half of the proof demonstrated his guilt, all the knowledge that could be brought from all the world to bear upon the subject would only prove it blacker and deeper. Yet, I suppose, that General Porter from the 21st of January, 1863, until this moment, has never had a single waking hour that has not been inspired with the prayer that he might not die until he should be able to demonstrate to his countrymen his innocence—should be able to clear his name from this infamous brand that has been put upon it, and hand it down to his children, as pure and bright as he received it from ancestors of honor and renown. This conscience which has been implanted within us is a great and powerful engine for support or for destruction. It may make—Shakes-

peare says it does make—"cowards of us all." It may make the great and gallant general who has sought and found a bubble reputation at the cannon's mouth, quail at the idea of coming before three of his brother soldiers simply to tell the truth. But when it takes the shape of what Virgil calls the "*mens sibi conscia recti*," the heart conscious of its own innocence, it can carry a man, as it has carried General Porter, through perils such as have never yet been found upon the battle-field, and through years of suffering and humiliation, to which death itself, at any time, would have been a merciful release. So, I submit to you that the fact that General Porter has been asserting his innocence, in the face of all the world, from the moment of his conviction until now, is, at least, entitled to be taken into consideration, in passing upon the question of the guilty or innocent intent within the breast of the man, which, after all, constitutes the very gist of this inquiry.

Well, he has maintained this contest, and upon what ground has he asserted it?

The learned Recorder is pleased to say, upon the ground of newly discovered evidence.

Why, not so entirely, if the Board please. It is on the ground that he was always innocent, that upon no facts that could ever be truly stated, ought he to have been convicted. And then, upon the further fact, that what he asserted upon his original trial, and what the Court refused to believe, he could now demonstrate so clearly that any man who runs might read and understand, and must believe it.

Well, the learned Recorder says, why didn't he ask President Lincoln to open his case, if he had such confidence in it himself? and several questions of that sort have been asked by the learned Recorder, which imply a forgetfulness of facts, facts proved in the case on his own part. There has not been a President at the White House from the day of his sentence, to this before whom he has not laid his case; and as to President Lincoln, we expressly proved an application on the part of Governor Newell, representing the petitioner; and we have always believed that if President Lincoln had not been taken away by the bullet of the assassin, we should have had justice at his hands. But—and I beg the attention of the Court to this fact—urgently as he has presented his appeal, just as urgently has it been resisted from other quarters. It is not for us to inquire or to know who has had an interest to prevent the question of General Porter's guilt or innocence being inquired into, but somebody has done it. And I rather think that the opposition has come from more sources than one. One of them is apparent upon this record: General Pope, his original accuser, has

always, except upon one occasion, the sincerity of which I do most truly doubt, been resisting the effort and inquiry, and has, down to this moment, been standing in the way of justice. I conceive that nothing but a consciousness of absolute innocence could have carried General Porter through to his present position in this case against such obstacles.

POWERS AND DUTIES OF THE BOARD

Now, we have the first result of all these strenuous efforts upon his part, the order for the constitution of this Board. The learned Recorder, from motives that I cannot understand, and from a view of the case which he has not disclosed, has studiously undertaken to belittle the functions of this Board. Ah, he says, it is to be regretted that this Board has no judicial functions. Judicial functions! A dignified Board of eminent soldiers, ordered by the President of the United States, and commanded to ascertain the truth of this controversy—for it is a controversy with sides, as it appears—and he, a member of the Board, what object could tempt him to impute to it insignificance and a lack of judicial functions? I had always thought that the highest function of judicial bodies, the highest and the grandest, was the ascertainment of truth; and when it takes the shape of the ascertainment of the truth of a point of history, which involves the good name, not only of a gallant soldier, but of a great army, and a great nation, human justice can attain to nothing higher. And so it did seem to me that this reflection upon the Board of which he is a constituent member, was wholly uncalled for.

Again he regrets that this Board has no power to summon witnesses, or, as he terms it, compel the attendance of witnesses. Well, who has been hurt by that? Who has not come that was wanted by us or by the Board? One man and one only. There is one big fish who has escaped from the meshes of this judicial net, the great general who stands behind this prosecution, holding up its arms. But is it for the learned Recorder, especially in view of the tender and confidential relations which seem to have existed between himself and General Pope, to regret that this Board has not had the power to drag him across the continent, and to place him a reluctant witness upon the stand, and have the truth drawn out of him, as by the forceps of the dentist? Yet these are his reflections; these are his regrets, and I have no doubt that, as I think I shall show you, it is General Pope's regret, which the Recorder has uttered, that the suggestion originated from him, that this Board has not the power to compel the attendance of witnesses.

And considering the defiant attitude in which that gentleman stands to this case, and to this Board, I think that the suggestion is cool, even for West Point, in the month of January.

I submit that this Board has the most ample powers for the discharge of the duty imposed upon it. For the one thing that we have missed, the personal presence of General Pope, I do think we shall be able to get along without. I do think we shall be able first to ascertain what General Pope's views are, and second, to put them to a competent analysis by comparison with the facts as they have been proved here, just as well without his presence as with it.

AUTHORITY FOR THE BOARD

Now, if the Board please, I wish to read the application of General Porter, and the order organizing this Board to show what its functions are:

To His Excellency, Rutherford B. Hayes,
President of the United States:

Sir: I most respectfully, but most urgently, renew my oft repeated appeal to have you review my case. I ask it as a matter of long-delayed justice to myself. I renew it upon the ground heretofore stated, that public justice cannot be satisfied so long as my appeal remains unheard. My sentence is a continuing sentence, and made to follow my daily life. For this reason, if for no other, my case is ever within the reach of executive as well as legislative interference.

I beg to present copies of papers heretofore presented bearing upon my case, and trust that you will deem it a proper one for your prompt and favorable consideration. If I do not make it plain that I have been wronged, I alone am the sufferer. If I do make it plain that great injustice has been done me, then I am sure that you, and all others who love truth and justice, will be glad that the opportunity for my vindication has not been denied.

Very respectfully, yours,

Fitz John Porter.

Then follows the order of the President organizing the Board:

In order that the President may be fully informed of the facts of the case of Fitz John Porter, late Major-General of volunteers, and be enabled to act advisedly upon his application for relief in said case, a Board is hereby convened by order of the President.

This is what it is to do:

To examine in connection with the record of the trial by court-martial of Major-General Porter, such new evidence relating to the merits of said case, as is now on file in the War Department, together with such other evidence as may be presented to said Board, and to report, with the reasons for their conclusion, what action, if any, in their opinion, justice requires should be taken on said application by the President.

One would think that there was an order from an unquestionable source of authority, which did constitute a judicial tribunal for one of the highest judicial purposes ever known to history.

Well, then, at the outset, questions arose how you were to proceed, and I have noticed a disposition on the part of the learned Recorder to hamper you by technical rules and restrictions; but we do not understand that there is any reason for putting fetters upon the action or power of this Board. What is it that you have to do—what is the object? Truth, is it not? Truth, and the whole truth is the only object; and justice—pure justice, is the simple end of it.

The record of the court-martial is submitted to you first, but in connection with everything else in the nature of evidence which may be brought before you. "You are to fully inform the President of the facts of the case," so as to enable him to act advisedly on the application for relief, and to report your conclusion with your reasons. I think my learned friend, the Recorder, might have cudged his brains for a good many years before he could have framed an order, the scope of which would be more full and large, to enable the Board to attain the only object which this petitioner, in asking, and as I believe the President in organizing the Board, has ever had, namely, complete and final justice.

Now, the nature of General Porter's claim, I wish it to be understood, is not for pardon but for justice only. He does not ask for pardon, as a condemned and guilty defendant, but he asserts now, as he has always asserted, his entire innocence of all guilt and asks that that may be declared. Complete innocence, perfect, unconditional loyalty is what he asserts for himself, and what we, upon the record now before you, assert for him.

THE PRESIDENT'S POWER

And that raises a question I suppose, of the power of the President in this matter of the constitution of this Board. In respect to that, I have a suggestion to make. At one time, when General Porter was making one of these renewed appeals for executive interference in this case, influences which I suppose were the same as have so long thwarted his application for justice, prevailed in procuring an Act of Congress, which I will now read to you. It is to be found in the 15th Statutes, page 125, and is known as—

An act declaratory of the law in regard to officers cashiered or dismissed from the army by sentence of a general court-martial.

Be it enacted by the Senate and House of Representatives of the United

States of America in Congress assembled: That no officer of the army of the United States who has been or shall hereafter be cashiered or dismissed from the service by the sentence of a General Court-Martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, except by a re-appointment, confirmed by the Senate of the United States.

A law which appears to me to be altogether just and wise, and as you see, it bears directly on the question, if ever there was a question, of the ability of the President in such a case, to restore General Porter, or any other officer in a like situation, however innocent, to the military service, unless the re-appointment shall be confirmed by the Senate of the United States. Well, now, under that branch of this order, which requires you to form an opinion and to report what the cause of justice requires of the President, there may be occasion for your action, there will be, as it seems to me, in any event. If, as the result of all our labors, you find the court-martial correct on all the facts now known; if you find on all the evidence that has been brought before you, that General Porter was guilty of the charges, you will so report, and that justice requires no action of the President. I think that more than that would come within your province and your duty; if you find that after all his lamentations he was guilty of all these infamous charges, you should not only report your conclusion, but that the punishment that was inflicted on him was altogether inadequate to the crime that he had committed. It would be only a just rebuke to the petitioner for vexing the ears of the country, and of the President, and of this Board, and of the students of history with his unfounded appeals. I say grossly inadequate to the crime committed, because, as it does seem to me, there never was so foul a crime imputed to a soldier in historical times as has been by this record, placed upon the petitioner. I desire to call the attention of the Board to this: it is not a mere case of disobedience of orders; there have been ample cases of disobedience of orders before; it is not a case of treason for which you can invent a motive, a provocation, or an apology; not at all. There have been other traitors. The place where we now sit was a witness to a conspicuous one, but Arnold's treason was merely an intent to hand over one of the military posts of the country to its enemies. The case of General Charles Lee has been cited by the Recorder, occurring at Monmouth, in the Revolutionary War, but that was of trifling malignity as compared with this, which was imputed to General Porter. Let me read one of these charges of which he was found guilty; the third specification of the second charge:

In that the said Fitz John Porter, being with his army corps near the field of battle of Manassas, on the 29th August, 1862, while a severe action was being fought by the troops of Major-General Pope's command, and being in the belief that the troops of the said General Pope were sustaining defeat and retiring from the field, did shamefully fail to go to the aid of the said troops and General, and did shamefully retreat away and fall back with his army to the Manassas junction, and leave to the disasters of a presumed defeat the said army; and did fail, by any attempt to attack the enemy, to aid in averting the misfortunes of a disaster that would have endangered the safety of the capital of the country.

Now, I challenge the Recorder, or anybody else, to find in all history a crime like that. I do not believe it is possible for any such crime to be found related. The annals of history may be searched in vain for the counterpart of this. That he wilfully, consciously, and merely to spite his commander—for that is the view in which it was presented by the learned Judge Advocate, and by the Recorder here—merely to spite his commander, did hold aloof, with his brave army corps, from the battle in which the rest of the army were engaged, with intent to sacrifice the rest of the army and bring shame upon its commander and ruin upon the country, and perhaps to hand over its capital and its very existence to its rebel adversaries. There is an instance, not in history, but in the legendary days of Rome—and in those legends we have ideal history embodied—which shows the judgment, I think, of mankind as to the proper punishment to be inflicted for such a crime. It is related that in the days of Tullus Hostilius a conquered king of the Albans, Mettius Fufetius by name, whom he had placed as corps commander in charge of one of the armies of Rome, went out with him to the contest with the Veientians, and the legend states that he stood aloof while the armies were engaged, in order that the army of Rome might be vanquished. Now you have observed that that had not the elements of crime here imputed; it was not the case of a man who had been a loyal subject and a General of his own army, but it was that of a conquered king who had been trusted with a command. What did Tullus do with him? “So when the Romans had won the battle, Tullus called the Albans together as if he were going to make a speech to them, and they came to hear him, as was the custom, without their arms; and the Roman soldiers gathered around them, and they could neither fight nor escape. Then Tullus took Mettius and bound him between two chariots, and drove the chariots different ways and tore him asunder.” And in my judgment no less than that would have been an adequate punishment of such atrocious crimes as were imputed to Gen. Porter.

DISPARITY BETWEEN OFFENCE AND PUNISHMENT

Now, we call the observation of the Board to the startling difference between the guilt that was imputed and the punishment that was imposed in this case. As one of the secrets of history it will probably never be explained how it could be that the court-martial regarded him as guilty of such a crime and yet merely dismissed him from service, and declared him to be forever disqualified from holding any office of honor or profit under the United States. The sentence itself confesses the injustice of the conviction. If it was for the punishment of the offender, it was wholly, as everybody sees, inadequate, but if there was an indirect purpose in that prosecution, if he was a sacrifice to the discipline of other men, of other Generals and other soldiers, that might explain a thing which otherwise is so mysterious. And perhaps the learned Recorder will not quarrel with the authority which I now cite on that subject, which is the reply of Judge Advocate General Holt to the answer of Mr. Reverdy Johnson, from which he has cited and to which he has so strongly objected:

The wonder of military men, who understand the atrocity of Porter's offence in all its bearings is, not that he was condemned, but that his life was spared. The court-martial might well have sentenced him to death, and they forebore to do so, in all probability, only because they felt that, as a walking, blasted monument of treachery to his country's flag, he would be a warning to others far more effective than any voice which could issue from the depths of his dishonored but perhaps forgotten grave.

Does not the Judge Advocate General here reveal the true inwardness of the action of the court-martial?

If Porter was tried and sentenced and punished for the supposed crimes or apprehended crimes of other men, we can understand it. If he was sacrificed to the discipline of the army of which he had formed a glorious part, even that, like death and wounds, is something which a patriot soldier can bear. It may be that we shall have occasion to examine that very question a little further, because as it does seem to us, that must be the explanation of the otherwise extraordinary judgment of the court-martial. This case has often called up to public recollection and comment the case of Admiral Byng, who, in the middle of the last century, was court-martialed for a supposed failure on his part to do his utmost when proceeding with a British fleet for the relief of the Island of Minorca that was besieged by the French. He was not guilty. He, too, was a brave and gallant soldier, faithful to his country's flag, but he was chargeable with an error of judgment in not pressing the French fleet with all his power,

as his brother soldiers assembled in court-martial, felt that he might and should have done. There is, however, this remarkable difference between Byng's case and Porter's case—the Court that declared the former innocent condemned him to be shot, and he was shot—shot, in obedience to a supposed governmental necessity, to appease the howlings of the British mob, for the Court expressly declared he had been guilty of no cowardice, of no treachery, of no evil intent. Yet, being instructed that the imperative nature of the article of war bearing upon the subject, if they found that he did not do his utmost, permitted no sentence short of death, they sentenced him; and, the king and the ministry not being brave enough to stand up against the brutal demands of the British public, he was led out and shot like a traitor. The Government, in spite of the eloquent appeals of William Pitt, deliberately sacrificed him to the mob who had burned his effigy in every town in England, and had placarded all the streets of London with the startling threat, "Hang Byng, or look out for your king!" Well, as it seems to me, to a brave soldier, Byng's fate was a light punishment compared to these sixteen years of imputed infamy and shameful humiliation which Porter has borne, and so Byng thought, for when he heard of the judgment of the Court, he said, "What! have they put a slur upon me?" apprehending that they had pronounced him a coward. But when told that it was not so, that they had acquitted him of cowardice, a smile wreathed his features, and he marched to his fate as bravely as he had ever trodden upon the deck of his frigate. But this court which tried General Porter found him guilty of all these damnable atrocities to which I have called your attention, and yet failed to impose any punishment at all in proportion to the magnitude of the offense.

And now, suppose, on the other hand, after giving all weight to the judgment of the court-martial and its proceedings, you find General Porter innocent. You must proceed further under the instructions of the order organizing the Board and requiring it to report; and as a necessary part of your investigation, and especially as bearing upon the question of the weight which you are to give to the proceedings of the court-martial, the important question must be answered, how, being innocent, so far as the record discloses, he came to be convicted. Justice to Porter, justice to the country, justice to the action of the Court will require at least a recognition of that question. If there were circumstances surrounding the Court, or in its composition, or in the necessary haste imposed on its action by the exigencies of the service, or in the imperfect facts before them, or in the rules of evidence applied

by them, unfavorable to justice, it is important to know it—for you, for the President, for the country to know it—for the purpose of determining how much you ought to regard yourselves as constrained, as guided by their conclusions. And so, as to the action of President Lincoln, entitled in the eye of every American, in the judgment of History, to the very first merit as an authority.

CIRCUMSTANCES UNDER WHICH PORTER WAS TRIED BEFORE

I ask you, first, to consider briefly the circumstances under which the court-martial convened, with a view to the question whether they were favorable to a just trial of the cause. If they were, it lends a support to the judgment of that tribunal which it will require all the more complete demonstration of truth on the part of General Porter now to overcome. Well, we knew that it did not need any evidence to bring before you the circumstances under which that Court assembled; and I submit to you that they were most unfavorable to the consideration of such a case or to the administration of justice upon the particular questions raised. This brings into view the whole previous history of the war in Virginia, but which need not occupy the attention of this Board for more than a few minutes.

The breaking out of the war of the rebellion, as everybody knows, found this government and country in a state of absolute destitution as to preparation for war. The first efforts and struggles on the part of the government to sustain itself were of the most painful character; and particularly is this true of the history of the war in Virginia, where these transactions occurred on the 29th of August, 1862. This has a bearing upon the circumstances that surrounded this court-martial. Who has forgotten the mortification and humiliation in which the first campaign in Virginia resulted? The whole campaign, if it may be called a campaign, in 1861, exposed the Government and the country to chagrin, remorse, and mortification. While the press and the people were howling "On to Richmond" with ten million voices, our arms in Virginia seemed almost paralyzed. The story of the first Bull Run and of the Federal army waiting before the quaker guns of Manassas, is a type and a picture of the whole history of that year. Then the government, and its gallant generals who had rallied to its support devoted themselves to the great work of preparation; the Army of the Potomac was organized, and the campaign of that army for 1862, for the next year, was set on foot. It was supposed to be the best organized and the greatest army that ever, on this continent, sallied

forth, and all the hopes and all the boastful promises and expectations of the government and of the people, were staked upon it. But it is not too much to say that its career was another history of disappointment and mortification. Who can ever forget the doleful stories that came from the swamps of the Chickahominy and the palsy that seemed to rest upon the country when the final step of a retreat to the James River was taken? There were redeeming features in the view of the government of the distressing history of that period. There were two bright days: there was the day at Gaines' Mill, and that other day at Malvern Hill, when it is not too much to say that the services of the petitioner were the most brilliant of all the great and brave achievements of its record.

But that army got back to James River, and in the judgment of the government and of the country, nothing useful had yet been accomplished.

Well, our hopes never failed us, at any rate, and our courage never failed us, and a new plan was resolved upon.

An Army of Virginia was organized; General Halleck was called from the West and placed in command as General-in-Chief, and General Pope, for whom the best wishes and best promises were held forth, was called to organize and command this Army of Virginia; and as the next step, the Army of the Potomac was recalled to unite with the Army of Virginia in the protection of Washington and in new projects for the conquest of the rebel confederacy. I need not repeat to you the history of the sixty days existence of the Army of Virginia. It was another story of disappointment and chagrin; more mortifying, more depressing than all that had gone before; there was fighting enough, there was slaughter enough, but in the public judgment, there was no result. And now we come, as I suppose, to the most distressing period in the whole history of our contest with the confederacy. Gold went up and the hearts of men went down, and shame and anger possessed the hearts alike of the people and the government. Always, in times of great distress, and disaster, I think there is no exception in history, it is the natural impulse of the great masses of a nation, the irresistible impulse of the popular heart, to look out for somebody to blame; to put it upon the shoulders of somebody, for somebody must be to blame. Well, what was the key-note of this last imputed failure? I pass no judgment. I can form none in such a matter, but I am looking at the public judgment that surrounded that Court.

What was the key-note of the failure? Why, it was that General Jackson and his famous rebel army, after its capture had been heralded as an absolute certainty, was allowed to escape. That was what happened, that was the crisis, that was the culminating point of national distress and mortification, and everybody enquired who was to blame.

Do you not know, does not everybody know that there are times, and that such are the times when accusation and conviction are equivalent and interchangeable terms? Well, there was another wheel within the wheel of the national distress; there were suspicions, there were charges that hung on every lip, that were believed by every other man you met in those days, that were evidently believed by the government, that there was treachery, that there was disloyalty in the Army of the Potomac, and among the generals of the Army of the Potomac, and that some proceedings were necessary. Some example was necessary that should enforce discipline and cut out the roots of any such supposed disloyalty or treachery. For myself, I believe that the whole charge was without foundation; for myself, I believe that they were all loyal, and that under any commander, as their achievements before and afterwards demonstrated, they were ever willing to fight their best. But, nevertheless, this charge was made, was taken up and became a public outcry, and the necessity for something to be done that should stop or should punish the supposed offence, was in every newspaper, and on every tongue. The thirst of a great nation for vengeance, for a victim, will always be satiated. Just then, General Porter was accused, the government believed him guilty; General Pope, the commanding general of the army, asserted his guilt, and General McDowell, who was next in command, supported the charge. And who, in such times, could resist such a charge?

Who does not know that in times like those, the mere accusation was, from the inherent infirmities of human nature itself, almost the same thing as a conviction? The Recorder says that we bring charges against the court-martial. I disavow it. I unite with him in all his encomiums upon the distinguished gentlemen who composed that Court. I question not their conscientious performance of duty in that critical time. But, they were only men, and human judgment is finite. The learned Recorder puts it most admirably, and if I had a copy of his opening address, I should be under obligations to him for expressing the very idea which I wish to present in regard to that Court.

It is too true that human judgment is but finite, and that there are many times and occasions when an innocent man is necessarily convicted. History is full of instances which demonstrate exactly what

I mean. I mean the impossibility of preserving an unbiased judicial mind in the face of an overwhelming pressure of popular impulse, or popular opinion. The greatest judges that ever sat upon the bench, the wisest and most trained minds who had made law and the investigation of disputed cases their sole province and study through a score or more of years, have been exposed to the same subtle, insidious, irresistible influence of public feeling upon them; and it is not in the least derogatory to their character as judges, but merely imputes to them that they are men. Take, for instance, Queen Caroline's case, a case which enlisted the public feeling of every man and every woman in England upon one side or the other. It is a regretted, but a recognized fact, that upon the questions of law raised by the facts in that case, and presented to the Law Lords, embracing the greatest and wisest of the judicial minds of England, they always voted upon them, not according to the law and the facts as afterwards considered, when reviewed by judicial minds, but invariably according to the dictates of that party division of the people of England with which, by tradition and by the experience of their lives, they happened to sympathize. Nobody has ever questioned the integrity of Lord Eldon or Lord Erskine. So it was in O'Connell's case, when England was agitated throughout every hamlet and household. There are times when the administration of justice in the face of this subtle, far-reaching, irresistible popular power becomes wholly impossible. And so, I say, that this court-martial sat in times and under circumstances which were not favorable to the administration of justice; and if any unfavorable reflections have ever been cast upon those judges or their action, I, for one, on the part of the petitioner and of my associates, disavow them all. We impute to them nothing but honest performance of duty.

THE COMPOSITION OF THE COURT-MARTIAL

In the next place, was there anything in the composition of the court-martial that was not favorable to justice? In that respect, my learned friend, the Recorder, has seen fit to comment upon the manner in which the court-martial was organized. I think, myself, that there was an error committed, but one with which you have not to deal, and one for which the Court was not at all to blame. Let me read to you the law to which I refer, the Act of Congress of May 29th, 1830, which was supplementary to an Act for the establishment of rules and regulations for the government of the armies of the United States, passed April 19th, 1806.

It enacted that: "whenever a general officer commanding an army shall be *accuser* or *prosecutor* of any officer in the army of the United States, under his command, the general court-martial for the trial of such officer shall be appointed by the President of the United States."

In our present view of the evidence, as it stands recorded before this Board, General Porter was brought to trial by reason of the accusation and prosecution presented against him by the General commanding the army of which he was a part. If the facts had been presented to the President or to the court-martial at the outset of its sessions, as they have been presented to you, that Court, at any rate, would never have proceeded with the trial. But, General Pope saw fit to go before that Board, and say that he was not the author of the charges, that he had nothing to do with them, and so to leave the Court under the impression that the real accuser and prosecutor was General Roberts, his Inspector General, in whose name they were presented.

Now, as to the object of this law, we differ from the learned Recorder in his construction of it. We suppose that when an Act says, that when a General is to be tried upon charges presented by his superior General, commanding the army of which he is a part, that the court-martial shall be constituted by the President, and not by the commanding General—General Halleck in this case, we suppose it is so enacted out of consideration for the dignity of the offence and of the offender,—that if a general officer is to be brought to trial upon charges involving his fame and his life emanating from such a source, no less dignified a person than the President shall appoint the Court; no less impartial a tribunal than one created by him—raised as far as human foresight can raise it—above army quarrels and army rivalries, shall be the judges who are to try him. Now, if that is the proper view of the law, suppose that General Pope had gone before the Board, and instead of swearing as he then did, that he had nothing to do with the charges, had sworn, as he afterwards stated, in his report to the Committee on the Conduct of the War, in 1865, which I have in my hand, for, there he not only boasted of having been the accuser, but confessed that he had demanded his reward for carrying the prosecution successfully through.

He said:

I considered it a duty I owed to the country to bring Fitz John Porter to justice, lest at another time, and with greater opportunities he might do that which would be still more disastrous. With his conviction and punishment ended all official connection I have since had with anything that related to

the operations I conducted in Virginia.—(Supplement to Report of Committee on the Conduct of the War, part 2, p. 190).

Now, let me read you a previous sentence from the same report, to show his boast:

In the last days of January, 1863, when the trial of Fitz John Porter had closed, and when his guilt had been established, I intimated to the President that it seemed a proper time then for some public acknowledgment of my service in Virginia from him.—(Ibid. p. 190).

Suppose, now, that the President of the United States, or General Halleck, or the court-martial had known those facts as there stated by General Pope, can anything be more certain than that a court-martial, at any rate selected not by the President, but by General Halleck, would never have proceeded to the trial of the cause.

The next circumstance in regard to the composition of the Court that I have to suggest, without imputing the least reflection or suggesting anything in the least derogatory to the members of that Court, except that they are but men, is this—and is in the direct line of the last objection that I have made—because I do not believe that the President of the United States would ever have committed that mistake. What was it? What was the cardinal thing that General Porter was accused of? What was it, that the rage of the country was to be appeased about? Why, it was letting Jackson escape, was it not? Jackson with his army, after the “bagging of the whole crowd,” had been most felicitously and publicly proclaimed. Now, from the facts that have been spread and confessed before this Board—we know that Jackson’s escape was accomplished the day before that upon which General Porter is charged with dereliction. It was not on the 29th of August that General Jackson effected his escape. It was on the 28th, because then, as was supposed, they had him in a trap from which he could not escape, and General Ricketts, who constituted one division of General McDowell’s corps, was stationed at Thoroughfare Gap, between Jackson and Longstreet, and General King was marching down the turn-pike to Centreville, behind Jackson, so that if they had remained there, as they were ordered at all hazards to do, there could have been no possible help or relief for Jackson. But they left those positions, where it is due to General Pope to say, especially as to General King, that he was ordered at all hazards to remain, and, as was stated by General McDowell, and as everybody knows, and as the Recorder will not question, the door of the trap that held Jackson was thereby left open, and nobody remained to guard it. Not a regi-

ment, not a soldier of our forces intervened any longer between Longstreet and Jackson. Well, one would have supposed, who knows anything of what are the necessary attributes of a judicial mind, that the very last thing which it would occur to the power constituting the court-martial to do, would have been to place General Ricketts and General King upon the Court to try the offender—absolutely upright men, perfect men, as I suppose, but how could they sit as judges? How could they bring to bear the judicial element and the unbiased mind? They might themselves be tried for letting Jackson escape, and they to sit in judgment upon another man to be tried for that offense! What we say is this: that judicial impartiality under those circumstances cannot be asked of men. This law that I read was a wise one. I do not believe that the President of the United States, if he had had the organization of the Court, would have organized it in the manner in which it was constituted. I do not believe that General Halleck, who did organize the court-martial, knew the fact at all. What a position in which to place those generals! I have spoken of the historical and traditional liability of the great and trained judges of Courts of Law to bias, to the difficulty of sustaining a judicial mind, in times of popular rage or excitement; but how much greater is the exposure of Generals summoned hastily from the field for the discharge, perhaps for the only time in their lives, of the great functions of judges? Well, why was this done? The order constituting the court-martial explains it, and it is certainly a source of the utmost regret that the exigencies of the public service did require any such selection, for the order organizing the court-martial says positively, that it was necessary, and that there was nobody who could possibly be spared to sit upon that Court, except those nine generals who did compose the Court. I want to read the exact words of the order:

No other officers than those named can be assembled, without manifest injury to the public service.

Was not that a lamentable thing, that two of the judges were thus related to the subjects that were to be tried? I doubt not that they did their best; I doubt not that they tried to be judges, but how could they be? Human nature will not stand everything, and however great they may have been as generals, or wise as men, I do not believe they could stand that. Nay, more, General King, to whose withdrawal from the rear of Jackson on the 28th, contrary to orders, is now imputed by everybody the escape of Jackson, not only sat as a judge, but had to be a witness. The exigencies of the public service

not only compelled him to sit in the impossible attitude of a judge, but compelled him to take the stand and establish the truth as a witness adverse to one of the principal aides and witnesses on the part of General Porter. Is it not asking a little too much of our poor human nature, to put a man in that position? Who knows but that it was the votes of Generals King and Ricketts—who knows but that it was General King's vote alone that turned the scales of Justice against General Porter? Nobody will ever know, except the members of that Court. But why do I cite all this? Because the Recorder said, that the judgment of that court-martial was right, and must be accepted by you. Independent of its being right, I think we see now that it was impossible for those nine men, all of them, to act as judges. That could not be. They might sit there and record their votes, but it was impossible for them all—it was impossible for two out of the nine—in the nature of things, according to the laws of the human mind, to be judges.

Another thing, among the many circumstances unfavorable to the administration of justice by that court-martial; was there any unnecessary haste? The Recorder says, that the record shows, that it took a great many days to get in the evidence. But was there any unnecessary haste in their judicial proceedings, which were required to be deliberate and slow—considering all things—looking before and after? I will read to you the order that was served upon the Court, upon the morning of January 6th, 1863, five days before the sentence was pronounced. Before I do that, let me say that even now, after we have had the benefit of a second trial, it would be regarded as rather summary, if you should receive orders from the War Department to hurry back to your respective commands as quickly as possible, and to close this case without regard to hours, because the public service required it, and that you should instantly, upon the closing of the argument, take a vote. It might be necessary, owing to the exigencies of the public service, but it would not be judicial. Now I read this order from Secretary Stanton to this court-martial.

War Department,

Washington City, D. C.

January 5th, 1863.

General—The state of the service imperatively demands that the proceedings in the court over which you are now presiding, having been pending more than four weeks, should be brought to a close without any unnecessary delay. You are therefore directed to sit, without regard to hours, and close

your proceedings as speedily as may be consistent with justice to the public service.

Yours truly,

Edwin M. Stanton, Secretary of War.

Major General Hunter, President, &c.

It was not, you will observe, justice to the accused, but justice to the public service, that the Secretary appealed to, as the final motive for a hasty decision of the case.

That was served upon the court-martial on the 6th of January. Then the prosecution brought up their rear guard of witnesses, and the case was almost instantly closed that day. There were given to the petitioner three days to prepare his defence, and then what happened? Why, these Generals, although they were Judges, were Generals first, last, and always. How could they shut their eyes to such an imperative order as that, from the great War Secretary, who was in that day the master of the fortunes of the whole army? The country was in danger, its capital was at stake; it was more important to the public service that they should get back to their commands, than that they should stop to deliberate upon the evidence upon which they had to pass. Now what took place? You can form some notion of how this imperative letter operated, judging by your own proceedings here. The Board met at half-past ten, the morning of the 10th of January. There was an argument presented on the part of General Porter, called the defence of the accused, which, read with even the speed of the rapid tongue of our learned Recorder, could not have been finished much before the shades of afternoon were falling, for it occupies forty closely printed pages of this record. I do not state it as a fact, because it is not in the record, but I have been informed, that it did actually occupy four hours and a half, or until half-past two in the afternoon. At six o'clock that court-martial had adjourned, and General Porter was already condemned and sentenced, because the exigencies of the public service demanded it, that each one of these Generals should go post haste to his command. Was that a condition of things favorable to the administration of justice? I should think that even you, after you know, as you now must know all about the case, would deem it necessary to deliberate after the arguments were concluded, and to compare the evidence with the arguments to see whether on either side they were specious and fallacious, or sound and based upon the truth. You would not say:

"Why, I must be off to St. Paul by the morning train," and "I

must be off to Fortress Monroe to-night," and "I must return to my neglected cadets."

But you would say, let us look into this thing. There is a man's life at stake. The fame of an officer of the army is involved. You would require to deliberate; and if you did receive such an order, which would be impossible in times of peace, you would remonstrate—you would refuse to decide the case without a chance for deliberation.

So it does seem to me that there are circumstances surrounding the history of that court-martial which make it only fair for us to say—and even the learned Recorder will not term it libellous, that it was asking more than human judgment, and more than human nature was master of, for them to pass judicially upon the case.

Next, as to the state of facts before them. Do you believe that the court-martial knew anything to speak of about the real facts of the case? What does a soldier when he is looking for the movements of troops, first ask for? Is it not for a map of the country? Did they have a map? Yes, they had a map, and only one map. Well, was it a map? For there are maps and maps, as the Recorder knows. It was in the form of a map, but it was all wrong. You could not tell anything about the country from it. I do not think that General Pope and General McDowell and the other generals are so much to be blamed, as they sometimes have been, for the movements of that campaign; because this map, the same which was produced before the court-martial, was the only one they had to study, and they did not know anything about the country independent of the map. Now, what is the fact about this map? General Reynolds has said that it was all wrong. General Warren, who has made a special study of the subject, because he has been sent down by the War Department, detailed for the special purpose of preparing it, has given a correct map of the same region to this Board. I read from General Warren's evidence, at page 26 of the new record:

That map is so erroneous that a proper answer cannot be given to the question. I cannot recognize these roads or places or any of the streams, as corresponding to the places as they are on the map I have made, now before us.

So I think that their pole star was wrong; it was several degrees out of the way; and many a mariner might easily make shipwreck if the north star were to get dislocated and removed many degrees, or even a few degrees from its place in the heavens. Well, did they know the great main facts of the case? Did they know that Longstreet's army had arrived on the scene of action, not whether they were in

front or behind the Gibbon's woods—but did the court-martial know that they were anywhere there? Not at all. It was told them, but obviously they did not believe it. You have heard from Mr. Bullitt a discussion of the Judge Advocate's reasons, which are to be taken as the reasons of the Court and the President, and it is perfectly obvious that they utterly disbelieved and ignored the great and the leading fact in the case as it is now known. Again, did they know the real location of General Porter, with respect to Jackson's right wing, when he was expected to fall upon and consume it? Not at all. They had not the least conception of the relative positions. * * *

Well, what else was there about that Court? Why, one-half of the witnesses could not be had. Some few witnesses from—shall I be permitted to call it the "Federal" Army, in spite of the Recorder's protest against that word?—were there; but all the Confederate soldiers and generals, and other officers, were, from the "exigencies of the public service," compelled to be absent, and the Court was compelled to get along without them. It does not give a very impressive weight to the judgment of a Court, that the doors of the Court were locked, so that one-half of the witnesses could not get in. That would not pass muster, even in a case of "petty larceny," to the like of which the Recorder is sometimes disposed to degrade this examination. I think that any poor wretch who had been convicted and sent to the county jail for thirty days, for thieving, would be entitled to a new trial at once, if it turned out that one-half his witnesses could not get in, because the doors of the Court room were barred against popular entrance. That is a very important matter, indeed, in considering the weight to be given to the action of the Court.

I observe that my learned friend, the Recorder, has been inclined to draw a line between rebel witnesses and Union witnesses, to the disadvantage of the former. But he cannot raise any such issue with us, nor as I believe with this Board. I know nothing in regard to the gentlemen who have been called on our part from the confederate army, Generals Longstreet, Wilcox, Early, and Robertson, Colonel Marshall, and many others, except what is known by everybody as historical about them; they were mostly soldiers educated at this institution; and with rare exceptions, I believe the graduates of West Point are taught, and do learn, so thoroughly that they carry it with them through all their lives, to speak the truth—whatever else they learn or fail to learn, they do learn that. It is a pretty good certificate from this institution, that anybody who does not tell the truth is very apt to slip out

by the back door of the Military Academy before the day of graduation comes around. Well, I believe they were gentlemen; I believe that they were possessed of just as perfect personal integrity as though they had not been rebels.

They were just as good witnesses as the federal witnesses and no better, entitled to equal credit, and to be measured by the same standard. Their evidence all round is to be weighed in the balance, and all the witnesses alike are not to be counted, but weighed. If they were to be counted we should have got out of Court a good while ago; for after we had closed our case with the examination of forty or fifty witnesses, the Recorder summoned in a hundred. So, pray, don't count the witnesses, but weigh them.

Again, the court-martial was led to believe, and it disposed of the case upon the theory, that there was a retreat by General Porter. On this vital point it has now been demonstrated, to the satisfaction of the most skeptical, as already shown to you by the arguments of my associates, that the whole pretence of any retreat at all was without the least foundation in fact. But once more, to dwell a little longer on the errors of the court-martial, and that on a part of the case which was most essential, namely, the alleged disobedience of the 4:30 P. M. order of August 29th, the whole truth was not before them, and there was what has now been shown to have been the most palpable falsehood before them instead of the truth. I suppose that if there is one fact that now stands clear beyond—I will not say contradiction, because the Recorder can contradict anything—but beyond reasonable contradiction, it is, that that order never reached the hands of General Porter until the sun was setting at about half-past six; yet the case was passed upon by the court-martial upon the evidence before them, in the belief that it was received by him at five o'clock or half-past five. Now, everything is perverted by false evidence. No Court can stand up against perjury—no Court can stand up against mistake, or against any manner of false evidence, and if you find that they were misled by false evidence, whether intentionally false or not is wholly immaterial, it lessens the weight to be given to the judgment of the court-martial. This is also, I think, fairly to be said upon the record of the court-martial: that whatever weight was given to facts, the facts were outweighed by the opinions of witnesses—the opinions, I mean, of General Pope, General McDowell, General Roberts and Colonel Smith. If I undertake anything in this argument, it will be to demonstrate to the satisfaction of this Court, and of every thinking mind that looks

into the case, that the opinions of these witnesses cannot be treated as fair or impartial opinions; that, whether from bias or from mistake and ignorance of fact, it was utterly impossible for them to express a fair and impartial opinion. But that their opinions did carry that court-martial, there is and can be no doubt. As to both General McDowell and General Pope, with the utmost disposition to do honor to the established authorities, it is our duty in this case to demonstrate to you that if they had stated to the court-martial what they have stated since, and what one of them has stated upon oath before you, General Porter's conviction could not possibly have taken place, and he would have been discharged by that Court, not with condemnation, not with rebuke, but with honor.

Now, as to the rules of evidence applied by the court-martial, I think that, if they were overborne by popular impulse, if they were men and not gods, if their minds were biased by causes which they could not help or prevent, perhaps you would find some signs of it in their proceedings. And so, and only for that purpose, I ask you to look into the record for the purpose of seeing how they treated certain questions of evidence which are subject to well-established rules. * * *

Now, whether these and other similar rulings could have been reviewed or not in a court of law is not the question. There are many more of the same sort. They have been carefully digested in a previous paper which will be placed before this Board. I only call the attention of the Board to them for the purpose of demonstrating, as it seems to me, they demonstrate themselves, that the times were not favorable to the administration of justice by that Board upon the case and the questions that were before them; so I will not trouble the Court with any more reference to what may be called internal evidence from the record. I only claim from all these circumstances that I have now brought to the attention of the Board, that there is good ground for saying that the judgment of that court-martial, as a judgment, ought not to stand in the way of justice now on any of the questions involved in the record; that it does appear that they were not placed in a position that rendered it likely, or, as we think possible, for them to bring to bear a clear, undisturbed, unbiased, judicial mind upon the questions before them.

So, too, in regard to the opinion of President Lincoln. There is no man in history for whose opinion on a case like this, if he understood it, if the facts were before him, I would claim greater weight than for that of President Lincoln, and I believe that will be the judgment of



*Mr. Choate in 1882
At the age of 50*

the country. You will observe, in the first place, that these errors which were committed by the Court, were all involved in the record upon which it was his constitutional province to pass; and if he had examined that record and then approved the sentence, they would have been committed by him also. But we have made it clear that President Lincoln did not examine the record, that he could not have examined the record, and that he made his decision not upon the evidence, not upon any opinion of his on the evidence and the facts in the case, but upon the paper that was of a nature to mislead him, prepared by the Judge Advocate General under the order requiring a fair and judicial revision to be made of the whole evidence, but which unfortunately sets forth, only parts of the evidence, as it appears to us, in a cruel and vindictive spirit, and in a way calculated only to prejudice and poison the mind of the reader against General Porter, and against the truth. The great pressure of his overwhelming official duties, in that crisis of our country's fate, left the President no time to examine the record, and compelled him to rely, as he had a right to rely, upon what he believed to be a fair, judicial review of the evidence, but which was in fact the one-sided and embittered statement of an advocate determined upon the ruin of the accused. We proved that by Governor Newell, because President Lincoln told him so. When application was being made to President Lincoln for relief on the part of General Porter, he said to the governor, in substance, that he had not been able to read the record. Do not the dates demonstrate, with equal clearness, that he had not, and could not have done so? The judgment and sentence were pronounced on Saturday night, the 10th of January. On Monday morning the order was made by the President—this order requiring the revision for the advice and determination of the mind of the President, to be made by Judge Advocate General Holt. Yes, on the 12th, one day prior to the proceedings having been forwarded to the Secretary of War for transmission, under the law, to the president. So that the proceedings were not in the President's hands before they went to Judge Advocate Holt, or before the 19th, when his pretended review bears date. For, on the 19th, comes that extraordinary paper, which has been sufficiently reviewed and exposed by Mr. Bullitt, a paper calculated, not to lead the President to the knowledge of the facts, but to lead him away from the knowledge of the real facts; and on that he based his judgment approving the action of the court-martial. I have said before, that we were much obliged to the Recorder for calling many a witness that we did not know of, and could not have

obtained. He calls a son of President Lincoln; and if there was any doubt before about how much and what sort of weight ought to be given to the opinion of the President, it is terminated by the evidence. Is it not? What does he say? He was then a young man of 19 or 20, and his father was in the habit of talking with him confidentially. One day he found his father reading or meditating on the Porter case; and the President produced to him, what? Why, that despatch of General Porter to Generals King and McDowell in the latter part of the 29th of August, indicating an intention to withdraw to Manassas, in accordance with the injunctions contained in the joint order of General Pope. Where did he find that? Why, it was set forth in full in the opinion, in the paper, prepared by Judge Advocate General Holt. The whole fact of the retreat was there; and that was all the retreat there was; and we shall find that, instead of being a censurable purpose, it was altogether praiseworthy under the circumstances as now known, and the facts out of which it arose. But the President was led to believe, because it is so stated in that paper of Judge Advocate General Holt that there was no doubt that General Porter carried out, and acted upon the intention declared in that letter, and did retreat, believing that the rest of the army was standing its ground against destructive odds. It was in this false belief that the President evidently spoke. Now, we know, if we know anything, that the despatch to Generals McDowell and King, meant nothing of the sort, and that there was no retreat. Then what did President Lincoln say? And this shows exactly what I have said before, as to the discrepancy between the guilt imputed, and the punishment awarded. Why, President Lincoln said that if that was true,—if all those malignant statements and those perversions of testimony so insidiously set forth, in the paper of Judge Holt were true,—that it would not have been too much or too severe a sentence if General Porter had been condemned to be shot. So, when you examine that opinion and find the basis of it, you will see, that as applied to the facts and circumstances now before the Court, it is no more pertinent than if it were in reference to the case of some other officer in some other war. But the striking point in Robert Lincoln's testimony as compared with Governor Newell's, is this. The two together show how completely the mind of the President in regard to the case had been changed before his death, and how from being satisfied, and more than satisfied, with the condemnation of Porter, he had come by a knowledge of the actual facts, to the conviction that in justice he was entitled to a new trial.

THE CHARGES AGAINST GENERAL PORTER

Let me now take up, very briefly, these several charges. I propose to consider them in their order, because there is some confusion likely to creep into the case, if they are considered otherwise, as the learned Recorder has seen fit to treat them. In respect to the transactions of the 29th, he jumbled up the consideration of all the charges, irrespective of the article of war, under which they are drawn. It may be that an officer is guilty of disobedience and yet is not guilty of the heinous crime of misbehavior in the face of the enemy; running away for the purpose of abandoning the capital of his country to a rebel host, and on the other hand the accused party might be not guilty of disobedience, and yet guilty of misbehavior before the enemy. So it seems to me that accuracy of judgment can only be preserved by treating of the distinct charges in the order in which they are arranged.

In respect to the first charge, the alleged disobedience by General Porter, of the order of the 27th. I will first read the charge, and then offer a very few observations about it.

CHARGE 1ST, SPECIFICATION 1ST, DISOBEDIENCE OF 6:30 P. M. ORDER

Charge 1st.—Violation of the 9th Article of War.

Specification 1st.—In this, that the said Major-General Fitz John Porter, of the volunteers of the United States, having received a lawful order, on or about the 27th August, 1862, while at or near Warrenton Junction, in Virginia, from Major-General John Pope, his superior and commanding officer, in the following figures and letters, to wit:

Headquarters Army of Virginia,
Bristoe Station, August 27, 1862, 6:30 p. m.

General.—The Major-General commanding directs that you start at one o'clock to-night, and come forward with your whole corps, or such part of it as is with you, so as to be here by daylight to-morrow morning. Hooker has had a very severe action with the enemy, with a loss of about three hundred killed and wounded. The enemy has been driven back, but is retiring along the railroad. We must drive him from Manassas and clear the country between that place and Gainesville, where McDowell is. If Morell has not joined you, send word to him to push forward immediately, also send word to Banks to hurry forward with all speed to take your place at Warrenton Junction. It is necessary, on all accounts that you should be here by daylight.

I send an officer with this despatch, who will conduct you to this place. Be sure to send word to Banks, who is on the road from Fayetteville, probably in the direction of Bealton. Say to Banks also, that he had best run back the railroad trains to this side of Cedar Run. If he is not with you, write him to that effect.

By command of Major-General Pope.

George D. Ruggles, Colonel and Chief of Staff.

Major-General F. J. Porter, Warrenton Junction :

P. S.—If Banks is not at Warrenton Junction, leave a regiment of infantry and two pieces of artillery, as a guard, till he comes up, with instructions to follow you immediately. If Banks is not at the Junction, instruct Colonel Cleary to run the trains back to this side of Cedar Run, and post a regiment and section of artillery with it.

By command of Major-General Pope.

George D. Ruggles, Colonel and Chief of Staff.

— did then and there disobey the said order, being at the time in the face of the enemy. This, at or near Warrenton, in the State of Virginia, on or about the 28th of August, 1862.

The ground has been very fully gone over on our side, and it would be only imposing upon the good nature of the Board, if I should detain it very long. In the first place your attention has been called to the comparatively trifling nature of the charge—I mean as compared with the gross magnitude of those in respect to the 29th. It all depends upon what we believe to be an immaterial variance, utterly immaterial, of two hours in the time of starting on the march on the night of the 27th. Without any regard to discretion, to judgment, to reasons that existed to the contrary, without any regard to the circumstances of the case, the learned Recorder asks in the most defiant manner, “Was he not ordered to march at one o’clock? He was. Did he march until three? He did not. Is he guilty? Guilty.” Well, if that is the way to dispose of the charge there is no use of examining it. There is no use of a trial. He was ordered to start at one, he did not start until three. And the Board will observe that the same case might be made, if instead of being two hours it was one hour, or half an hour, or quarter of an hour. If a court-martial can convict an officer and dismiss him from the service for a variation of two hours from the time at which he was ordered to march without the least regard to the circumstances they can just as well do so, by the same summary method, for a delay of fifteen minutes.

The learned Recorder made one suggestion in this connection that rather galled me. Even on the court-martial there was a decent regard paid to the feelings of the accused. The forms of courtesy at least were adhered to. But the learned Recorder in his opening argument has suggested that this change of two hours on the night of the 27th was made by General Porter, in the hope that those two hours would bring a change of commanders, from Pope to McClellan. I do not think such a suggestion as that is worthy of this Board, or of a component member of it. Now, that I am upon that subject, let me say also this; that the observations that he made this morning, imputing a lack of personal integrity to General Porter are as gra-

tuitous as they are offensive. I do not think he would have made that after deliberation; nobody ever made any such suggestion before, as that General Porter wilfully stated falsehoods in his despatches, a charge distinctly made by the Recorder this morning. That was not the charge on which he was being tried by the court-martial or re-tried here. I shall not make any more observations about these insinuations in the further progress of the discussion, except to repeat once for all that they were very uncalled for and very painful to the feelings of the petitioner and his counsel.

As to this order of the 27th. I say, although the complaint was a trivial one, although nothing came of it, and there was no delay resulting, although, as I suppose, it was merely thrown in as a make-weight on the subsequent and greater charges, still General Porter is bound to explain it and justify it. We ask nothing that shall loosen the bands of discipline or impair the cardinal rules of the military service as to implicit obedience to orders. We claim implicit obedience, and we claim intelligent obedience; we claim actual and not fictitious and pretended obedience; we claim that a corps commander should act, and that General Porter did act, not like a machine set in motion by an order which he was not to read or interpret, but that he was an intelligent instrument of the dignity of a corps commander, invested with the functions which the military law imputes to that high grade of service. Now, what is the nature of the question? It is not, as it seems to me, whether he was ordered to start at one and did not start until three. I cannot think that that is the question. If it is, all the labor, talk, and study that has been devoted to it has been thrown away.

The question, it seems to me, is one of intent. Was his failure to march until three, an act of intended disobedience and disregard of the order, or was it a decision justifiably arrived at by him in good faith, in the exercise of his duties and his responsibilities as a corps commander, ten miles from his chief who gave it, and receiving it under circumstances which could not be known to General Pope, who gave it? If you establish the affirmative of the latter question, we claim that General Porter is completely exonerated from this charge. The Recorder has said that General Porter has no right to set up his will against that of the commanding general. Well, so we say: We say he did not set up his will, that he did not assume or pretend to set up his will. His will, his impulse, was to obey the order strictly and to the minute; but his judgment, which he was at liberty to exercise, which he was bound to exercise, required him not to move until the near approach of day.

In the first place, in regard to this order, I make one observation, and that is, that whatever may be the duties of corps commanders in the interpretation and execution of orders, they have a right to expect that all orders that are sent to them by their chiefs at a distance, shall be both intelligible and possible of execution—I mean possible within the view of the sender. Now, was this such an order? Although the Board are perfectly familiar with the order and the objects expressed upon its face, I will read it once more.

I want to ask whether you think that General Pope thought it was possible of exact execution when he gave the order. Because, if he did not, the rule of discretion conceded by the Judge Advocate and conceded by the learned Recorder comes in. Applying the test of the Napoleonic rule in respect to obedience and discretion, as to orders given by a commander at a distance, it is contended by both of those learned legal authorities that there is no discretion as to the end, although there may be a discretion as to the means. The rule is as follows:

A military order exacts passive obedience only when it is given by a superior who is present on the spot, at the moment when he gives it. Having then knowledge of the state of things, he can listen to the objections and give the necessary explanations to him who should execute the order.

The prosecution in that view, says that this order was to get to Bristoe by daylight, and if he could get to Bristoe by daylight by starting at some other hour than one o'clock, all right, no offence given or taken in changing the hour of starting; but there is no discretion as to the end. Well, suppose you have a written order of which the sender does not believe the end was possible; suppose General Pope orders General Porter to march from Warrenton Junction at one o'clock, so as to get there at daylight, when he knows it is not possible for him to get there at daylight, or when he has fair reason to believe that it is not possible for him to get there at daylight, and that General Porter on receiving it knows that, how does that affect the application of the rule as to discretion, if there is such a rule? It removes the end altogether, does it not? If the commanding general orders a corps commander to march at one to reach a certain place by daylight, knowing that he cannot do it, even by starting at one, what is the next conclusion? How is it to be construed? Why, it is to get there with all practicable speed, is it not? Now, I want to ask the Board whether they believe that General Pope, when he said start at one a. m., and get to Bristoe at daylight, thought Porter could do so. That is an important question. If General Pope

had honored us with his presence, we could have found out from the best authority. But when he stood at his post in Kansas, and said he would not come upon a request, but would come upon a subpoena, and then when he was subpoenaed said he would not come at all, and defied the summons of this Board, we have a right still to explore the case for his motives and his knowledge. And, fortunately, we are not without the means of ascertaining them. It so happens, that General Pope had gone over this very road from Warrenton Junction to Bristoe that afternoon, starting in the latter part of the afternoon and getting there early in the evening, and he knew something about the condition of the road. He did not know how it was after the wagon trains had closed up behind him, but he knew something about the distance and the condition of the road, as it was when he went over it. He was accompanied by two very intelligent and distinguished officers. He went alone with those few personal attendants, on horseback, and it took him a good while to go; I do not know how long, but more hours than he allowed to this army corps to go in the middle of the darkest night and get there at daylight. Having got there, he sends an order for this army corps to start at one, saying that it was necessary for them to be there at daylight. Now, what I say is, in the voluntary absence of Gen'l Pope, if you have the judgment of two equally competent persons, who were with him when this order was issued, and who accompanied him on that journey, you have, I think, a pretty fair means of testing whether Gen'l Pope thought it was a practicable or possible order. I refer to the evidence of Gen'l Ruggles and Gen'l McKeever, to both of which I shall ask permission to call the attention of the Court. [Mr. Choate then quoted from the record.]

Now, does not that satisfactorily establish that General Pope, when he gave that order, could not himself have deemed that it was practicable to obey it? If so, what becomes of this rule, urged by the Judge Advocate and by the Recorder, that the corps commander, in such a case, has no discretion as to the end. There is no end if the end is impossible, except the end indicated by the order as the object of calling the army corps over the road. As it has been pressed against General Porter, we have considered whether it was possible. But, further, was it quite fair and honest? It was pressed upon the attention of the President, you will recollect;—and the Court seems to have been imposed upon, to believe—that the immediate occasion of giving this order, was, because after the fight with Ewell in the afternoon, it was found that Hooker had got out of ammunition; and Porter having

ammunition, that was the reason for sending for his corps to come up; and also, because of an anticipated attack in the morning by the returning enemy. Both those considerations were urged upon the President, in the review by the Judge Advocate, and he was led to believe, as I understand, that that being the purpose for which the order was sent, was the reason for its urgency, as made known to the court-martial. Well, now, if those were the purposes, would not it have been fair to put them in the order? If General Porter was afterwards to be tried and convicted for not obeying an order, the urgency of which was that they were out of ammunition and expected an immediate attack, would it not have been fair to put one or both of those reasons in the order?

PRETENDED REASONS FOR THE ORDER

Let us see now how this matter about the ammunition and the anticipated attack stands. General Pope made a report of September 3d, which has been put in evidence, but not yet called to the attention of the Court, and it is to be found in this Board record, on page 1115. In that was the first suggestion that this order was sent on one of those accounts. There it is stated in this way, on page 1116:

The unfortunate oversight of not bringing more than forty rounds of ammunition, became at once alarming. At night-fall, Hooker had but about five rounds to the man left. As soon as I learned this I sent back orders to Fitz John Porter to march with his corps at one o'clock that night, so as to be with Hooker at day-light in the morning.

He does not say anything about any anticipated attack in the morning. But, he afterwards, January 27th, '63, made what is called his official report; and there both these circumstances for the first time appear. There, at page 18, he puts it in this way:

Thinking it altogether likely that Jackson would mass his whole force and attempt to turn our right at Bristoe Station, and knowing that Hooker, for want of ammunition, was in little condition to make long resistance, I sent back orders to General Porter, about dark of the 27th, to move forward at one o'clock in the night, and report to me at Bristoe, by day-light, in the morning.

You will observe that the order says nothing about either of these matters. The order describes a very different state of things, and of purposes. After giving directions to come, and referring to the fight that Hooker has had, the order says:

The enemy has been driven back, and is retiring along the railroad; we must drive him from Manassas and clear the country between that place and Gainesville, where McDowell is.

And these are the only purposes expressed in the order; nothing about ammunition, nothing about an anticipated attack—and for two reasons—first, he did not know when he sent the order that they were out of ammunition; and second, he had no reason for anticipating an attack, because he thought the rebels were retreating, and wanted Porter there to pursue them. Now, the Recorder says that General Pope and General Heintzelman, and all the witnesses prove, that Pope knew, when he gave the order, that Hooker was short of ammunition. I take direct issue with that statement, and say that they do not; that they prove just the contrary; that they prove that General Pope did not know of the ammunition being short, and did not know of the anticipated attack when he wrote this order. The order is dated 6:30 p. m., which is sunset; an hour after that it is dark. General Ruggles, in his testimony before this Board, says, he wrote the order and dispatched it before reaching Bristoe, where Pope arrived at dark, and then, and not till then, could he have received any report of lack of ammunition on the part of Hooker. General Pope, on page 12 of the court-martial record, says: “Just at dark.”

Very precise; this is his sworn statement:

“*Just at dark* Hooker sent me word, and General Heintzelman also reported to me, that he, Hooker, was almost entirely out of ammunition, having but five rounds to a man left.”

* * * * *

At 6:05 a. m. 28th, General Pope sent Porter a note stating that Hooker was out of ammunition, and he desired Porter to hasten forward. This note appears for the first time before this Board at Governor's Island, and is brought forward by General Porter to prove that General Pope had previously sent no such notice of lack of ammunition to Porter. This note was never received by Porter. It was published and found for the first time in a pamphlet published by General Roberts, in 1862. It is now found in General Pope's despatch book here before you, and dragged out by us. Now, is it fair for the Recorder to assert that Pope knew at 6:30 p. m. 27th, that Hooker was out of ammunition, and the sending that order to Porter was prompted in part by that knowledge?

Thus, you have all the facts and circumstances; and you have the time when Hooker communicated to Pope, and it was just at dark. There is not a particle of evidence in the case varying it from that. Writing his order to General Porter at 6:30 he does not say a word about ammunition because he knew nothing about it; and yet, in his report and on the trial, and before the President, it was imputed to

General Porter that this order was based upon the urgency of a want of ammunition known to General Pope at the time he sent it.

PORTER'S INTERPRETATION OF THE ORDER AND ACTION UNDER IT

The first thing in considering the action of General Porter under this order, as it seems to me, is to inquire how it must have been considered by him when he received it. It was brought by Captain Drake DeKay, whose evidence was taken on the court-martial. Now, what is the fact about Drake DeKay's arrival with the order, and how did he come? He came alone; he came on horseback with this order, which is regarded all around as one of great urgency, and he came as fast as he could, did he not? I suppose so. He claims so. Now, what time did he get there? The learned Recorder thinks he got there about 9 o'clock. But General Pope, in his report of the 3d of September, states the exact hour. He says:

"The distance was only nine miles, and he (Porter) received the dispatch at 9:50 o'clock."

It is said that General Porter did not know very much about the road. Didn't he? He knew that there was an aide bound to make all possible speed, coming alone on horseback over the road, starting at 6:30, that is with the advantage of the last hour of daylight, and it took him three hours and twenty minutes, which was twenty minutes more than General Pope proposed by the order to allow an army corps to go the same distance over the same road, in the darkness of midnight, afoot. Did not General Porter know anything about the condition of the road? Was not the first thing, that necessarily came to his mind, the impracticability of exactly executing the order? It seems to me that is beyond all question. What else came with it? Why, DeKay complained that the road was obstructed, and of the great difficulty he had had in getting through. Now, if he had had great difficulty in getting through alone on horseback, because of the obstructions of the road, General Porter at once saw that to an army corps going without any light whatever on foot, and with their artillery as they were required, it was an impossible order. What was his first impulse? There is a great deal of talk about animus in this case. The first words that an officer utters when he receives an order have a very strong bearing upon the question of animus. He says, this order must be obeyed; General Pope who gives it knows what he wants. Let us start at once! To whom does he say that? To his division commanders; all men of character and unquestioned loyalty and integrity, Morell, Butterfield and Sykes.

Some criticism is made as to the manner of the petitioner, whether he read the order aloud, or whether he handed it to each one of them, or whether they knew its entire contents. But General Butterfield says he handed it to Sykes or Morell; and I think General Warren says the same thing. And Mr. DeKay says, that they discussed the subject matter: he told them what had happened, and that he was sent to guide them back.

Now comes the question of discretion. These division commanders, all three of them instantly united in a common protest against starting at one o'clock. And on what ground? Because of the jaded condition of their troops, taken in connection with the impenetrable darkness of the night, for it was impenetrable at that time, and the blocked condition of the road, it being absolutely blocked up with wagons. Wagons had been rolling through there all day on the retreat to Alexandria, as specified in the orders of General Pope, which I will presently read to you. Now, it seems to me that the question which is presented in a military sense (and on that I speak with infinite distrust), is this: When the division commanders who are charged with the responsibility for the welfare and condition of the troops and the performance of a march, unite in such a protest on such ground, ought their protest to be taken into consideration? There is the test of the guilt or innocence—of the alleged disobedience. Ought such a protest to be taken into consideration? Well, General Porter thought it ought. And if it ought, who is to consider it? Who is to say, whether in view of the jaded condition of the troops, or some of them, and of the infinite darkness of the night, and of the absolute blockade of the road, who is to pass upon that question, or is it not to be passed upon at all? Is it to be considered, and if it is to be considered, who is to consider it? General Pope, who gave the order, cannot consider it; he is ten miles away, and does not know these circumstances. If you answer the question, yes, that it is to be considered, the whole question of disobedience passes away, for General Porter is the only man left to consider it; the rules of war place him there as the substitute of General Pope. That is the way it appears to me. You will observe that while it is an absolute and peremptory order, if you please, to start at one and get there by daylight, yet it gave the reasons why his presence with his corps was wanted. On this question of whether he ought to consider the protest of his division commanders in view of the terms of the order, what the order says as to what he was wanted for, as it seems to me, comes in:

"The enemy has been driven back; but is retiring along the railroad. We must drive him from Manassas, and clear the country between that place and Gainesville, where McDowell is."

He was wanted, then, to be there, not at daylight—not at all; General Pope, as we have seen, never could have suspected it possible for him to be there at daylight; he was wanted as early as he could get there in the morning to pursue the retreating rebels, and sweep the country between Manassas and Gainesville.

Now, was it the thing, in a military point of view, for a corps commander so situated, receiving such a protest on such a ground from his division commanders—was it right for him to take the protest and the circumstances into consideration, in view of what he was wanted at Bristoe for? Well, we submit that it was. We submit that just that protest, on just those grounds, raised the question, whether he could be there so as to fulfill the purposes for which the order said he was wanted—not his own ideas, not his own purposes, but General Pope's statement of what he was wanted for. If you find first, that it was right for him to exercise that judgment; second, that he exercised it in good faith; and third, that he exercised it on fair and reasonable grounds and knowledge, he must stand acquitted. It does not seem to me that there can be the least doubt, regarding it as a question of law or military science, or common sense. I suppose that in your profession, as in ours, great questions of law, and great questions of military duty, alike depend upon the dictates of common sense, and are governed by them.

Now look at the ground of protest as bearing upon the objects of the order, as stated in the order. What kind of obedience did it call for? Did it call for General Porter to plunge his corps into the absolute darkness of midnight, at one o'clock, and throw them into inextricable confusion, and set them floundering about in camp, or at the first run, so that they could not be extricated until after daylight, and so that they could not start on the road until long after they had broken camp. I suppose that it called for an effectual, serviceable obedience. That is what common sense dictates. That is what we suppose military laws and regulations require. General Porter heard the protest. What did he know that General Pope did not know? Well, he knew the condition of the road as Drake DeKay, the messenger, found it. He knew the condition of the road, as his officers knew it; as his aides-de-camp, Captains Monteith and McQuade, who had been sent out for the purpose, had reported to him. And then,

as to the condition of the troops. General Pope had not made any inquiries about that; there is not the least scintilla of evidence in the case, that he had any knowledge whatever about it. Well, these troops that had been making day and night marches all the way from Acquia creek—their condition is not to be tested by a question of how many hours and minutes they had been in camp that day, or that night, but upon the knowledge and honest judgment of their direct and immediate commanders, exercised in good faith, as to their condition. The Recorder says, that the direction of the order was, that Sykes should come alone. That was not so. Sykes was not to come alone. Nobody was to come alone; if Morell was not there, Sykes was to come alone; but if Morell and Sykes were together there, as the proofs show that they were, then the order is imperative—"The Major-General commanding directs that you start at one o'clock to-night, and come forward with *your whole corps*."

THE CONDITION OF THE ROAD

Briefly, as to the condition of the road. The evidence on this subject is very full. So fully has it been developed that I will not refer to it. I understand the substance of the evidence to be, that there were between 2,000 and 3,000 army wagons upon the ten miles of road. In one respect it will be seen that this case differs from its attitude before the former court upon this question; the Government has abandoned the pretence, that he could have gone along the railroad, because, I suppose under the evidence of McKeever and Ruggles, the Recorder thought it was idle to make any such claim as was claimed before. Well, then, it was a common dirt road, and not a turn-pike; running partly through the woods, and blocked up with 2,000 or 3,000 army wagons, which, if stretched out one by one, would occupy 24 miles in length; and if they were doubled up it is very difficult to say how even a horseman could get through without the greatest difficulty, as Drake DeKay found when he undertook to come alone.

DARKNESS OF THE NIGHT

The character of the night also has been pretty amply developed. If ever there was a dark night, it appears to me, from the evidence, that this of the 27th of August, 1862, was it. They say that there were other marches that night. Yes; there were. There was the march of King's division. I should think a dozen privates had been brought here from Gibbon's brigade, King's division, to say how they marched

that night. Do you recollect the evidence of General Patrick and General Gibbon about it? They were terminating a march that night, floundering and straggling along, going into bivouac at 10 or 11 o'clock. The evidence of General Patrick, is that he had to stretch a line of men across the road, in order that the troops might be stopped as they came along and turned aside, for it was not possible for them otherwise, to see that those in advance had stopped. Then it is said that Lieutenant Brooke made a ride from Pope's head-quarters to Greenwich, with a troop of sixteen men, to carry an order to General Kearney and another to Reno. Yes; he did. How did he do it? Riding on an unobstructed road it took him three hours and ten minutes to go four and a half miles. There is also another very significant piece of evidence in the case, because it is the testimony of one of the main witnesses for the government; Lieutenant-Colonel T. C. H. Smith went out on a scout, as he calls it, and he made five miles between one o'clock and six o'clock. He says he was scouting for rebels, but I don't think he was. I think he was scouting for General Porter; for he says that he came around soon after day-light or about six o'clock, at a distance of two or three miles from Bristoe, whence he had started; and then and there saw the head of the column come up, with General Porter at the head. Colonel Smith was, as you know, one of the most malignant of witnesses against General Porter. But he confessed that there was that night, beginning at 9 o'clock or thereabouts, and extending until 11 or 12 o'clock, a storm of darkness that exceeded anything he had ever witnessed; the darkness was absolute; he could not see his hands before his eyes; what eyes he has the Board know; because it was those marvellous optics that saw treason lurking in the eye of General Porter, on the next day, the 28th of August. The darkness, according to him, was total. He says it is true, that at one o'clock, when he started out, it was not so dark; that he could see the forms of the houses and fences in Bristoe; but he forgot to add what we called out from him on further examination, that the light of the fire at Manassas that was made by Jackson burning our ham and bacon and flour in such immense quantities was still perceptible, but even that light was extinguished by the Cimmerian darkness of the storm between nine and twelve o'clock. Now, there is something singular about this. When General Porter was called upon to act upon this order, it was right in the middle of the Egyptian darkness of that night, as depicted by Lieutenant-Colonel T. C. H. Smith. I do not think the Recorder had ever considered that when he pretended there

was not any new evidence in the case on the subject of the darkness of the night.

Another suggestion was made by the learned Recorder. I must admit that it would be unfair to ask any lawyer or military man to charge his mind with all the proof in this case. It is not possible. No man's skull is large enough to carry it all, and, therefore, I do not blame the Recorder for forgetting it. But he would not have asked the question that he did ask if he had remembered the evidence. He asks, why did not General Porter send back word to General Pope that he was not going to start until daylight, and his reasons for not starting? Well, the answer is, he did. After a lapse of sixteen years, when we have such an infinite variety of facts brought out with such perfect clearness, it is one of our grievances, that we still lack four things, four links in the perfect chain of proof, I refer to the failure of General Pope to produce the three despatches which he received on the 29th from General Porter, and the despatch that he received on this night of the 27th, when General Porter, at the close of the deliberations of his council of war sent a written message by special messenger to General Pope, declaring that he could not start, and why he could not start, at one o'clock, the hour mentioned in the order, and when he was going to start. That is so important that I want to call the attention of the Board to the evidence on the subject. General Pope, at page 13 of the court-martial record, testified as follows:

Q. Did he at that time, or at any time before his arrival, explain to you the reason why he did not obey the order?

A. He wrote me a note, which I received, I think, in the morning of the 28th, *very early in the morning, perhaps a little before daylight*. I am not quite sure about the time. The note I have mislaid. I can give the substance of it. I remember the reasons given by General Porter. If it is necessary to state them I can do so.

And on page 27:

On the contrary, from a note that I had received from him, *I did not understand that he would march until daylight in the morning*.

Q. Have you, sir, in your possession, or can you readily find in this city that note?

A. I cannot, as I stated in my evidence yesterday. As the same statements contained in the note were made to my aide-de-camp, if other testimony on the subject is necessary it can be got from him.

Q. When you received the note which, according to your recollection, stated that he would be unable to march, or would not march, until daylight, will you state at what hour you received it?

A. I think that, in my testimony, I stated that it was quite late in the night. I do not remember exactly the hour; I think towards morning—towards daylight; perhaps a little before that.

Q. Did you take any steps, by message, or order, in another form, to the accused to expedite his march?

A. I sent back several officers to try and see General Porter and request him to hurry up.

Now, he sent back several officers, because of the answer he received from General Porter. He also says that this note expressed the reasons of the change in the execution of the order. We do not accept General Pope's statement that he mislaid this order. He had no right to mislay it. If he mislaid it he should have found it. It is not for the general commanding an army to come into Court and say that he has mislaid or destroyed his despatches when he is seeking the condemnation of an officer in respect to matters which would be explained if those despatches were produced. General Ruggles has testified that when he ceased to be chief of staff of General Pope, on leaving Washington at the end of that campaign, General Pope required him to hand over all his despatches, which he did; and he says all were preserved. General Smith, who was aide-de-camp to General Pope, in the same capacity, testified as positively that he handed over to General Pope all the despatches that he had had. The learned Recorder has quoted a good deal of Latin. I will give him a sentence: "*Omnia presumuntur contra spoliatores*," a favorite maxim of law, that all things are to be presumed against the destroyer of evidence. There never was a more outrageous pretence or claim made than this, to condemn General Porter for disobedience to an order, and for not explaining the nature of his reasons for that disobedience when the commander has destroyed or mislaid the note which he received, stating why the order could not be obeyed.

I say there was no delay, no time lost. But suppose that instead of this intelligent obedience and this rational exercise of the functions of a corps commander, having in view the carrying out of the expressed purposes of the order in the best way in which they could be accomplished, he had floundered out at one o'clock as the order required, knowing that he could not, by so doing, get there at daylight in this darkness, as described by Colonel Smith, that they had been involved in the inextricable confusion incident to such starting, and instead of getting to Broad Run, with the head of the column, at eight o'clock, as did happen, the corps had been delayed so that the head of the column did not get there until ten or eleven o'clock; he would have appeared to obey the order and he would not have obeyed it. Would not he have been culpable? I am not competent to answer the question. I put it to you as military men; would not he be blamable for

making a pretended obedience to the order, and not a real and intelligent obedience, if it had resulted in a delay that had thwarted the objects of the order as indicated on its face.

The Recorder has referred to certain worthless evidence on this subject, of one Buchanan. Buchanan says, that he was in front of Porter's headquarters at 3 o'clock and there were no signs of life, till after break of day, and that he waited there and saw nothing of Porter till after sunrise; but it turns out from the evidence of Locke and Monteith, who were in personal contact with Porter, that General Porter was already out upon the road endeavoring to clear it to expedite that march in the dark. Then Solomon Thomas, corporal Thomas, who is always brought in when the Recorder don't know whom else to appeal to—he is brought in to say that they did not start as soon as they should; but it turns out on his cross-examination that he says they did start at one o'clock A. M., and did not get to Bristoe until two o'clock the next afternoon.

I call the attention of the Board to another matter, which seems to me to be worthy of consideration.

Several very eminent legal gentlemen have expressed to General Porter their views upon this case; and if the Board will permit me, I would like to read a short extract from the opinion of Charles O'Connor, which seemed to me exceedingly sensible and entitled to the greatest consideration, and we will treat it as an offset to the opinion of the Recorder. [Quotes Mr. O'Connor's opinion.]

[The Board then, at 6 o'clock, adjourned until tomorrow morning at 10 o'clock.]

West Point, January 11, 1879, 10 a. m.

The Board met pursuant to the foregoing order and adjournment.

Mr. Choate resumed his argument on behalf of the petitioner as follows:

In reference to the subject of the state of public feeling at the time the prosecution of General Porter was initiated, and to the distress and excitement, especially of the authorities at Washington, where the public feeling culminated, I omitted to read a passage or two from the report of General Pope to the committee on the conduct of the war. I wish to read this morning from page 166 of that report, where he describes the origin of the complaints—I will not say the beginning of them, but where they take shape in official form, presented by the commanding-general of the Army of Virginia to the authorities at Washington. It is in a despatch written by him on the 1st of Septem-

ber, at Centreville, and addressed to Major-General Halleck, General-in-Chief. He says:

I think it my duty to call your attention to the unsoldierly and dangerous conduct of many brigade and some division commanders of the forces sent here from the peninsula. Every word and act, and intention, is discouraging, and calculated to break down the spirits of the men and produce disaster. One commander of a corps, who was ordered to march from Manassas Junction to join me near Groveton, although he was only five miles distant, failed to get up at all—worse still, fell back to Manassas without a fight, and in plain hearing, at less than three miles distance, of a furious battle which raged all day. It was only in consequence of peremptory orders that he joined me next day; one of his brigades, the brigadier general of which professed to be looking for his division, absolutely remained all day at Centreville, in plain view of the battle, and made no attempt to join. What renders the whole matter worse, these are both officers of the regular army, who do not hold back from ignorance or fear. Their constant talk, indulged in publicly and in promiscuous company, is that the Army of the Potomac will not fight; that they are demoralized by withdrawal from the peninsula, etc. When such example is set by officers of high rank, the influence is very bad amongst those in subordinate stations. You have hardly an idea of the demoralization among officers of high rank in the Potomac Army, arising in all instances from personal feeling in relation to changes of commander-in-chief and others. These men are mere tools or parasites, but their example is producing, and must necessarily produce, very disastrous results. You should know these things as you alone can stop it. Its source is beyond my reach, though its effects are very perceptible and very dangerous. I am endeavoring to do all I can, and will most assuredly put them where they shall fight or run away.

Now, to see what effect these words had, (and by and by we shall be able to judge what measure of truth there was in them,) the effect appears in the same report at page 189:

I made my personal camp at Ball's Crossroads, and on the morning of the 3d of September, repaired to Washington, with a few officers of my staff, and reported in person to the General-in-Chief, the Secretary of War, and the President. Each one of these high functionaries received me with great cordiality, and expressed in the most decided manner his appreciation of my services, and of the conduct of my military operations throughout.

Great indignation was expressed at the treacherous and unfaithful conduct of officers of high rank, who were directly or indirectly connected with these operations, and so decided was this feeling, and so determined the purpose to execute justice upon them that I was urged to furnish for use to the Government, immediately, a brief official report of the campaign. So anxious were the authorities that this report should be in their possession at once, that General Halleck urged me to remain that day in Washington to make it out. I told him that my papers, despatches, &c., were at my camp, near Ball's Crossroads, and that I could not well make a report without having them by me. He still urged me to remain with great persistence, but I finally returned to my camp, and proceeded to make out my report. The next day it was delivered to General Halleck, but by that time, influences of questionable character, and transactions of most unquestionable impropriety which were well known at the time, had entirely changed the purposes

of the authorities." It is not necessary, and perhaps would scarcely be in place, for me to recount these things here, and I shall therefore only speak of results which followed. The first result was that my report so urgently demanded the day before in order that the facts might at once be laid before the country and made the basis of such action as justice demanded, it was resolved to suppress. The reason for this change of purpose was sufficiently apparent. The influences and transactions to which I refer, seemed to the authorities to make it essential to the temporary interests of the government, that General McClellan should be reassigned to the command, and as a result, that the bad faith and bad conduct which the government was so anxious the day before to expose, should, at least for the present, be overlooked.

Here we have it clearly stated and confessed by General Pope himself that the alarm and distrust which his despatch of September 1st, from Centreville, excited in the mind of the Government at alleged treachery and infidelity among the generals of the army of the Potomac led directly to the avowed purpose of executing justice upon them, or at least, as the event showed, of finding a victim among them, and that it was to reports and information to be furnished, in hot haste, by General Pope, the author of the charges, that they looked for material upon which to base and conduct a prosecution. If General Porter was really innocent, and if those were the motives in which his prosecution originated, and which sustained and carried it through to the end, then we are not without proof upon the record of the truth of what has been so often observed, that General Porter stands in the position of a scape-goat for the calamities that had overwhelmed the people and the transgressions which had been committed, or which were supposed to have been committed, not by him, but by others. And that that matter may be tested, I have looked into the original authority to see what the real character of the scape-goat was; and for that purpose I beg leave to read three or four verses from the 16th chapter of Leviticus, where the matter is fully set forth.

And Aaron shall cast lots upon the two goats; one lot for the Lord, and the other lot for the scape-goat.

And Aaron shall bring the goat upon which the Lord's lot fell, and offer him for a sin offering.

But the goat on which the lot fell to be the scape-goat, shall be presented alive,—which may account for the failure of the court-martial to sentence him to be shot,—before the Lord, to make an atonement with him, and to let him go for a scape-goat into the wilderness.

And Aaron shall lay both his hands upon the head of the live goat, and confess over him all the iniquities of the children of Israel, and all their transgressions in all their sins, putting them upon the head of the goat, and shall send him away by the hand of a fit man into the wilderness.

And the goat shall bear upon him all their iniquities unto a land not inhabited; and he shall let go the goat in the wilderness.

And he, that let go the goat for the scape-goat, shall wash his clothes, and bathe his flesh in water, and afterward come into the camp.

Now, who is the Aaron of this dramatic performance may easily be conjectured; and how can there be much more doubt as to who fills the role of the man who let go the goat for the scape-goat out into the wilderness; for it was he *who thereby secured the washing of his own hands and returned into the camp, by which, I understand, that he continued in the military service of the United States.*

OPERATIONS OF AUGUST 29

Now, we reach the matters of the 29th of August, which I shall endeavor to dispose of as briefly as possible.

The situation on the morning of the 29th of August is best displayed by the despatches of General Pope, and whatever we can extract from those, certainly the Recorder will not object to. The movement of that day originated with a despatch from General Pope, at a very early hour in the morning, an hour which he is fond of describing as the earliest blush of dawn—3 a. m. The situation then was, that General Porter was at Bristoe with his corps, where he had been directed the day before to wait and rest his troops, their fatigued condition being recognized by the general in command. General Pope had gone on expecting to concentrate his forces, as I understand, at Centreville, behind Bull Run, excepting those, which, as he then thought, lay between General Jackson and Thoroughfare Gap, consisting of McDowell's and Sigel's troops. He was of the belief that, if he had a fight, it should be, certainly, somewhere between Gainesville and Centreville; and I think the despatches will show you that he expected to have this fight behind Bull Run. Now, quite a contest has been made here as to whether General McDowell disclosed to General Porter, that that was the original purpose that morning of the commander-in-chief, or whether that had been his view on the previous day. But, if the despatches of General Pope show you that he expected the fight to be at Centreville, which is behind Bull Run, all that controversy falls out of the case. He sends, at three o'clock in the morning, from his head-quarters near Bull Run, this despatch to General Porter:

General McDowell has intercepted the retreat of Jackson; Sigel is immediately on the right of McDowell.

He was in entire unconsciousness of the retreat of McDowell's force from behind Jackson, although it had then actually taken place two hours before.

Kearney and Hooker march to attack the enemy's rear at early dawn: Major-General Pope directs you to move *upon Centreville* at the first dawn of day, with your whole command, leaving your trains to follow. It is very important that you should be here at a very early hour in the morning. *A severe engagement is likely to take place*, (that is, of course, at Centreville,) *and your presence is necessary*.

The Recorder has laid great stress upon this statement in the despatch, that a severe engagement is likely to take place, and that General Porter's presence was necessary. So do I. But in a different direction, I call it to the attention of the Board, as declaring as emphatically as words could declare that he expected Porter to be then at Centreville, for the purpose of taking part in an engagement to be had there. That was, undoubtedly, his expectation. The heights of Centreville was the place where he might hope, if he could find Jackson there, for a successful engagement, as Jackson had McDonnell and Ricketts behind him. It so appeared, however, that at midnight of the previous day, the whole groundwork of the movement contemplated by this despatch, without his knowing it, had fallen out: instead of McDowell having intercepted the retreat of Jackson, that had failed, and his force, as I have said, and as it has been so often said, had moved away, leaving the way open behind Jackson, at a time too, when everybody knew that the main army of Lee was pressing forward to join him, and was coming through Thoroughfare Gap. Now, the Board will observe that the suspicion had not yet reached General Pope, and no rumor had reached him, that McDowell was not, where this despatch places him, behind Jackson, cutting him off from any relief from the west. General Porter proceeded with the execution of that order. He advanced from Bristoe as soon as could be done after the receipt of this order, in the direction of Centreville, and his force arrived at Manassas Junction, or Manassas Station, or a little beyond; and he, himself, reached Bull Run, or very near Bull Run, where it has been testified he found a messenger from General Pope that morning.

The Recorder has somewhat gratuitously, I think, indicated that there was some delay in the execution of this order on the part of General Porter. It does not seem to me so, and it is not worth while to discuss it. It has been ably and fully discussed by Mr. Malthby. I challenge a careful inspection of the record, to bear me out in the proposition that this order was faithfully carried out by General Porter to the best of his ability, and that he was making rapid headway to the point to which he was directed, to Centreville, there to take part in a severe engagement, expected by General Pope to take place, when

the whole movement in that direction was counteracted by the receipt of the next despatch, which turned him to the right about face to go back upon the road upon which he had come, and to proceed upon Gainesville—the explanation of this being, of course, that General Pope, in the meantime, between 3 A. M., when he wrote the despatch, which I have already read, and about 8 or 9 o'clock, when he wrote this next despatch, which I am about to read, had received news of the catastrophe which had taken place by the falling back of McDowell's force from behind Jackson. You will see that General Pope, in those six hours, had got from near Bull Run, where his headquarters were during the night and at 3 A. M., to Centreville, where this was written, probably at about 8 o'clock—from 8 to 9 o'clock.

Centreville, August 29th, 1862.

Push forward with your corps and King's division, which you will take with you upon Gainesville. I am following the enemy down the Warrenton turnpike. Be expeditious, or we shall lose much.

John Pope, Major-General Commanding.

Major-General Fitz John Porter.

It is observable that in this order there is no mention of General McDowell. The first despatch had stated that McDowell had intercepted the retreat of Jackson. This despatch, giving a new direction to the movements of Porter's corps, because of the departure of King's force from the turnpike, makes no reference to McDowell, or his great army corps, except what is implied in the order to Porter to take King's division with him. Now, the first question is, what was the reason of that? The reason is manifest in the conspicuous fact upon this record, that McDowell at that moment was lost—lost to the commanding general, lost to the army, lost to all the world, and had been lost since 4 o'clock on the afternoon before; and it was necessary that King's division which had fallen back in the immediate neighborhood of Manassas Junction, where Porter was, should be put under competent command, and it was therefore placed under the command of General Porter. The true and touching story of this loss of General McDowell is demonstrated by a map which I propose to offer as a part of my argument, showing the movements of McDowell personally from four o'clock on the afternoon of the 28th, until midnight, or after midnight of the 28th, and where he was during that most important period, while his troops, in defiance of positive orders, were abandoning the very key of the Federal position, and throwing away the only chance of the capture of Jackson. His testimony is, that before the fight, on the turnpike between King's division and Ewell's on the

evening of the 28th, being evidently in a state of great anxiety in consequence of the situation, he went in search of General Pope, and he went for the reason that he was better informed as to the situation than General Pope, and that General Pope would be benefited by a little conversation with him. That, I believe, is his exact language. He started out at 4 o'clock from a place on the turnpike a little west of where the fight of the 28th was; and he made this remarkable ride which will rank in history with Sheridan's ride, although under different circumstances.

[The map was here explained to the Board.]

Thus the temporary disappearance of General McDowell is the obvious reason for this order to put his troops under the command of General Porter.

Now, the immediate military object of this order is one upon which I take issue with the Recorder. The Recorder says, that the intent was to get this force of King's division, which had retreated from the turnpike, increased by Porter's corps to which it was now added, back to the very place of the battle of the night before between King and Ewell's force, which we will suppose to be Gibbon's woods, a very familiar ground to us now through the map, and on the pike just west of Groveton. Well, I do not know what military object there could have been in getting them back there, if he wished to retrieve the position that had been lost the night before by their retreat, because the enemy were then understood by everybody to be in possession of that battleground, from which our forces had retreated. No; the object of the order is evident to everybody. As has been asserted here, on our part, and as has always been asserted by General Porter—you will find it in his preliminary statement—it was to get this increased force back behind the rebel position, between them and Thoroughfare Gap, between them, and if possible, Gainesville, and at Gainesville, which was the commanding position of the whole situation. There has been an attempt made to show by General Gibbon that it was to put the increased force right back into Gibbon's woods; and you know that the whole argument of the Recorder on this point was, that when he got to Dawkin's Branch, Porter was pointed a way proceeding straight up to Gibbon's woods, and that he ought to have gone there. General Gibbon does not say any such thing. * * *

[The evidence] shows that General Pope understood perfectly well that it was not any small detachment of the rebel force that was pressing through Thoroughfare Gap to relieve Jackson, but that it was the

main army of Lee, from which Jackson's force was a detachment. General Porter received this order at Manassas Station, or thereabouts, and just then, singularly enough, General McDowell appears. Well, what was the situation? It has been claimed that they fell under that article of war which provides that where forces under different commanders are united upon a march, accidentally or otherwise, the senior in rank takes command. That was not the situation. General McDowell had no troops. King's division, which was the only one of his corps that was then there, had been given to Porter, and he, under his responsibility as corps commander, had been compelled to take command of it with his own. The conduct of both generals shows perfectly well that that was recognized, although I know that General McDowell has intimated an opinion that he did have command or might have commanded. Not so. Because, if he claimed command, why did he not lead the column? Why did he ask Porter, as a favor, that he would put King on his right in forming his line, so that he could have him when General Pope said so? Why did he linger behind at Manassas Station when there was this important order, important upon its face, to move on Gainesville and be expeditious or they would lose much—why did he linger at Manassas Junction? That is fully explained from his own testimony, and from Pope's testimony, namely, that he was impressed with his situation and fully realized it; that while he might be senior in rank to General Porter, yet King's division had been taken from him and turned over to Porter, just as these important movements were taking place. How distasteful this was to McDowell, and how embarrassing to Porter appears from their interview near Manassas Station. You can conceive how awkward and trying it was to both of them; under what restraint it necessarily placed both of them; how embarrassing to McDowell; and how ten times more so to General Porter. Well, General McDowell, to cure that, writes his note to General Pope, protesting against King's division being taken from him, and asking that it might be restored; and then from that follows the joint order, the violation of which is the subject now under consideration.

THE JOINT ORDER TO MCDOWELL AND PORTER

Headquarters Army of Virginia,

Centreville, August 29, 1862.

You will please move forward with your joint commands towards Gainesville. I sent General Porter written orders to that effect an hour and a half ago. Heintzelman, Sigel and Reno, are moving on Warrenton turnpike, and must now be not far from Gainesville. I desire that as soon as communica-

tion is established between this force and your own, the whole command shall halt. It may be necessary to fall back behind Bull Run, at Centreville, to-night. I presume it will be so on account of our supplies. I have sent no orders, of any description, to Ricketts, and none to interfere in any way with the movements of McDowell's troops, except what I sent by his aide-de-camp, last night, which were to hold his position on the Warrenton pike, until the troops from here should fall on the enemy's flank and rear. I do not even know Ricketts' position, as I have not been able to find out where General McDowell was, until a late hour this morning. General McDowell will take immediate steps to communicate with General Ricketts, and instruct him to join the other divisions of his corps, as soon as practicable. If any considerable advantages are to be gained by departing from this order, it will not be strictly carried out. One thing must be held in view, that the troops must occupy a position from which they can reach Bull Run, to-night, or by morning. The indications are that the whole force of the enemy is moving in this direction at a pace that will bring them here by to-morrow night, or the next day. My own headquarters will for the present be with Heintzelman's corps, or at this place.

John Pope, Major-General Commanding.

Generals McDowell and Porter.

This joint order was not received until General Porter had reached the front at Dawkin's Branch, and the messenger who brought it, Dr. Abbott, declared that, bringing duplicates of it, which he took from General Pope about ten o'clock in the morning, he found General McDowell somewhere between Manassas Junction and Dawkin's Branch, and delivered him his copy and then rode rapidly on to Porter, found him at the head of the column at Dawkin's Branch and gave him his copy. They were about a mile apart. That would very nearly account for the situation, because General McDowell says that at that time, at least, a full brigade of King's division marching behind Porter's had passed Bethlehem Church and had got out, as I understand it, very near the Five Forks road, which the Recorder has now made the wonderful discovery was a road which somebody ought to have taken. Now, when General McDowell and General Porter were together near Manassas Station, and had this unpleasant talk—of course, it must have been unpleasant to both of them, nothing could have been more disagreeable—General McDowell then declared his willingness to recognize the situation, stating that King's division had been taken from him and given to General Porter, and expressed the wish that Porter, when he formed his line of battle, would place King's division upon the right of him, so that it would connect with his own force, which was understood to be south of the Warrenton pike, or up at the Warrenton pike in the neighborhood of Groveton. Now, when General McDowell gets his copy of the joint order he rides immediately forward, as he says, and overtakes General Porter. How soon he

reached Porter, after the joint order reached Porter, you can imagine; because the messenger was only a mile away and he followed the messenger, and must have reached General Porter almost immediately with the joint order.

Before considering the question of the joint order, and as there is no fault found with Porter's conduct up to the time, at any rate, of the receipt of that order, and as there has never been any complaint of his execution, so far as he could, of this previous order to push forward with his own force and King's division upon Gainesville, I want to call the attention of the Board to what he did under that order, before the receipt of the joint order, because it seems to me that is very important—it discloses to us the military situation at which he had arrived, and the animus which inspired him under that order, under his instructions to move upon Gainesville. Now, if Porter had any intention of holding back that day, it seems to me that is the time when he would have manifested it, is it not? But what happened? In the first place, it is necessary to understand the point at which he had arrived. General Warren has fully described to the Court his knowledge of the situation, and the Board has knowledge of it, as depicted by the map, and this makes it unnecessary for me to describe the stronghold at Dawkin's Branch, which Porter had reached, or that other similar stronghold, on the other side of that Branch, which was already in possession of the army of Longstreet. Beyond the valley was this other commanding situation, not unlike that at Dawkin's Branch, which he had already reached, and the bed of which stream was the dividing valley. To the right stretched the ravine, through which the stream continued, and an open space beyond that spread onwards towards Groveton, fully commanded in all its parts by the batteries of Longstreet from the opposite stronghold which he occupied. Not all known to General Porter, of course, for he had never been there before, but sufficiently known, as a glance at the map will show, to enable him to realize the importance and strength of that position, which he had reached, and of the similar position in front of him, which the enemy already held. Then, it appears, they halted. Has that halt ever been complained of? Not in the least. McDowell says: "That up to twelve o'clock," which must have been from half-an-hour to an hour after the halt, "Porter's movements were unexceptionable." What kind of a halt was it? Was it ordered by General Porter? That does not appear. But the reason appears: it was that necessary, spontaneous, involuntary halt that any column of

troops, I suppose, makes, when they come into the actual presence of the enemy, placed in a position corresponding and opposite to that which they had themselves reached, and which, in this instance, was quite as inaccessible to Porter, as Porter's own position on Dawkin's Branch was inaccessible, in a military point of view, to the enemy across the stream. Now, what does General Porter do? You will observe that there is a good deal of time from the arrival of General Porter at the head of his column at Dawkin's Branch—he was near the head of the column when it halted—there is a good deal of time between that and General McDowell's arrival, and the arrival of the joint order. He is not yet under the directions of the joint order. His direction was to move upon Gainesville by the order under which he was then acting. The road was the road to Gainesville. What did he do? He prepared, as I suppose any wise commander would, to move upon Gainesville, according to the order—to continue to move upon Gainesville. He deployed his leading division, Morell's, on the right and left of the road, he had Sykes' division then drawn up in column behind Morell; he sent General Butterfield with his brigade across Dawkin's Branch, where this enemy was in sight upon the opposite hill; he sent out his line of skirmishers under Colonel Marshall. That was the situation when the joint order and General McDowell arrived.

Now, was that right? Did that show zeal and earnestness and skill on his part? It is for you to judge. General McDowell testifies emphatically that it was all right. Now, the issue between ourselves and the Recorder is right here; he says that without and independent of the joint order, Porter was under orders from McDowell to march to the right to Gibbon's Wood, where Jackson's right wing lay, and that he should have done so instead of pressing forward as he did towards Gainesville as he was ordered by General Pope to do, which could only be done by the movement which he had already organized before McDowell's arrival upon the enemy in his front; there, says the Recorder, was his mistake; that duty required him to march up this road, as he calls it, from Deats to Groveton, a road which is no road, a road which I think is a fiction of the Recorder's imagination. General Warren, when he went to make a map, found none there; I do not understand that the Recorder, when he went to make his personal inspection, found any road there; but somebody told him there had been a road there, so he marked it down upon his map. It is not at all material, as it seems to me, for the deciding of this issue, whether there was a road there or not. If there was no enemy op-

posite, the country was all one road, for all the way to Gibbon's Wood was open, and this resort to an imaginary road is wholly unnecessary; but on the other hand, if there was an enemy in force upon the opposite rise of ground then it does not matter, I suppose, whether there is or ever was a road there or not. If there was a road, we suppose they could not march by the flank exposed to this enemy in force upon the opposite rise. * . * . *

We are content to rely upon the testimony of General Warren in the obvious situation upon the stronghold that General Porter had arrived at, as demonstrating the entire propriety of his movements before the receipt of the joint order, and before the arrival of McDowell; and so clear is it, as we suppose, to military men, that Porter's actual movements were dictated by the highest military intelligence and skill, that it is the reason why McDowell has always said that Porter committed no fault until after his own departure from the scene, and everybody connected with the case heretofore has admitted that that is so. But now for the first time the learned Recorder advances the theory that all this is wrong; that independent of the joint order, independent of anything, independent of having that interview with McDowell, and especially after that interview, that it was Porter's duty to have marched to the right immediately on arrival at Dawkin's Branch, and to occupy the battle ground of the night before, because the purpose of the order was to move to Gibbon's Wood, the scene of the last night's fight. Now, the Recorder can fight a very good battle, if you get the enemy out of the way, I will agree. If there had been no enemy, any boy could have seen that when he got to Dawkin's Branch, if he was in sight of Groveton, and there was no enemy commanding the heights opposite, why, he could go to Groveton. The Recorder has gone to great effort to discover this road. Singularly enough, some kind individual, apparently not connected with this case, but a student of it, has made and circulated a map which by a happy coincidence exactly conforms to the Recorder's idea of the situation, and of what then should have been done.

The Recorder: I should like to ask if that is in evidence?

Mr. Choate: No; I propose to ask to have it incorporated as a part of my argument.

The Recorder: As an historical illustration?

Mr. Choate: As a geographical illustration. It is a singular piece of prophetic foresight in whoever prepared this map that he should so exactly have hit the views afterwards expressed by the learned Re-

corder. I suppose I can have it incorporated as a part of my argument, because it shows exactly the condition in which the learned Recorder's proposed movement would be a right one, and why it would not be exactly the wrong one, as demonstrated by General Warren. It was wholly unnecessary for the delineator of this map to lay out a broad army road from Deats to Lewis Lane, through the valley of Dawkin's Branch, because on either condition it does not make any difference whether there was a road there or not. This road, known only to Lieutenant Brooke and the Recorder, occupies a very conspicuous position upon this map. Then, a very important condition, a necessary condition, is to get the troops out of the way from the field in front, from the high ground corresponding to Dawkin's Branch, across on the north-west side. That is most happily and successfully done by the projector of this map, by withdrawing the whole of Longstreet's force, after he had got in position, and we have proved that when Porter arrived at Dawkin's Branch, he had substantially got in position, withdrawing all those forces in the rear of Page Land Lane, and placing them exactly half way between Gainesville and Groveton, a most extraordinary thing to do with a rebel army under such an accomplished general as Lee, with such an aid as Longstreet, after they had been driving through Gainesville three or four hours before, at the top of their speed, for the purpose of reenforcing Jackson at Groveton. Then another necessary part of the condition is to compress the rebel force into such a narrow place into the awkward position into which he has drawn them, or a very large part of them, up behind the rebel batteries that were posted between Jackson and Longstreet. What good any of them could do there, it is impossible to see, because it is demonstrated by the evidence that that was very low ground, and they would have had to fire through several ridges in order to reach anybody anywhere. That is so happily in accordance with the views of the Recorder, that I shall ask to have it incorporated as illustrative of my argument.

THE RECEIPT OF JOINT ORDER, AND McDOWELL'S ARRIVAL

Now, what happened when General McDowell came up, for that is one of the important questions. General McDowell, we have proved, and this he has not contradicted, although he says he doesn't recollect it, General McDowell rushes up with the joint order (which, of course, having been just received is fresh in the minds of both and does not need much discussion) he comes quickly up, having now, however,

accomplished a purpose which he had in view, in writing to General Pope in the morning. He has the joint order which now, under the articles of war, places him, for the first time, in command of all the forces. Porter now, and until they separate, is his mere lieutenant. What does he do? He rushes up and sees what is going on. Does he not? He says so. *He says that the skirmishers were already engaged.* What does that mean? Engaged with whom? Why, engaged with the skirmishers of the rebel army on the opposite height. That he saw himself. He is informed that shots have been exchanged. What does he say? He says, "Porter, you are too far out; this is no place to fight a battle." What did he mean? Here we come first to the consideration of the joint order, as those Generals considered it. Now, what was deemed too far out by that joint order? Why, there was this:

"One thing must be held in view, that the troops must occupy a position from which they can reach Bull Run by night, or by morning. The indications are, that the whole force of the enemy is moving in this direction, at a pace that will bring them here by tomorrow night or the next day."

Another passage which you will recollect is:

"It may be necessary to fall back behind Bull Run, at Centreville, to-night. I presume it will be so on account of our supplies."

Such was the situation. Here was Porter, a mere lieutenant to McDowell, from the moment of the latter's arrival, after the receipt of the joint order.

We proved by five witnesses, that McDowell gave him this order—"Porter, you are too far out. This is no place to fight a battle"—two of them new witnesses introduced upon this trial, in addition to those who testified before. Was it binding on Porter? Nobody questions. Was it given? Nobody can doubt it. Now, what was he to do? It thwarted his plan, which had been to feel and press the enemy, as he was already doing by Butterfield, and the express testimony is, that he obeys the order and withdraws Butterfield, leaving his skirmish line out. Now, what next happened? What was there in the joint order that they had to look to?

"You will please move forward with your joint commands towards Gainesville. I sent General Porter written orders to that effect an hour and a half ago. Heintzelman, Sigel and Reno are moving on the Warrenton turnpike, and must now be not far from Gainesville."

Let me pause there, to ask the Board one question, which I do not quite understand. This joint order was written by General Pope, at

Centreville, at 10 o'clock in the morning. Sigel, at least, under his directions, had commenced a severe skirmish with the enemy, on the turnpike, at six o'clock. Tell me, if you can, why no reference is made to that in this despatch? This despatch, as expressed, is an order of pursuit, and not an order of battle. Was it possible that General Pope, the responsible commander of all those forces, was ignorant, four hours after it had taken place, of an important skirmish between Sigel's force, and Jackson's force, at Groveton? Was it possible, that knowing it, he left it intentionally out of this despatch, in so important a communication to McDowell and Porter? But he did leave it out. He does not indicate the least suspicion on his part, that an immediate action is impending. He makes it an order of pursuit, as I think you will see.

"I desire that as soon as communication is established between this force and your own, the whole command shall halt."

Halt with what view?

The next word is:

"It may be necessary to fall back behind Bull Run, at Centreville, to-night. I presume it will be so on account of our supplies."

Now, in respect to this order, if this was in the minds of both generals when General McDowell rode up, what did General McDowell mean by saying: "You are too far out. This is no place to fight a battle?" Did not he mean that the time had come, hearing this firing on the right, at Groveton, and knowing that there the Federal forces had probably stopped, did not he mean to indicate—was it not plain upon the face of the situation, without even this indication, that when he said: "You are too far out," he meant that this was the time and the place to halt, according to the directions of the joint order? I suppose so. Then, what was the next thing? The next thing was to obey the joint order, unless they should see fit to vary in the exercise of that discretion which was now McDowell's direction in carrying it out. "As soon as communication is established between this force and your own, the whole command shall halt." Well, communication was not established; but there was the place, according to General McDowell's indication to make a communication—not connection. The word is not "connection," which I understand has a very different military significance from "communication;" but communication at least, was possible. Now, what do they do? They proceeded through that unknown woods to a point down here [on the railroad, nearly half a mile east of Dawkin's Branch], to see what there was, and how it

was practicable to make communication, the remaining duty enjoined by the joint order. They go over across the railroad on horseback, and come down and water their horses in this stream, which I do not consider must have been necessarily Dawkin's Branch, but some stream that ran into Dawkin's Branch.

Now, irrespective of the dispute which appears to be in the case, as to what orders General McDowell gave when he left, let us see what was determined at any rate, beyond all dispute. What were they there for? What could be the only object of their riding there? Of course, to see about this communication with Heintzelman, Sigel and Reynolds, on the left of the Federal troops. They came back, didn't they? They found that that could not be done there, did they not, unless by this happy device of the Recorder, according to that map, which neither of them was soldier enough to think of? They found they could not do it. Now, it is suggested, and McDowell claims to have originated the idea, of his taking King's division around, which Porter testified in the McDowell Court of Inquiry, that he perhaps first suggested. When they met at Dawkin's Branch, is it difficult to see how it actually took place? There is no doubt that the request to put King on his right had been made in most urgent terms by General McDowell, aggrieved as he felt himself in the taking away of King's division at their unhappy conversation at Manassas Junction. Now, then, they come up to study this question of communication. McDowell has stopped Porter's advance. Porter says that he suggested it. Well, what does that mean? It was the suggestion of a lieutenant to his chief, was it not?—a suggestion in deference to what had been said at Manassas Junction, before he had come under McDowell's command, was it not? And what did it amount to?

Why, "as you cannot get through here in the face of that enemy in front of us, it is possible to carry out your idea, by taking King's division around by the Sudley road, and come up and make this communication."

At any rate, that was the plan which McDowell, under his then responsibility, conceived; and it was apparently concurred in by General Porter at the moment, for he says, in his answer to Secretary Chandler, which is harped upon here as a contradiction, that, when McDowell left him, he understood that that was his idea. I cannot see any contradiction between his various statements on the subject. I wish I had time to read them all, and show you that they are exactly alike, and consistent with his statement as made here, and with the

proved position as we claim it. I speak apart from anything that was said or any orders given. It was determined by McDowell, whose responsibility it was to determine, to take King around by the Sudley road. What was that for? What must Porter have understood it to be for? Was it for General McDowell's troops to wander up the Sudley road to the turnpike? No; it was to make the communication required by the joint order, by going around the Sudley road, and coming in on the ground between him and Reynolds. Is there any question then that communication would have been established as required by the joint order? Is there in the least a question that it never was established? Whose fault was it? Was it Porter's? Is not McDowell and his force the missing link throughout this day? There is a map here, as I have stated, as to what they did; and General McDowell did not come in and make a connection or communication. Was Porter to do it? Should they both do it? General McDowell left him there and went around by the Sudley Springs road to make the connection which the joint order required. It would have been a very stupid violation of the understanding, if, while McDowell was going around, Porter had gone over and occupied the ground to which McDowell had agreed to go, would it not? So, I say, that Porter's conduct is justified without any reference to any dispute that there may be about what was said. * * *

I desire now to call your attention to what was done under the joint order by General McDowell. One thing he certainly did do; he observed the precaution; he held it in view, that his part of the troops should occupy a position from which they could reach Bull Run that night. General Patrick, at pages 189 and 190 of the new record, states what was done. * * *

Either the making of communication by the plan that McDowell agreed upon was impossible, or if possible, he did not accomplish it. Either alternative is equally satisfactory to us on behalf of General Porter.

DISOBEDIENCE OF THE JOINT ORDER

Now, we come to this question of the disobedience of the joint order. As I understand this joint order, it does not direct an attack, it directs a pursuit. But, of course, the Recorder says, that you cannot say it does not contemplate an attack. Any movement in pursuit of a flying enemy contemplates the possibility of an attack. But the not making an attack is not a disobedience to the joint order; that is a disobedience to

the military rules that control the situation. How was it in this case? It has never been claimed by anybody, by General McDowell, or General Pope, or by Judge Advocate Holt, or by the Recorder, that the joint order, taken by itself, was disobeyed. Not a bit of it. What is the claim? Why, that the joint order as modified by General McDowell was disobeyed, asserting the right of McDowell on leaving Porter to modify it. So the Judge Advocate, and General Pope, and General McDowell, say, that a violation of the joint order was committed; a violation of the joint order, as modified by McDowell, because General McDowell directed him to make an attack. Now, what does the learned Recorder say? He says that Porter violated the joint order as modified by McDowell, not because he did not make an attack, he should not have made an attack, says the Recorder. That was an unmilitary movement; it was contrary to the recognized principles of warfare—but he violated the joint order, as modified by McDowell, because, when he got to Dawkin's Branch, he did not wheel around and march up to the right, straight to the front of the enemy at Groveton. General McDowell, at Governor's Island, protested against being defended by the Recorder. I see now, perhaps, what he meant, although I do not believe the Recorder then disclosed this view. It is a complete going back upon all of my learned friend's antecedents. Nobody heretofore has suggested this view; and as I said at the beginning of my argument, if we are to take him as the authoritative mouth-piece of this prosecution on this important part of the case, we need not consider it any further. For, he now asserts that McDowell was all wrong; that General Pope did not know anything about it; that the Judge Advocate General was entirely in the clouds, and that Porter's error, joint order or no joint order, and particularly under the order of General McDowell, ordering him to go to the right, was in sending Butterfield across, in pressing the enemy upon the other side of Dawkin's Branch, that he should have marched up to the right—they said that he should have attacked, and attacked more vigorously. Well, I must leave them to settle their hash between themselves; I certainly cannot solve that problem. This, at least, is absolutely clear, that if, on arrival at Dawkin's Branch, it was the obvious duty of Porter to proceed at once to the right to make the Gibbon's woods, that was as obviously the duty of McDowell when he arrived at the front in command of the united forces. If it was the right thing to do, why didn't McDowell do it?

Now, I fall back briefly upon the consideration of the case as it stands. We must either leave McDowell out or the Recorder out;

and it does seem to me that his presentation of the case disposes of itself. Now, I propose to leave him out, and consider a little further the case, as made without him. * * *

Now, how was it? If you cannot impute any violation of that joint order except as modified by McDowell, was there any modification of it? General Porter says there was, by General McDowell telling him to remain where he was. General McDowell says there was, by his giving Porter an immediate order to make a vigorous attack upon the right flank of the enemy in front of him. Now, which is right? Did General McDowell give any such order as he claims to have done? He says, he told him, "put your troops in here;" but you will still recollect his description of it which has been brought to your attention by Mr. Bullitt—his interpretation of those words given on the former trial—when he is brought to the point of what he meant, saying: "I meant just what is stated in the 4:30 p. m. order." Well, there is no doubt about what that was, and what that order directed, because that is just what McDowell testified on the former trial that he meant to say, and did say by, "Put your troops in here." The 4:30 P. M. order says:

Your line of march brings you in on the enemy's right flank. I desire you to push forward into action at once on the enemy's flank, and if possible on his rear, keeping your right in communication with General Reynolds. The enemy is massed in the woods, in front of us.

Now, did General McDowell give any such order as that? We say he did not. He swore upon the former trial that he did. The case went against General Porter on the violation of this joint order upon the belief of the court-martial, that General McDowell did give such an order. Now, did he do it? In the first place let us see what the two generals knew on the subject of the force in front of them at that time. We have seen, up to the time of General McDowell's arriving, that General Porter was not very fully informed; he saw there was a force there, and he was proceeding to feel it and press it; he had taken a couple of scouts who said it was Longstreet's force, and that opened his eyes. What came with McDowell? McDowell brought a despatch from Buford. What did that tell him? Why, if they were not fools, it told them everything; it told them that all of Longstreet's force was there. Because you will observe in what I have read from General Pope's testimony, that he understood perfectly well that it was the main army of Lee that was pressing through Thoroughfare Gap to re-enforce Jackson; no small detachment, no room for any

quibbling about divisions or brigades, but it was the main army of Lee that was pressing through, and nobody knew it better than McDowell. Had he not been stationed in front of Lee on the Rappahannock when Jackson broke off from him? Do not his despatches subsequently show that he knew well that what Lee was fearing was that he could not get through Thoroughfare Gap in time to relieve Jackson? That was obvious without any special information; it seems to me that the youngest lieutenant in the army might have guessed it, and ought necessarily to have inferred it. Now, the Recorder says that the captured scouts may have been two of Robertson's troopers, and that Robertson's troopers were not with Longstreet; they were with Jackson. Was that quite ingenuous? Did he suppose that he could mislead the minds of this Board by such a suggestion as that? What does this despatch of Buford's say?

Headquarters Cavalry Brigade, 9:30 A. M.

Seventeen regiments, one battery, five hundred cavalry, passed through Gainesville three quarters of an hour ago, on the Centreville road. I think this division should join our forces now engaged at once.

Please forward this.

John Buford, Brig. General.

That was Buford who had been sent to keep watch of them. The Recorder has saved me the trouble of counting those troops. They were 14,100 men, he says—more than one-half of the main army of Lee that was pressing forward with all speed to relieve Jackson, as they all understood it. What had happened? Why, a quarter before nine, just about the time that General Porter received his order to reverse march at Manassas Junction, they had, what? Come through Thoroughfare Gap? No. Reached Gainesville? No; but *passed through* Gainesville—the main army of Lee that was coming through Thoroughfare Gap, that was what had come. I do not mean the entire army that had come up from Richmond. I mean the main army; the portion that Jackson had left or broken himself off from, when he came through Thoroughfare Gap. Now, then, if they came to reinforce Jackson post-haste and had passed through Gainesville, which is nearer to Dawkin's Branch by far; a little more than half as far as the distance from Manassas Junction to Dawkin's Branch; if those two generals were not fools, didn't they know who and what was in front of them? There were, at least, 14,100 men. I do not care whether they were at Stuart's Hill, or between there and the turn-pike, or between there and this road; they were there; they commanded this position on the other side of Dawkin's Branch, which General Warren

has described as a stronghold, corresponding to this stronghold on which Porter was. General McDowell disavowed knowing anything about Longstreet, and led the court-martial to believe that he did not believe they were there. But you must put yourselves in the places of Generals McDowell and Porter, when they read that despatch of Buford on that ground, and found that those two scouts had reported Longstreet's men in front of them. What ought they to have understood? But we are not left to that. We are not left to any mere calculation, because McDowell himself says what he thought about it. At page 893 of the new record, it does seem to me this question is settled beyond all dispute. Here is the passage to which I call the attention of the Board: * * *

"I took it for granted that there would be other forces come up."

Of course, they took it for granted. They were educated at West Point, were they not? They knew that here was an army of 25,000 men, more than half of which had passed through Gainesville at a quarter before nine, and the question was at twelve, where were they? Were those troops interfering with their progress? Longstreet was another name for the main army of Lee. How much was it? Fourteen thousand one hundred men certainly already there, and they took it for granted that the rest were coming. General McDowell says, "That under those circumstances he told General Porter to attack at once with his whole force." That he swore to on the former trial. Was he mistaken about it? May he have been mistaken about it? I will not re-argue that question. It has been so fully argued by Mr. Bullitt. Of course, he was mistaken. Of course, this lamentable result of the first trial upon General Porter came from that testimony.

But though I will not argue it, this feature of the case is of such vital importance to General Porter that I must, at the risk of some repetition, call the attention of the Board to the direct and absolute inconsistency between General McDowell's evidence at the court-martial and his new evidence before this Board in respect to the nature and effect of the directions claimed by him to have been given to General Porter when they were together at Dawkin's Branch, and just before they separated.

On page 85 of the Court-Martial Record, General McDowell testified as follows:

The question with me was how, soonest within the limit fixed by General Pope, this force of ours could be applied against the enemy. General Porter made a remark to me which showed me that he had no question but that the enemy was in his immediate front. I said to him: "You put your force in here, and I will take mine up the Sudley Spring Road, on the left of the

troops engaged at that point with the enemy," or words to that effect. I left General Porter with the belief and understanding that he would put his force in at that point.

And again, on the same page, he testifies:

After seeing the larger part of my troops on the Sudley Spring road, I rode forward to the head of the column. I met a messenger from General Pope. I stopped him and saw that he had an order addressed to General Porter alone. I do not recollect more than the general purport or tenor of that order. It was to the effect that he should throw his corps upon the right flank or rear of the enemy from the position he then occupied.

The order being shown him, he says:

I can only say that the order that I saw in passing was of that same import.

And that order I have already read to the Board. It is a positive direction to Porter in these words:

Your line of march brings you in on the enemy's right flank. I desire you to push forward into action at once, on the enemy's flank, if possible on the rear, keeping your right in communication with General Reynolds.

On page 87 he testifies:

Q. When did you first see the order of which you have spoken in your testimony-in-chief,—that of 4:30 P. M., of the 29th of August, which directed the accused to turn the right flank and attack the enemy in the rear? You have been understood as saying that that was the effect of the joint order. That is not your meaning, is it?

A. It was the effect of the joint order, *as modified* by me, when I left General Porter, so far as I had the power to modify that order, and so far as the understanding with which I left him at the time.

Q. Are you to be understood as saying that before you saw the order to General Porter of 4:30 P. M., of the 29th of August, you, under the discretion you supposed was reposed in you by the joint order to yourself and General Porter, had directed him to attack the enemy's right flank and rear?

A. To that effect, yes, sir, I *knew* I had that discretion.

Again on page 92, he testifies:

Q. When you saw the order from General Pope to General Porter, the one subsequent to the joint order, did you give, or had you given any order to General Porter, which would interfere with his obedience to it?

A. None.

Q. The orders you had given to General Porter, were not in opposition, or, at least, not of a different character, from the one that came to him from General Pope?

A. They concurred. The arrangements that I supposed to exist when I left General Porter, concurred with the order which I afterwards saw, from General Pope to General Porter. They were to the same effect, except as to details, which General Pope may have given. I gave no details.

And on page 95 he testifies:

Q. When you left General Porter, for the purpose of taking the Sudley Spring road, did you or not expect that he would attack the enemy as soon as he could reach them, and did you or not consider it his duty to do it?

A. I have already said as much, I think; at least I meant to say it.

Q. Had the accused made a vigorous attack with his force on the right flank of the enemy, at any time before the battle closed, would or would not in your opinion, the decisive result in favor of the Union army of which you have spoken, have followed?

A. I think it would.

Here, then, as plain as language can state it, was the evidence of General McDowell to the court-martial, that before leaving General Porter, he addressed to him the words, "Put your troops in here," thereby, meaning to instruct him to make an immediate attack on the right flank and rear of the enemy posted in front of him, upon the other side of Dawkin's Branch; and that this was the sense, in which he was doubtless understood by the court-martial, as doubtless he intended to be, and also, how deeply this piece of evidence weighed against General Porter upon that trial, appears from the use that was made of it by Judge Advocate General Holt, in his notorious paper to the President.

Now, in contrast with this testimony, it is my painful duty to call your attention to the new and wholly different version of this transaction, given by General McDowell on his examination before you at Governor's Island.

On pages 814, 815, of the Board Record, he testifies as follows:

* * * * *

Q. Did you intend that he should get into a general engagement with the enemy while you were removed from the scene back on the Sudley Road, so as to be out of all possibility of rendering him immediate assistance?

A. I do not want that question put in that way.

Q. That is the one I want you to answer.

A. Because you are putting words in my mouth, and putting plans in my head which were not suggested there.

Q. Then you can merely say it was not the case.

A. *When I left General Porter, I left him a corps commander, for him to operate in the direction indicated. How quickly he was to get in an engagement, whether an hour or an hour and a half, and how he would do it, whether in one way or another, I did not indicate, nor did I take it into my mind; it was simply that he was to operate on the left, and necessarily, when he got over there, the nature of his operations would be determined by the condition of things that he would find. What those conditions would be I could not at that time tell.*

And on page 817 he testifies:

Q. Did you expect General Porter to engage the enemy alone, when along the rest of the line there was nothing but artillery engaged?

A. He would not be engaging the enemy alone, if the rest of the line were engaged with artillery. You seem to think artillery is of no consequence.

Q. What kind of an engagement did you expect him to enter into, while no other but artillery fighting was going on along the rest of the line?

A. As I have tried to make myself understood on several occasions, the nature of the particular kind of contest which he was to engage in, was not a matter which I ventured to impose upon him. As a distinguished and zealous officer, with his corps under his command, I did not venture to do anything more than indicate the place where I thought he was to apply that force. Whether he was to skirmish or have a very deep line, or extended one, was a question which I did not go into at all, nor think of going into.

Q. Then a skirmish line would have answered your expectation when you left General Porter, if in his discretion, that was more advisable?

A. It would depend upon the nature of the skirmish—how it was done; how vigorously carried out; whether the circumstances required it, and it only. It depends upon a great many things, that you must make a great many suppositions about, before I can give an intelligent answer. If you want to know a general principle, I believe it is laid down by military writers, that a body of men should be in a condition to offer battle or decline it; whether the main body shall be advanced or retire on the reserve, and many other positions; all of which are conditions upon which battles are determined.

Q. And determined upon the discretion of the corps commander?

A. Yes; provided he acted energetically.

Q. Provided he acted according to the best of his discretion as a soldier?

A. Yes, sir.

I have thus shown you, that General McDowell was utterly reckless in his testimony, on the court-martial, producing a wholly false impression on which Porter was convicted, and which he has now been compelled to retract and correct. On the court-martial, he swore that he left Porter with a positive order to attack at once. For not doing so, as ordered by him, General Porter was convicted and disgraced.

Now, he swears, that only indicating the place of operations, he left all to the discretion of Porter, and that the right and sufficient thing for Porter to have done, under his indication, was exactly what Porter is proved to have done. How far, or from what motives the error arose it is not for me to say. There may be various explanations of it. I should think, perhaps, he might have been angry, so as to disturb his good judgment, but he denies that we have ever seen him angry. Perhaps he had the nightmare, as he says this campaign has been a nightmare to him from the time of its occurrence. I took occasion to see what effect that would have, and I find that it might disturb any man's judgment if it was operating upon him when he was testifying. A very recent scientific authority describes a nightmare as "a terrific dream, in which there appears to be a disagreeable object, as a person, an animal, or a goblin present, and often upon the breast or stomach of the sleeper, accompanied by an inability to cry out, or move or call for help." Well, something happened to destroy his judgment or his presence of mind, or his recollection upon the former trial, and he swore to that. Now, at Governor's Island he came and said that he

meant no such thing as he had been understood to mean, and had sworn at the court-martial that he did mean—not that he did not use the words, “Put your troops in here,” but that he didn’t mean any such thing as was imputed to his language at the court-martial, but that all he meant was to do just what General Porter did do, act upon his discretion, feel the force of the enemy in front of him by a skirmish line, if in his judgment that was the proper thing to do under the circumstances, and any other method that he, as a corps commander, left as sole master of the situation, might deem sufficient and proper. What we claim is, that General Porter, acting under that discretion, did what he did, and that it was the best thing under the military circumstances to do. If it was left to his discretion, the question is, whether his discretion was exercised honestly and in good faith, and not whether it was the best thing that might have been done? McDowell comes to Governor’s Island, and says that he did not mean what was imputed to his language before, but that he did not think there could be much doubt about it, because when he said it, he indicated by a gesture what he meant by “Put your troops in here.” Now, his testimony on that subject is very remarkable. One would suppose that if he said, “Put your troops in here,” and indicated by a gesture, he would know where the gesture indicated. Now, here is the cross-examination on that subject:

Q. You are quite positive, I understand, as to your recollection of the exact words which you used to General Porter about putting in his troops, as you stated on page 85, “You put your force in here.” Is it your recollection of those being the exact words?

A. Yes, sir.

Q. Was then and is now?

A. Yes, sir.

Q. Then you did not say “Put your troops in there?”

A. Is not that what you said?

Q. No; Put your troops in here?

A. It was accompanied by a motion of the hand, here or there.

Q. I want to know whether it was *here* or *there*?

A. That I cannot tell you.

Q. Would it make a difference whether it was *here* or *there*?

A. No; one might be a little more critically correct as an expression, but here or there would have been understood.

Well, it would have been a very singular order for him to say to General Porter, “put your troops in here or there.”

Q. I look for your recollection of the real words, whether you said, put your troops in here, or, put your troops in there?

A. I could not tell you as to that.

Q. You say that here or there would make no difference?

A. No; in connection with the movement of the hand, as indicating the place.

Q. Do you recollect the movement of your hand?

A. I cannot tell you whether it was the right hand or the left.

Q. Can you recollect which way you were facing?

A. No, sir.

Q. Can you recollect whether you moved your hand north, or south, or east, or west?

A. It was not in reference to the direction of the compass.

Q. No; can you recollect that fact?

A. I could not.

I do not think the order is helped out much by the gesture, and when you come to see that there was no order, but only a gesture, added to this wild and unintelligible "here" or "there," east, west, north or south, it left General Porter in the position which I will now indicate.

General Porter swore before the McDowell Court of Inquiry, which I am much obliged to the Recorder for putting in evidence, that when McDowell left him he said no such thing as "put your troops in here;" but that when Porter said, in view of this idea of taking King away, "what shall I do?" he, McDowell, said nothing, but waved his hand and rode off as fast as he could. Is there any corroborating testimony to that? Yes, Captain Monteith, aide-de-camp to General Porter, was present and heard the question and saw the wave of the hand, and saw the departure without an answer. Now, what? Why, General Porter was left there alone, down near the place where the horses were drinking, and he came back alone to his command. As he came back, he saw, as he swears before the McDowell Court of Inquiry, the enemy gathering in his front. He knew well enough what that meant, did he not? That those troops reported by Buford were there, and, as he thought then, coming down upon him. What was the natural movement? What was the natural suggestion? He had thought before McDowell arrived, and when he was in command of 17,000 men, 9,000 of his men and 8,000 of King's, which had been placed under his special command—he had thought the wise course was to press the enemy in front, and if possible, go over to attack him; but McDowell having now left him, without any answer even to his suggestion that now was a time when he might make a communication by taking King's division around on the Sudley Springs road; (these things shifted with every changing view from the enemy, did they not?) And, as he rode back, he saw the enemy gathering in his front, and he says: "Now, if ever, is the time to attack. Don't we know that the force reported by Buford is here—don't we take it for granted, as McDowell says, that all the rest are coming? Now or never is

the time to attack!" What does he do? Why, he renews and continues his movement to press the enemy, and in that view pushes Morell over to the right beyond the railroad; he is preparing a new or a forward movement beyond Dawkin's Branch. Well, on what view was that possible? On what theory had it always been possible and practicable in his idea? Why, it was not with 9,000 men against from 14,000 to 25,000 over there, wherever they were. I don't care whether they were within a few rods of Dawkin's Branch, or anywhere that the Recorder pleases to put them. No; it was not with any such idea. It was, that with 17,000 men he might try it; and that was the only time, as it seems to me that military men will say that an attack should have been tried. So, on the impulse of the soldier, knowing that there is a supporting force within reach of him, namely, King's division, not yet at any rate in motion to the rear, he sends to King to hold on. What was that for? That he might press with Morell; that he might bring Sykes out here (in support), and make the movement described by Warren as the necessary movement and the only practicable one, with King's force to be held in reserve while Morell deployed, and to come up as he and Sykes advanced. Now, the learned Recorder sees fit to dispute what, as we claim, immediately followed, viz.: that General McDowell, on being appealed to by Porter, to let King's division stay where it was, peremptorily refused, and instead, ordered General Porter to stay where he was. I never have seen how it can be disputed. I never could see how, at least, General Porter could help believing that it was so ordered by General McDowell, and acting on that belief. He sends General Locke after King's force. The answer comes back from McDowell in place of King, "Give my compliments to General Porter, and tell him to stay where he is; I am going to the right, and I will take King's division around with me." Now, if that was the time to attack, who is responsible for its not having been done? Porter, who wanted to do it, Porter who began to do it? or McDowell, who refused to join or support him?

And now I wish to call attention to the Recorder's imputations upon our evidence that what I have thus stated did really happen. McDowell said he didn't recollect it. That is all he said. General King said he didn't recollect it. Well, if it turns out that General King was not there, and that it was some other officer, there is pretty good reason for King not recollecting it, apart from the terrible illness under which he was suffering, which might naturally affect his memory, an illness which it is proven upon the record, did overcome him, and from which

he had been suffering, and in a disabled condition for the whole of two weeks before. Well, but says the Recorder, Porter knew that King had gone away, and, when Porter says that he sent Locke to King, he tells a falsehood. Now, it would be something, if Porter knew that King had gone. The Recorder has made the deliberate statement, with the intent that you should believe it, that this record shows, by the evidence of Patrick and Judson, that Porter knew that King had gone. I deny it. I say it does not show any such thing. At page 104 is the testimony of Judson, upon which he relies, which is this:

Q. What time did you reach that position (Bethlehem Church)?

A. I cannot state the hour; it was early in the morning of the 29th. I think.

Q. Then your division knew the way very well from Bethlehem Church to where the fighting was the night before?

A. Yes, sir.

Q. In the morning were you still posted on that road when General Porter's division came along marching towards Gainesville?

A. We were.

Q. Did they come by you; the head of the column on the road?

A. My recollection is such.

Q. Was General Porter with them?

A. He was.

Q. Did you see him?

A. I saw him.

Q. Did you have any conversation with him?

A. I did.

Q. State that.

A. General Porter asked me where the commanding officer of these troops was.

Now this was a man in Hatch's brigade.

A. I conducted him to General Hatch.

Q. Had General McDowell at that time made his appearance?

A. I have no recollection of seeing General McDowell since the day before until that time.

Is that an indication even to Porter that probably King was not there? Not in the least; there is not a word of suggestion about King. Judson may have taken him to Hatch as the immediate commander of the brigade, which he was, or King may have been temporarily away. There being no reference to King, how unfair it is to impute to Judson's testimony knowledge on Porter's part, that King had gone. It does not help the matter any more to refer to General Patrick, at page 187, because it shows that, when Patrick says that King came up to say good-bye, Porter's column had already gone past.

I think General King was the first whom I saw. It was somewhere about eight or nine o'clock, while my commissariat and personal staff were hunting

up supplies, &c. General King rode over to my headquarters, and told me that he was not fit to be in command, that he was going to Centreville, and came over to bid me good-bye. I think Colonel Chandler, his adjutant-general, and I do not recollect who else, were with him at the time; he came to say good-bye, and I do not know that I saw him after that.

Q. In the mean time had you found the promised supplies?

A. We got some somewhere.

Q. You found after a while the rest of the brigades of your division?

A. No; I have no personal recollection of seeing them there at all. I must, I think, have seen them or knew of their being thereabouts from some source.

Q. What happened next after King's departure for Centreville?

A. I was ordered, I think, by McDowell in person, to move as soon as I could in the rear of General Porter; Porter having just passed through, or passing through near Manassas Junction, to go back to the scene of our fight the night previous.

Clearly, when General King came there to bid General Patrick good-bye, Porter had already gone to the front. How puerile is it then to say, that Porter must have known that King had gone, and therefore he could not have sent this message by Locke to King, when it appears that he was all day (and the Government produces the despatches) sending despatches, not to McDowell and Hatch, but to McDowell and King. Oh, says the Recorder, those despatches were properly described by a little word of three letters, seldom used among gentlemen and never among soldiers. Well, will that go down with the common sense which we claim for leading military minds? Of course not. This message was sent by Locke to McDowell, and this was the answer: and, mind you, it corresponds in substance with what McDowell said at Governor's Island, that he meant by, "put your troops in here," "I meant to indicate the point at which he should operate." For there is not much difference between that and—"give my compliments to General Porter, and tell him to stay where he is." There is no denial anywhere of Col. Locke's very positive testimony that he did bring and deliver this message to Porter, and it seems to me to put the finishing touch to the alleged disobedience of the joint order. Was there a disobedience of the joint order? nobody claims that there was, except as modified by McDowell; and it was not modified by McDowell, except to thwart what General Porter thought ought to be done with the 17,000 men, and to leave him there with his force of 9,000 or 10,000 men—a force utterly insignificant—as compared with what they both knew was over on the other side. I will not enter into a dispute with the Recorder, as to where each division of the enemy's troops was. They were there as everybody knew. Longstreet, Wilcox, Marshall, and Williams have told you where they were. Corporal Solomon

Thomas and his reverend associates, and the medical assistant surgeons of this, that, and the other regiment, may come and tell you to the contrary, but there is the evidence. It hardly needed more than Buford's despatch to demonstrate it.

Well, both the Recorder and the Judge-Advocate-General say, that there was a retreat, and that that was a violation of the joint order. It is pretty late in the history of this discussion, as it appears to me, for us to be arguing the question upon the evidence, as to whether there was a retreat that day. I think we will be stultifying ourselves to discuss that matter any more, unless we accept the learned Recorder's military view. If you do, then there was a retreat. He says, that when General Morell's force, in obedience to the order of McDowell, was withdrawn from beyond the railroad and brought back to the road, and placed under cover to "come the same game," upon the enemy, as they were evidently coming upon him, and so Sykes' brigade was withdrawn, 100 or 200 or 300 yards, to make room for them, he says that was a retreat. Well, it seems to me that there was a pretty emphatic expression upon the countenances of the several members of the Board about that, when the evidence was coming in. It seemed to be a pretty plain indication that some of us did not know what the word "retreat" meant. We do not pretend to dilate now upon that question. There it stands upon the record. All the witnesses, as it seems to me, substantially agree that there was not any retreat, that there was nothing in the nature of a retreat—there were movements back and forth. If a brigade is moved up 100 or 200 yards, we do not call that an advance upon the enemy; and if they withdraw to give place for the movements of other brigades, we do not call that a retreat. Well, that is all there was that day affecting in the least the situation. It is true, that under the circumstances which I shall presently describe, there is claimed to have been an order to General Sturgis, or so stated by him, and forgotten from the outset by General Porter, there was a direction to General Sturgis, who was in the rear of Sykes, to go back to Manassas Junction; and then there was apparently an almost immediate recall, and they came back before they had got anywhere near Manassas Junction; and it is not far from the junction of the Sudley Springs and the Manassas and Gainesville road to Manassas Junction. Ah, but says the Recorder, there was an *intention* to retreat; and in a case of petit larceny, he says, the taking of a watch or other chattel and having it in your hand, even for a moment, makes out the crime. Well, is this a petit larceny court? We think, that sometimes he has had that

idea. We supposed it was a great military tribunal, examining into a question, according to the recognized maxims of warfare, not to judge that there was a retreat, unless there was a retreat, and when there was no retreat, finding that there was none. But, if this Board is going to be degraded into a police justices court, I for one, beg leave to retire. I should retire beyond Manassas Junction. It seems to me that we should be imposing upon the good nature of the Board, if we took up the details and answered the criticisms of the learned Recorder about the movements in the nature of a retreat. He said a good many other ingenious things; it seemed to me, that a good many nights must have been employed in digging them out, keen and crispy criticisms upon the evidence. But, how any of them fairly weigh upon the mind of the Board as indicating a retreat, it is impossible for me to guess. It would be a waste of time to discuss that question. They all admit of the obvious answer, that a great deal of the testimony upon which they were founded was from utterly incompetent men. Dr. Faxon, who is he? Dr. Faxon was assistant-surgeon of a Massachusetts regiment. His office required him to attend to his pills and powders, his lances and his cutting knives; he did not notice anything in particular, but he thought there was a retreat. But Morell, and Butterfield, and Sykes, and Warren, and Griffin, all skilled leaders, didn't see it. Well, it is the medical view of the situation. We do not believe it will be a valuable use of the few remaining hours of this day to discuss that question of a retreat, and so we leave the subject of the joint order. All pretences of disobedience of that order have long since been exploded. If it was violated it was not violated by Porter. If it was varied from he could not vary from it, because the responsibility was on other shoulders. He wanted to do with a force which possibly might have been adequate, what here and there in this case it has been claimed he ought to have done, but he was thwarted by the peremptory refusal of his superior officer. In that same connection we call the attention of the Board to a most remarkable document, and one that has excited no little curiosity, one that was sent here by the Secretary of War, or under his authoritative sanction. We have tried to get the Recorder to admit its paternity, but he does not see fit to do so, and we have had to look at the internal evidences, which are sometimes quite conclusive. The external evidences are considerable, because on the back of it is this endorsement which does not say who wrote it, or where it came from, but which indicates, it seems to me, its source.

Washington, June 15th, 1878.

Respectfully referred to Major A. B. Gardner, Judge Advocate, U. S. A., Recorder of Board appointed by S. O., of 8th Apr. 12, 1878, from this office.

It is understood that *General Pope* wishes Major T. C. H. Smith, Paymaster U. S. A., to attend the trial, and the Secretary of War thinks it would be well to subpoena him, as he is quite familiar with the facts.

By order of the Secretary of War,
(Signed)

E. D. Townsend, Adjutant General.

The Recorder: Do I understand that that is in evidence?

Mr. Choate: No; I am using it as part of my argument.

The Recorder: Then I shall bring it to the notice of the Board, that the gentleman is arguing upon what is not in evidence.

Mr. Choate: None of my argument is in evidence.

Mr. Malby: That was admitted and shown to the Board during this session, though the name of the author was not required.

The President of the Board: Not admitted as evidence, but as a suggestion of a line of argument.

The Recorder: Is it put upon the record to be printed as the rest?

The President of the Board: Not at all; it is received as a line of argument.

Mr. Choate: I will ask leave to incorporate it in my argument. There is some little indication of its authorship. It is sometimes said that the style is indicative. I think the style is very indicative, and if you can attribute a part of it to anybody, perhaps you can impute the rest of it to the same author. Now, I find in a letter of General John Pope to the Compote de Paris, written from Fort Leavenworth, Kansas, December 21st, 1876, this sentence:

The greater the force of the enemy in our front, the greater need there was of the help of Porter's corps, and the greater his obligation to render it, and if you could prove that the whole Southern Confederacy was in front of him on that day, you would only succeed in blackening his crime; the crime of deserting the field of battle and abandoning his comrades to the unequal odds he left behind him.

Now, in the document thus indorsed by the Secretary of War, I find this:

The greater the force of the enemy in front of Porter, the greater the necessity of his aid, and if the whole Southern Confederacy had been before him, it only made his desertion of the rest of the army the more shameful.

I should not suppose that better external and internal evidence could be furnished or required than this, of the authorship of this remarkable document which has been sent here under the imprimatur of the Secretary of War for you to consider; and I trust you will consider it.

I care not whether it originated with General Pope, whose language it evidently bears, or with Colonel Smith, whose name is upon the back of it, or from some unknown source, which appears to be pressing this prosecution from behind. It is the last authoritative statement, prior to the Recorder's, of the argument, and in that point of view I want to read it. If it differs from what was claimed on the former trial, if it differs from what General Pope then claimed, if it differs from what General McDowell then claimed, if it differs from what he claimed at Governor's Island, if it differs from what the learned Recorder now claims, I give the Government the benefit of the doubt; they may choose between their various theories when they get through. Now, I will read this. The theory of it is this, that Porter was at fault for not attacking when General McDowell was going around on the Sudley road. Was ever anything so preposterous as that heard before, in view of the claims that have now been made, and all the evidence that has been laid before you? After McDowell's refusal to let King stop a moment that he might make an advance, they say, Porter was at fault in not making an attack any time while McDowell, with King's division and Ricketts' division, was going around where they went. Now, there is a remarkable circumstance connected with this theory, the cardinal idea of which is, that King and Ricketts were within supporting distance, although they were being led by their commander away from the scene of action in which he refused to let them participate, and away from this theory; that is to say, around upon the Sudley road where we always supposed King and Ricketts both went up. But some clergyman or sutler, or possibly Corporal Solomon Thomas, having said that he saw Ricketts' division around on what is called the new road, the gentleman who got up this fancy map, as we will call it, which harmonizes with the Recorder's view, put Ricketts away around; not on this road to Sudley, but away around here [on the "New Road," from Manassas Station to the Sudley Springs Road] several miles further off. Now, in the light of that consideration, we will observe what this paper says about their being in supporting distance as a reason why Porter should have made an attack between 12 and 2 o'clock.

At 12 o'clock m., on the 29th of August, 1862, a severe battle was going on, and so continued until dark, between the right wing of the Union army, and the Confederate forces under General T. J. Jackson, at Groveton, on the turn-pike leading from Centreville to Warrenton, Va.

The line of battle was perpendicular to the turn-pike, the left of our force and the right of the enemy's being just south of that road.

If this came from General Pope, it is an emphatic denial of the Recorder's theories about a contrary position of his own troops

At 12 o'clock noon.

That is the objective point of time.

When the battle of the right wing was at the hottest—

Just think of that, in view of the clear proof to the contrary—

These two corps, Porter's leading, had reached a point west of the Bethlehem Church. At that church the road to Sudley Springs branched to the right, (north) and passed directly through the lines of battle.

The orders of these two corps, which directed their march from Manassas Junction upon Gainesville, are given in the testimony before the Porter court-martial, and required their march to be continued toward Gainesville until they connected by their right, with the right wing of the army. When they reached Bethlehem Church, about half way between Manassas Junction and Gainesville, they were in full hearing of the battle going on, on the right, and found their advance in the presence of a force of the enemy.

The writer of this paper thought the enemy was there.

McDowell finding the whole road in front of him toward Gainesville, blocked up by Porter's corps, which was stretched out in column, and knowing how necessary it was for him as well as Porter, to go immediately into action, told Porter to attack at once where he was, and that he (McDowell) would take the Sudley Springs road, on which the rear of Porter's column rested, and join the battle on the right.

See how this differs from McDowell at Governor's Island, and from the Recorder here.

That McDowell would have attacked, as he told Porter to do, had he been in front, there is not the faintest shadow of a doubt.

McDowell declares that he thought that he then had so far advanced that they were close up to the pike, and that there was not room for any considerable force of the enemy between them and the pike. And it is clear from an examination of his whole testimony and his false position admitted in it, that he thought they were very near the pike at 12 o'clock.

At that time and for two hours afterwards McDowell's corps was still with Porter.

What an outrageous proposition that is. Porter sends back for King's division. McDowell says: "You cannot have it," and takes it away with him, and this paper says that at that time, and for two hours afterwards, all the while they were getting up to the Henry house, McDowell was still with Porter.

Or so near that its rear, as it marched to the right up the Sudley Springs road from Bethlehem Church, must have been still in view, so that Porter's attack could and would, if necessary, have been supported by McDowell. At the time Porter's attack, by every rule of warfare, and of military obligation, should have been made, and for hours afterwards there were present on the ground, not much (if any) less than twenty thousand Union troops, viz: the corps of McDowell and Porter, less Ricketts' division, but plus Piatt's brigade of Sturgis's division which was with Porter's corps, in addition to his own two divisions.

The substance of it all is that Porter was at fault for not attacking while McDowell was going off to make connection on the right, after having positively refused to let him have a man. That is about a fair specimen of the ground upon which this prosecution has been pressed.

The Board then at one o'clock took a recess of one hour.

Mr. Choate resumed his argument, as follows:

PORTER'S TESTIMONY BEFORE THE McDOWELL COURT OF
INQUIRY, IN JANUARY, 1863

I desire now to call attention to what I regard as a most authentic and true statement of the situation then and there, I mean the sworn statement of General Porter before the McDowell Court of Inquiry. Much criticism has been passed on that.

I desire to incorporate it as a part of my argument, because it will stand any criticism that can be brought to bear upon it. The facts were then fresh in the mind of General Porter.

It is true that the examination was under the most constrained circumstances. It is not true, and the Recorder has been misinformed, when he said that General Porter volunteered his evidence there. He was brought compulsorily before the Court. It is one of those little errors which seems to me of very little consequence, but which give a coloring to the argument for which they are presented, like the statement that General Hunter was invited to sit upon the court-martial by General Porter, and was one of his intimate friends, both of which are denied by him. But the circumstances under which Porter was examined were these: it was after all the evidence in his case had been closed; it was after McDowell had given destructive testimony against him before that Court, which he then knew and we now know, was not true. It was pending the time between the closing of the evidence and the publication of the sentence. He was not permitted to testify fully and freely; he was restricted to certain questions which bore upon the question of this joint order, and of the relations of Por-

ter and McDowell. Fortunately you will find the matter stated, with perfect consistency, not only with its various parts, but, as we claim, with all the subsequent statements that General Porter has ever made. The ground of criticism as to inconsistency in itself, is this. He speaks of various movements and intentions as to his operations at Dawkin's Branch, after General McDowell left him, and of the effect of what General McDowell said to him. But the Court will see when they come to examine it, that he had always in his mind, the effect of these three things; the recognized presence of the enemy in front, General McDowell's injunction to remain where he was, and the fact of General McDowell taking King with his 9,000 men away from the combination, away from any possible operation under the joint order. It is said also, that the statements in this deposition are falsified and contradicted by the despatches which are now produced in this; that General Porter said, it would be "a fatal military blunder," to move over to the front, or to the right and front, as it was insisted that General McDowell had directed him to do. It is said that by these despatches it appears that he did afterwards direct movements over to the front or to the right and front. That certainly is not so. The only movement to the right and front was that which was put an end to by General McDowell; the only movement to the right, was that made through Morell's deployment over beyond the railroad, exactly to the right, after General McDowell had personally quitted General Porter, and before the message had been received through Locke, for him to remain where he was, and that he should take King with him. * * *

THE 4:30 P. M. ORDER

Now, a few words as to the pretence of a disobedience on the part of General Porter, to the 4:30 p. m. order of the 29th. So much has been said already on that subject, that I am only called upon to answer what the Recorder has said about it.

Headquarters in the Field,

August 29, 1862, 4:30 p. m.

Your line of march brings you in on the enemy's right flank. I desire you to push forward into action at once on the enemy's flank, and, if possible, on his rear, keeping your right in communication with General Reynolds. The enemy is massed in the woods in front of us, but can be shelled out as soon as you engage their flank. Keep heavy reserves, and use your batteries, keeping well closed to your right all the time. In case you are obliged to fall back, do so to your right and rear, so as to keep you in close communication with the right wing.

John Pope, Major-General Commanding.

Major-General Porter.

The Recorder's first and main proposition is, that there is no new evidence before this Board, and that the case is not changed from the attitude which it held on the former trial. It does seem to me that such a statement ignores all the real evidence in this case. But, I suppose, it is necessary, in attempting to make an argument against General Porter, at this stage of the case and on this subject, to ignore and forget all material evidence. No new evidence! What do you say to the evidence of General Ruggles, one of the most important pieces of testimony introduced into this case, in respect to the 4:30 p. m. order?

General Ruggles was the man who wrote that order. It was very material to know whether the "4:30" which is on it, could be taken as a certain indication of its actual date. Why was that so? Because Captain Pope had undertaken to say that he knew that he started with the order at 4:30, because that was the date of the order; but he had no other means of knowledge, and no other foundation for his recollection. Now, then, if General Ruggles had written the order, and had dated it upon delivery to Captain Pope, there would have been some sense and substance to Captain Pope's testimony, some foundation as to the beginning of the half hour to two hours, which, from his various statements, it must be regarded that he has said it took him to go with it. But Ruggles says his habit was, and he knows it was followed in this instance, when he and General Pope began the work of preparing the order, he acting as scribe, and General Pope as dictator, to date the order first, and whether, after writing the "4:30 p. m.," there were interruptions, or whether the whole order was written consecutively and immediately afterwards, or whether he and the general went about other business in the meantime, he has no means of stating. Neither he nor any one else has any means of stating. So that the very foundation of Captain Pope's evidence entirely falls out of the case, viz., immediate connection between 4:30 as the time of the beginning of the order, and 4:30 as the time of its delivery to Captain Pope. Now, when the Recorder says that there is not any new evidence in the case, he must have forgotten that. Then is there no other new evidence in the case? What does he say to the testimony of Captain Randol of the regular service, who came from Boston Harbor, where he is now stationed? The Board cannot have forgotten his clear and strong statement. If my recollection does not fail me, he saw the delivery of that order to General Porter. He saw the officer come up and deliver it; and adds his testimony to that of five or six witnesses, who were produced on the trial before the court-martial;

that it was sun-down—6:30, not 5 o'clock or 5:30. Had the Recorder forgotten that when he said there is no new evidence? Should he say that there is no new evidence, in face of the fact of the complete demolition of all the Government evidence on the former trial? Is the testimony of Captain Moale, and of Lieutenant Jones, no new evidence? It is true they were not present on the scene of action there, and they did not witness the delivery or the receipt of that order; but they had a far more fatal piece of new evidence to produce, to the destruction of the Government case on this head; and what was it? Why, that Captain Pope, when he was no longer in the immediate service of his uncle, when he was in a remote part of the continent, years afterwards, when there was no anticipation of any new trial for Porter, when it was not supposed that any such transaction could take place, in friendly discourse with his associates, with his mess in the company to which he belonged, he *confessed*—that is the word to use—confessed that his testimony on the former trial was not true. He had said on the former trial, that he presumed that he got that order at 4:30, because it was dated 4:30, and he accomplished the journey in half an hour, and delivered the order to General Porter at 5 o'clock; with great precision, as if he had a clear recollection about it, he said, perhaps within three minutes after five. But to Captain Moale and Lieutenant Jones, he confessed that on the way with that order he got lost, and to one of them he said he was from one to two hours, and to the other he said he was a very long time, making the same statement, that he had lost his way in carrying the order. Now, where is the substance of the evidence for the prosecution on that part of the case? Where is there any evidence whatever, to meet that offered by General Porter, that it was received at 6:30 p. m., sun-down or after? I cannot, as a lawyer, see any. And how a military man can discover any substance of evidence, whatever, left on the part of the prosecution, it is impossible for me to imagine. Further than that, you have had Captain Douglass Pope recalled. He has endeavored to show you how he came. You have had Duffee, the orderly, recalled, and he, too, has tried to show you how he came. I submit that their evidence on this subject, on this new examination, independent of all new evidence, independent of the demolition of their former statements, by the testimony of Captain Moale and Lieutenant Jones, shows that they had not the least idea which way they went, and that they have not now. They tried to pick out a path upon the map; but you have positive proof that Duffee said that until he went

and viewed the ground, he thought he went around through Five Forks. What then is the fair conclusion from all the testimony as it stands? Is it not that the testimony of Douglass Pope and of Duffee on the former trial ought not to have been credited, and that now it cannot be credited in the least? The fact is established of their having lost their way, of their seeing no troops on the Sudley Road, which from below the old Alexandria pike is where they pretend to have come, when King's division and Ricketts' division must have been blocking up that road entirely, so that the passage of any one would have been a work of extreme difficulty. Yet, they did not see a soldier. What is the inevitable conclusion? That they got down to the junction somehow after wandering in the woods, whether by Wheeler's or down Compton's Lane, or somewhere else; and that they struck the Alexandria road and came down to the junction of the Sudley road is probable. But it is not possible that from there they went down the Sudley road, because then they must have met these troops. The ingenious map-maker for the Government has attempted to relieve that difficulty by getting Ricketts off the road. But it will hardly serve the purpose. Ricketts was on the Sudley road right behind King. General McDowell has so sworn, and General Pope, in his argument sent here, acknowledges it; and all the testimony proves it. There is but one way that they could not have seen a soldier, and that was to cross directly the Sudley road, and go down the continuation of the old Warrenton, Alexandria, and Washington pike from their junction in the direction of Manassas, and get around some way on the Manassas road, and come up by the junction by Bethlehem Church, and that is the way they took, and that accounts for their being so long upon the way, and shows the

TIME OF DELIVERY OF 4:30 ORDER

There is one other remark to be made in connection with the 4:30 p. m. order as to the time of its delivery. There was testimony on the former trial, and I think there is testimony now, that they came up to the junction from the direction of Manassas to the headquarters of General Porter, and it seems to me that there is nothing left whatever of the case, but to conclude, taking all the parts of the testimony together, that they did come around by that way, and must necessarily, receiving that order some time after 4:30, and that they, by some round about way, must have got lost. Then you make all the evidence coincide. You accept as true these six witnesses introduced on the part of

General Porter, all credible, all intelligent, all respectable, that it was received not before sun-down. But there is one other fatal circumstance which I must not omit to mention. In all celebrated cases, I think the experience of every lawyer will permit him to testify that before the cases concludes, there is some piece of false evidence foisted upon the case, sometimes even by voluntary evidence from some unknown source, originated and promoted by some unknown party. That has actually taken place in this instance. A third party, a second orderly, one Dyer, has been produced here, who pretends to have accompanied Captain Pope and orderly Duffee on that expedition. But Duffee does not recollect his presence; if you can accept Duffee's testimony, it is that he was not there, and the most convincing proof that he was not there is what he says himself. I will not recall all the particulars of how he recognized the road when he went down there. He went over the ground with Duffee to find the way, and he found it by an unmistakable landmark of a house with a four square roof. That was the way he recognized it, as he rode over. He says he went with Captain Pope sixteen years ago, and then saw the same house which he recognized last week. Unfortunately for that statement, it turned out that that four square house was built after these battles were over. He said he did not go quite up to General Porter's headquarters, but that he saw the church by which his headquarters were, and he recognized the church, knew it was a church by the steeple. Well, it turned out upon authentic testimony, which cannot be disbelieved or doubted, that the church never had a steeple. The Recorder has an idea that it was in ruins, a melancholy ruin, and that perhaps two of the walls had fallen in, so that anybody could see that it was a sacred ruin. But that did not impress the man Dyer. He saw a steeple which never had existed. Then he saw General Porter come out of his tent with Captain Pope. But the evidence is clear that General Porter had no tent. And the evidence on which General Porter was convicted before, and which was re-asserted by Judge Advocate Holt in melancholy tones in his paper to the President, was that General Porter was lying down under a tree, and continued lying under the tree for several minutes after the order was received. But this man Dyer pretended to have seen him come out from around the corner of his tent with Captain Pope. But to crown all, he swears that he went back with Captain Pope, and went direct to General Pope's headquarters. Well, how was that? Captain Pope testified that it was about 8 o'clock when he reached the scene of headquarters on his return, and he was confused

at so many camp fires; he could not tell General Pope's headquarters from those of anybody else, and he had to go to General McDowell's headquarters to inquire which General Pope's headquarters were. But this witness says they got there before dark, and saw no camp fires, and did not go to McDowell but went straight to Pope. Now we are known by the company we keep, and when you find these three witnesses now brought, thus standing together, Douglass Pope, Duffee and Dyer, what remains to sustain the ground of this prosecution on their evidence and accusation? It seems to me that they all tumble out of the case together.

But there is another new and startling piece of evidence which demonstrates that the 4:30 p. m. order was not received by Porter until sunset. At page 810 of the new testimony, there is a fatal piece of evidence—two of them, and the Recorder must have been slumbering when he failed to recollect them. The necessary part of the case of the prosecution is that this 4:30 p. m. order was received at 5 or 5:30 o'clock, in time for General Porter to have made an attack before dark. But here is a dispatch which General Porter wrote at 6 p. m., which absolutely negatives, in every line of it, all possible idea of his having received this order to attack, not only from the fact that he says he has no cavalry, and Captain Pope brought him some orderlies as now appears, left three with him, but the whole tenor of the dispatch shows that he had heard nothing from McDowell or Pope for a long time, and did not know what the situation was. Let me read this dispatch.

Failed in getting Morell over to you. After wandering about the woods for a time, I withdrew him, and while doing so artillery opened on us. My scouts could not get through. Each one found the enemy between us, and I believe some have been captured. Infantry are also in front. I am trying to get a battery, but have not succeeded as yet. From the masses of dust on our left, and from reports of scouts, think the enemy are moving largely in that way. Please communicate the way this messenger came. I have no cavalry or messengers now. Please let me know your designs; whether you retire or not. I cannot get water and am out of provisions. Have lost a few men from infantry firing.

Aug. 29—6 p. m.

F. J. Porter, Maj.-Gen. Vols.

Now when he wrote that dispatch at 6 p. m., had he yet received the 4:30 p. m. order? That is impossible.

Another thing I must refer to in order to refute the suggestions made about this. He says: "I have no cavalry messengers." Where was he when he wrote that? He was at his headquarters at Bethlehem

Church. "Oh," says the Recorder, "he had cavalry." Yes; there were cavalry up by Morell, because, shortly afterwards, not getting any cavalry from McDowell under this message, he sends to Morell for some cavalry. The meaning is, not to deny that he had cavalry up at the other end of his line, but none at his headquarters. And that leads me to this, (in this place, I may as well say it as in any other) that as to the alleged variations and inconsistencies in the various statements of General Porter, and particularly in his opening statement before this Board, there are just exactly two. And the wonder to me always has been, and the wonder to me when General Porter's opening statement was prepared was, that it was possible, or could be possible to make a statement in which there should be so few omissions or failures of memory as compared with the facts which now appear demonstrated here. There are two. One is a difference of recollection between him and Sturgis, whether he knew of the presence of General Sturgis, and ordered him back to Manassas with his 840 men on that day. There is a direct difference of recollection between them, and judging it by the ordinary laws of evidence, it looks to me as if Sturgis's recollection was the better. But I am thrown into confusion upon that when I refer to Porter's examination upon the McDowell Court of Inquiry in January, 1863, when he testified that he knew nothing of the movements of Sturgis on that day. The other failure of memory which the Recorder regards as so destructive to General Porter, is, in this matter of forgetting that he had some cavalry with Morell that day, a part of a Pennsylvania troop. A troop that Morell, to whom the commander says he was to report, but don't recollect reporting, and Locke and Martin who were in the front, did not see or have any knowledge of.

So if the testimony of those cavalymen is to be taken, that must stand confessed, that failure of memory. But it does not in the least affect the merits of this case; nor in respect to any material point the deductions that are necessarily to be drawn. That ends what I have to say upon the 4:30 p. m. order, because I assume it to be demonstrated that not being received till sunset, it was then too late to make the attack which was directed by it. That Porter, acting upon the natural impulse of a loyal and devoted soldier, receiving such an order as that from his chief—that his first impulse was to carry it out, is manifest. What did he do? Did he, as was pretended by the Judge Advocate, and I think is still insisted by the Recorder, send an order to move forward two regiments supported by two more? No. It

appears now clearly proved upon the record, that that had all been already done upon some previous, but false report that the enemy before him were retreating. But he sent an immediate order to General Morell to make an attack with his whole force, and he followed it up in person instantly to the front, and with such speed, that he was guilty of a possible omission which has been charged upon him as an act of criminal neglect. What was that? Why, that Sykes being with him at headquarters, he hurried forward to the front where Morell was ready to begin an attack, in such haste that he omitted to tell Sykes of the receipt of the order. To my mind, that is only clear proof of Porter's zeal to carry out the order. He found that he had been under a misapprehension about the withdrawal of the forces behind Bull Run, indicated by his dispatches shortly before. He found that General Pope now was insisting that he should make an immediate attack, and he hastens forward. What is in his mind is to carry out that order. He first sends Locke ahead with his order to make an immediate attack with his whole force. He goes to the front, and if it is true, if Sykes' memory is not at fault on this point, he went forward without ordering Sykes or communicating the order to him. If I understand the military manœuvering the order was properly to be given as it was given to Morell to make the attack. Sykes, with his division was right behind, ready to be brought up into instant support. He was in immediate contact. Now what is all his parade of rhetoric and of assertion about this failure to exhibit this order to Sykes? It only shows the instant zeal with which Porter sprang to obey that order. Then what happened? He got to the front; he found Morell about ready to obey that order, and darkness was already upon them. I accept the military authority that has been brought into the case, to the effect that it was impracticable then to make an attack. General McDowell said on the former trial that he might have made an attack within an hour after receiving the order. He confessed, on the present examination, that he knew he was wrong about this, confessed that Porter's position was in fact not so far advanced as he had supposed; he will not say exactly how much, but it would have taken much longer to make the attack here ordered than he had previously supposed. Colonel Smith, who before testified, to the destruction of General Porter, that that attack might have been made within an hour, concurring in the opinion then given by McDowell, now comes and frankly states that it would have taken not less than two hours. Suppose it to have been in the neighborhood of 7 o'clock, already nearly

dark, when Porter got to the front, could he but concur with the conclusion of his skillful subordinate Morell, that it was too late—two hours—9 o'clock, to complete the movement, and push forward into contact with the enemy? I suppose it is a military absurdity to pretend that. It has never been claimed that Porter should have made a night attack under this order—and we suppose that in view of the situation as it then was, and so utterly different from what the order contemplated, such a proceeding would have been the height of folly. So I leave that branch of the case.

VIOLATION OF THE 52D ARTICLE OF WAR

Now, in respect to those more grievous charges, as they seem to me to be, having acquitted General Porter of all that can possibly be charged against him under the head of disobedience. Now comes the question of whether he was guilty of the frightful crimes charged upon him in the specifications under the second charge, imputing to him shameful treachery and misconduct in the face of the enemy running away when he knew that a battle was raging on his right, in which the rest of the forces were engaged, by which even the capital of the country itself was involved in danger, and moving off without the least effort, or lying still upon his arms all day without the least effort to assist. You will observe that all this has practically been disposed of in our discussion of the previous question under the joint order, if there was no retreat. The whole pretence of a retreat was based upon the despatch to McDowell and King, that, as the sound of battle seemed to retire, indicating to him that the main part of our forces were withdrawing behind Bull Run, as the joint order had contemplated the necessity of doing, he had made up his mind to retire also. I never have been able to discover any just ground of complaint as to that suggestion of his. If the circumstances were what he supposed, and what the despatch shows he supposed, it was not acted upon; there was no movement whatever, such as the despatch contemplated; there was no retreat. The substance of the information upon which he had written that despatch was immediately contradicted, and he moved forward and directed an advance instead of a retreat. But under the application of the joint order, under General Pope's reiterated injunction in that order that it might be necessary, and that it probably would be necessary, for all of that army to fall back behind Bull Run that night, and under no circumstances to get into any position by which they could not fall behind Bull Run that night, if at 3 or 4 or 5 o'clock

in the afternoon he became satisfied from the sound of battle, as this dispatch shows he did, that the rest of the army was falling behind Bull Run, what ought he to have done? Ought he to have left his little band of nine thousand or ten thousand men exposed to the whole rebel army of now fifty thousand instead of twenty-five thousand; and he the only outpost and wholly unsupported? Well, I know nothing of soldiery, but it does seem to me to be the obvious dictate of common sense that if that was his belief the purpose of following the rest of the army behind Bull Run, as indicated in this message to McDowell and King, was not only eminently proper, but under the circumstances, was absolutely necessary; and when that information was contradicted, then you find that the first thing he does is to move forward.

As to the numbers of the respective armies that day, I do not propose to afflict you with any further discussion. I have taken it for granted that, from all the statements that have been made up to this time Porter's force consisted of ten thousand men; that is the proof upon which he was tried before; that is the theory upon which this case has been tried throughout, until the day before yesterday, when the Recorder, upon what we regard as mistaken and fictitious methods, figured it at twelve thousand or fifteen thousand. Pope thought it was twelve thousand, but the actual figures show ten thousand. Neither do I know or care what the exact number was of the rebel forces opposed to him on Dawkin's Branch, or between there and the Pike, they were all in supporting distance of each other. It was one united force, and an attack by him upon that force at any time after McDowell left him would have brought down together concentrated upon any part of that ground, the whole of Lee's and Longstreet's force. And what had he reason to believe they were? He and McDowell agree upon the testimony as it now stands upon the record, that they knew there were at least 14,100, who must have got there before they did, and they took it for granted that the rest were coming. Now what is the nature of the question under this specification? We have got the question of disobedience out of the way. That is all gone. I assume that we have made a complete case in answer to the charge of disobedience. The question on this part of the case then is, the retreat being out of the way, whether it was his duty to make an attack between the time of McDowell's departure, taking King with him, and the receipt of the 4:30 p. m. order. Now, I am perhaps not capable of discussing the military principles that must govern such a question; but I can state

upon the one side, the theory upon which he was found guilty, because he did not attack, and I can state, upon the other, the facts as they now stand, and I think you will agree that if those facts as they have now been proved, had been before that court-martial, there never would have been the least idea of convicting him. In the first place, we have the fact of the actual force that he had; and, substantially, there is no difference between the former trial and this, in respect to that. King and Ricketts having been withdrawn from him, he was left with, say in round numbers, ten thousand men. The Recorder pretends, by a novel method of reckoning, that he had 33,000 men. The triumph of the science of mathematics is here well illustrated. He had his own 13,000 [magnifying this 10,000 to 13,000]; then he had King's and Ricketts' 17,000; then he had Banks' 10,000—40,000; a great many more than I supposed. Forty thousand men, so says the learned Recorder, and that he ought to have made an attack. Well, yes; if he had 40,000 men, I agree that he ought to have made an attack. But, when it is necessary for the Recorder at this late day to resort to such marvellous calculations, is it not a pretty clear abandonment of the case as it always stood before, and as we think it stands now. Why bring into this case all this rubbish about Banks? Was Banks under the command of Porter? Why didn't Pope, anxious as he was to have Porter's conviction stand in former years, make that suggestion? Why didn't the Judge Advocate General, reciting to the President all the evidence there was against Porter, say anything about Banks? That is the triumph of the Recorder's ingenuity; that is a new invention; and, I think, a weak invention of the enemy. General Banks, (says the Recorder) was at Bristoe, or Kettle Run. There has been quite a deal of dispute and discussion, raised by him upon the evidence of Professor Andrews, and of his superior officer, General Gordon, as to the precise point where Banks was, whether at Bristoe or at Kettle Run. I don't know where he was. The Recorder says it is quite manifest that it was not Porter's force, but it was a brigade of observation from Banks' force, sent out half a mile or a mile from Bristoe, that caused the transportation of Wilcox's force over to their right wing in the afternoon of the 29th. But, is it not too obvious for dispute that it was some movement of Porter's 10,000 men close upon the enemy, so close that Longstreet would not let Lee attack, although Lee wanted to attack, that dictated to them that precautionary transfer of Wilcox? If that was not sufficient cause for transferring Wilcox over there with his three brigades, how was the

advance of a single brigade of observation, away down within a mile of Bristoe, cause for the transfer of Wilcox? The Recorder says the enemy in that movement was waiting for something to turn up. Well, something had already turned up. Porter had turned up, and was there with his 10,000 men close upon them. It was undoubtedly some threatening movement upon Morell's part; something done, or apparently threatened to be done, that called for that transfer. So, I do not think it worth while to discuss that question any more. The character of the position at Dawkin's Branch, held by Porter for offence and defence is proved by the maps and surveys, and the testimony of Warren, of Morell, of Sykes, and others. Did the former court-martial understand that? The maps that were before them show that they did not. For all that they knew, Porter, wherever he was, had nothing but the clear open country before him, without a single rebel soldier intervening between him and Jackson's right wing. On their theory, an attack was just as practicable as it is upon the Recorder's theory, as evidenced by the map which I have been enabled to incorporate into my argument, because there was nothing to prevent his attacking. Now, here is this new fact of the introduction of anywhere from 14,000 to 25,000 men absolutely commanding and closing the way. They outflanked him on his left, and they outflanked him on the right, clear away to the Warrenton turnpike. Now, where is the soldier, we challenge him to come forward—who will say that, under these circumstances, General Porter ought to have made an attack? General Pope does not dare say so. If he could have said that, he would have been here to say it; he would not have waited for any subpoena; if he, as a soldier, could have demonstrated to you, as soldiers, that Porter, in that situation ought to have attacked, he would have come, because he is anxious to support this prosecution, and keep General Porter under this brand of infamy which he has laid upon his head. No; I don't believe there is a soldier in this or any other country, who dares to come and say that Porter, under those circumstances, should have made an attack.

Then, what else is there? There is the difference of position. I speak not now of the ignorance of the court-martial, of the ground which has been so clearly laid down before this Board. I speak now of the confessed difference as to Porter's position, the relative position of Porter to the right wing of the rebel army as it was then believed to be, and as it is now demonstrated to have been. It is involved in the question of the then supposed absence of the confederate force

which we now know, and was then by Porter asserted assuredly, to have been present between Jackson and Porter. They thought, and all thought, apparently—McDowell certainly thought—that Porter was much nearer the Warrenton turnpike than he was. They all thought that Porter had reached the second run that crossed the Manassas and Gainesville road, one mile in advance of where he was. The maps show it. The sworn statements show it. And then they thought that he was behind the right wing of the rebel army, and very near to it; that there was nothing there but Jackson's force, as has been demonstrated to you over and over again—nothing there but Jackson, and that there was no pretence of execution on Porter's part of his recognised duty, the situation being what they supposed it was, of going in, orders or no orders, and attacking the right flank and rear of Jackson's force.

WAS A BATTLE "RAGING" ALL DAY?

There was another thing. The court-martial believed, and it was so sworn, that there was a battle raging all day in his plain sight and hearing. Well, was there? You all know about that now. The Recorder called a host of witnesses to prove that there was a battle. It has enabled us to develop exactly the situation. There was not a battle raging with continuous fury from daylight until dark, as Pope, in his despatch of the next morning, asserted. There was a series of successive spurts, as Heintzelman said; there were skirmishes all along the line from just below the Warrenton pike up to Sudley Springs and Sudley church. Was there no battle? Why, yes; there were lots of them. Every regiment, apparently, and every brigade, had a battle of its own. But they were no more connected than if one had been in Maine and another in Florida, and the rest in interlying States. There was no support of one attack by another attack. Let me read what General Schurz said upon that subject. He was there; he was engaged in it. Heintzelman says there were successive spurts. General Schurz says:

"If all those forces, *instead of being frittered away in isolated efforts*, had co-operated with each other at any one moment, after a common plan, the result of the day would have been far greater than the mere re-taking and occupation of the ground we had already taken and occupied in the morning, and which, in the afternoon, was for a short time at least lost again."

We have prepared, and will give you, a synopsis in print of what these successive spurts were, where they were, and when they took place. It demonstrates that there was no continuous battle; and they

account for the fact that General Porter, who, you will remember, was left alone, without a word from General Pope all this time, never heard anything but artillery firing. The Recorder says, "O, yes, he did." General Marshall, in charge of his skirmish line, makes very strong statements of seeing, from that skirmish line, on the other side of Dawkin's Branch, the rebel army and Pope's army in fight, moving backwards and forwards, heard their yells, and that there was no man in our force who did not feel assured that Pope's army was being driven from the field. General Marshall stated that. I have no doubt that, so far as he was concerned, it was entirely true. There is not the least evidence that he made any such statement to General Porter. But what was it? He does not fix the time on his first examination; but on this new trial he does. What was it? What conflict was there that day that answered all these conditions, that could possibly be seen from any ground in the neighborhood of Dawkin's Branch? It was the fight between King's division and Hood, when King was thrust down on the turnpike just at dusk. There is not any other fight that day, on that field, that could possibly have been seen or heard from that part of the country, that could answer the conditions described by General Marshall, and that does answer exactly to them. Mr. Maltby tells me, from a very careful inspection of the record, that until that fight with King's division, on no part of the line was there, at any time, a larger force than eight regiments concerned in any one of these skirmishes or conflicts. There was a great deal of slaughter, undoubtedly. What principle it was conducted upon no historian has ever yet stated. We have a promised history of Colonel Smith's, which may probably explain it, but there never yet has been any explanation of that method of warfare. Well, I have one which I will give you presently. I think it was conducted upon the general laws of war as laid down by General Pope, when he took command of the army, upon the principles of attacking whenever you see anybody to attack, without regard to the circumstances or the consequences, exactly according to the military code of the Irishman at Donnybrook fair. But now, what is the real fact, as to its being a continuous battle, within sight and hearing of General Porter, and raging all day? We have produced the evidence of every man in his division who is worth believing, that until General Marshall saw the fight between Hood and King they saw nothing. They heard only artillery firing. And there was General Porter awaiting news from Pope and McDowell. The news from McDowell, that he got, said that all went well with

him towards Bull Run. It didn't go well anywhere else. The evidence shows that King, or rather Hatch (as King was absent), marched up the Sudley Spring road, going to and fro on contradictory orders from Pope and McDowell, and that he did not get into any action until this disastrous run on the pike, when he was rushed down through all the other forces at about sunset, or after. I suppose that a corps commander, as I have had occasion to say on this subject, is bound to take notice of the situation, and if he was aware of circumstances and facts wholly unknown to his commanding general, at the other end of the line, he was bound to act upon what he saw before him—was he not? Now, was there any time that day when he ought properly to have attacked, and when it would not, on the contrary, have been a fatal and stupid blunder, for which he would have been grossly culpable, and chargeable with all the destruction of life that would have been occasioned, if he had made an attack—was there anything known to him that would have justified the sacrifice of his corps by an attack that day? We know now that if he had sacrificed his whole corps by the blunder of an attack, it would not have afforded any relief to Pope's army. There is a demonstration of this, as it seems to me, in this case, that the whole world would be content with, in confirmation of Longstreet's testimony, that it was Porter's presence there that prevented an attack by Lee that day. And, what is the demonstration? What happened next day when Porter was withdrawn by the orders of General Pope from this position! What is the evidence? What is the irresistible conclusion from the proofs as to what happened on the 30th? Why, that it was only Porter holding on to where he was, against every threat and every doubt, that prevented on the 29th the slaughter that was consummated on the 30th. What could have justified Porter in withdrawing his force from there on the morning of the 30th but the positive orders of General Pope, who still remained, or claimed to have remained, in absolute ignorance of the intervening situation? Remember that day of the 30th. When General Pope withdrew General Porter's force and brought it up with him to Groveton, he could not believe, Reynolds and Porter together could not convince him, that the rebel army, under Lee and Longstreet, was there. Had not he said in his despatch of the previous day that they were coming at such a rate as would bring them in by the night of the 30th or the 31st? No, he could not believe that the whole rebel army was then already there. He said they were in full retreat even then, that morning of the 30th. He launched his army upon them supposing that they were in

full retreat, when they were there in that fortress, that impregnable fortress, upon the Independent railroad cut, and thence stretching away upon these heights down to the situation where Porter had left them that morning. Well, you know what slaughter took place on the 30th. You know it was when Porter was withdrawn from the position which on his judgment he had maintained the day before. It seems to me that the truth as to the situation of the 29th, and the propriety of Porter's conduct on the 29th, are demonstrated by what appeared to follow on the 30th, when, contrary to his own judgment, he was withdrawn from this fortified position on Dawkin's Branch, which had up till that time held the main force of the rebel army in check, and the whole Federal force was huddled together on the inside of the circle in front of the Independent railroad cut, and upon the successive heights, beginning with Douglass height and extending down to the Manassas and Gainesville road, all along which the rebel army was entrenched. * * *

DESPATCHES OF THE 29TH

Now, if the Board please, the Recorder has had a great deal to say, in respect to the despatches that passed between General Morell on the 29th, and General Porter. I do not propose to weary the Board with a re-consideration of these. That has been done in the statement presented by Mr. Bullitt, and most carefully perfected by him.

These despatches show no inconsistency; they fully explain the much complained-of message to McDowell and King, on the strength of which Porter was convicted of retreating. Now there are some things to be said in regard to these despatches. General Porter remained at the front after McDowell left him. McDowell did not go until somewhere between 12 and 1 o'clock; that is certain. Porter remained a long time after that at the front, and came to the rear, and established his headquarters at Bethlehem Church, somewhere from 2 to 3 o'clock, probably at 3 o'clock. These written despatches between him and Morell must have begun about that hour. I do not suppose there was any need of written despatches when both were at the front. It is not likely that we have all the despatches. If we could have all that General Porter wrote that day, if none were withheld from us by the prosecution, there would not be a single circumstance in all the details of that afternoon left unexplained. If we could have the despatch that General Porter sent to General Pope by Weld; if we could have the other despatch that he sent to Gen. Pope, in answer to the 4:30 p. m. order, that came by Douglass Pope, explaining the situation then in regard to the force in

front of him, in regard to the time, showing the exact time when that was received; if we could have the other despatch sent to General Pope, which told him that General McDowell had taken King away, and which is testified to before McDowell's Court of Inquiry, we should have everything. But it does seem to me, that those despatches now before you tell substantially the whole story, and make out a perfect case, under all the charges, in respect to the conduct of General Porter on the 29th.

The Recorder, for some reason or other, has seen fit to say, that Porter's headquarters were two and five-eighths miles from the head of his column. Well, if it were so, I don't know that there would be anything wrong, if his column were two and five-eighths miles long; but unfortunately for the statement his column was only a mile and three-quarters; Morell, at one end of it, and he at the other. I think you will find it admitted by Judge Advocate Holt, on his written argument, that Sykes, who was with Porter at his headquarters, was in the proper place. I suppose that is an admission that General Porter was in his proper place, where he could not only command his whole force in front of him—where he could command his own force, and get the promptest intelligence of everything that was going on in front, and at the same time be in a situation to communicate with Generals McDowell and Pope, and to receive the messages that General Pope did not send him. General Lee, it seems, had his headquarters in the rear of his force, on the 29th and 30th. Gen. Pope started out in the morning, with his headquarters at Centreville, 8 or 10 miles away, and did not come on the field until after 1 o'clock, and then he established his headquarters a little farther from his foremost force than General Porter was from his. General Pope said that he was in the presence of the enemy when he was at Centreville, so that I do not think there is any difficulty in this matter, of the distance of General Porter's headquarters from his front.

VALUE OF GOVERNMENT TESTIMONY—GENERAL MCDOWELL

The whole case, so far as the facts go, has now been completely disposed of. There is not a rag left of the Government case against General Porter; and yet there is something that remains. There are the opinions of two witnesses, who, if their opinions were entitled in this particular case to weight, ought to receive great consideration. Those are the opinions of Generals McDowell and Pope. What I propose further to say, in respect to them to complete this review of the

affairs of the 29th, is, that General McDowell and General Pope have placed themselves in such a position before this Board, that you must utterly reject their opinions when given adversely to General Porter. About General McDowell enough doubtless has already been said. The fatal mistake that he made on the former trial, or that he alleged was made, was in allowing his testimony as to what he said to Porter, to be construed into an order, to make an immediate attack with Porter's whole force on the right flank and rear of the enemy in front of him. He claimed this time, and said that he didn't mean any such thing; he didn't mean that General Porter should have done anything more than we have fully proved that he did do. Well, I think that should have removed General McDowell's evidence, and the weight of his opinion, if there is a shred of his opinion still left in the case, should have removed it all. But I must call attention to two or three circumstances in respect to General McDowell, which would wipe out, as it seems to me, from the case, the weight of his opinions, because of bias and hostility from some cause—I don't know what—to General Porter. Let us see. In 1870, I think it was, he, in answer to the petition or application of General Porter to the President of the United States for a reopening of his case, prepared for circulation, and distributed certain evidence, as he called it, to counteract that claim. What was it? It was an account by General Jackson of the battle of the 30th, but purporting to be of the battle of the 29th. With what object? To show that General Porter must have known that there was a fierce contest going on between the Federal troops and the Confederate troops at Groveton. Well, it now so happened that that account of General Jackson related not to the 29th, but on its face related to, and purported to relate to the 30th. And the worst part of it was that the ferocious federal onsets referred to by Jackson, which were intended to be a demonstration of Porter's knowledge on the 29th, from his distant position at Dawkin's Branch, that there was a furious battle raging, were Porter's own fighting of the 30th. It was his impetuous attack; it was his brave troops of the Fifth Army Corps on the 30th, that made such a demonstration—such onslaughts, such irresistible attacks upon Jackson's front, that he was compelled to call for reinforcements, and that was put forth to the public by General McDowell as a demonstration that Porter, in his distant position on the day before, must have known that that very state of things was going on then, and thus to find cause to condemn his inaction on the 29th, the day before. Well, the question is, as

to General McDowell's purpose in this. I am going to read to you Jackson's account of what then happened on the 30th, because, with that map of the 30th before you, it can be more easily followed. You know what took place, and you know who did the great deeds of that day. As General McDowell now admits, it was General Porter and his troops that bore the brunt of that fight. Now, the question is, whether General McDowell, who was charged with the superintendence of that whole work of the 30th—who was charged with the whole business of the pursuit—in the first place, whether he ever read this, which I hope he never did; and if he did read it, whether he could for a moment have remained of the impression that it referred to the 29th. This is Jackson's account of that fight, and you will see that nothing approaching this or anything like it, happened on the 29th—that it was all Porter's magnificent fighting on the 30th; and as General McDowell, on being confronted with the very book from which he took this extract, was forced to admit, the events described are there expressly stated to have taken place on the 30th, and not on the 29th:

After some desultory skirmishing and heavy cannonading during the day, the Federal infantry, about 4 o'clock in the evening, moved from under cover of the wood, and advanced in several lines, first engaging the right, but soon extending its attack to the centre and left. In a few moments our entire line was engaged in a fierce and sanguinary struggle with the enemy. As one line was repulsed another took its place, and pressed forward as if determined, by force of numbers and fury of assault, to drive us from our position. So impetuous and well maintained were these onsets as to induce me to send to the commanding general for reinforcements; but the timely and gallant advance of General Longstreet, on the right, relieved my troops from the pressure of overwhelming numbers, and gave to those brave men the chance of a more equal conflict. As Longstreet pressed upon the right, the Federal advance was checked, and soon a general advance of my whole line was ordered. Eagerly and fiercely did each brigade press forward, exhibiting in parts of the field scenes of close encounter and murderous strife, not witnessed often in the turmoil of battle. The Federals gave way before our troops, fell back in disorder, and fled precipitately, leaving their dead and wounded on the field. During their retreat, the artillery opened with destructive power upon the fugitive masses. The infantry followed until darkness put an end to the pursuit.

An exact description of the transaction of the 30th, of which General Porter bore the brunt. Now, is it possible for General McDowell procuring that, publishing it, putting a heading on it that it referred to the transactions of the 29th, to have read it and not seen at once that it referred not to the 29th, but to Porter's fight, as we may well call it, of the 30th? I do not wish to throw the least discredit upon any general; I am only speaking as I have a right to speak of what

stands recorded here, and to speak of the weight to be given to General McDowell's opinion, as adverse to General Porter's. If it had stopped there it would have been bad enough. But what more have we? Why, when that came out, Col. Smith, who seems to be a deluded, but a reasonably truthful witness, at once protested that it was not true; that that was a mistake, that it referred not to the 29th, but to Porter's fight of the 30th. Well, the question was raised, and it became a public, bruited, agitated question among military men. What happened? That question came to General McDowell's ears. What should have happened? I suppose fair play is a rule among soldiers as it is among civilians. Here was this report gotten up by General McDowell, circulated by him for the purpose of thwarting Porter's application for a rehearing, which necessarily must have been to his infinite damage and prejudice, because of this injection into the 29th of the very different facts of the 30th. The question was publicly raised, whether General McDowell had not made a mistake in his dates—whether he had not erroneously published the events of the 30th as the events of the 29th. I should suppose that the first instinct of a soldier in such a case would have been to find out whether he had made a mistake or not. It would be the first impulse of anybody outside of the army, and it seems to me that it would be of every man in the army. Well now, what did General McDowell do? Knowing that the question was agitated, and that he was suspected of having made this mistake, to the great damage of his brother soldier, who was suffering under this undeserved ignominy, what did he do? He did nothing. He let it go uncorrected. Why? Now, do not let me do him any injustice. Let me show you his own words. Why did he let it go uncorrected. I read from page 768 of the record:

Q. Now, when this doubt was raised, whether it did, in fact, refer to the 29th or the 30th, did you take any pains to find out?

A. I did not; but the "pains" were taken in that being sent on to Washington, to see whether it was a correct extract, and they said it was.

Q. Did it occur to you then, that if this mistake had been made, and it, in fact, referred to the 30th, and not to the 29th, an injustice had been done to General Porter, which might be corrected then?

A. You must understand, that up to within a few minutes, I never knew what I have since admitted to be the fact, that that statement did not refer to the 29th.

Q. But when it did become a matter of question, whether it referred to the 29th or 30th, you did not take any pains to find out which it did refer to?

A. No, sir.

Q. Did it occur to you, at that time, that if it was a mistake, an injustice had been done to General Porter by that, which might, and should then be corrected, at that time?

A. No, it did not, *because I did not think it my province to do it.*

Not his province to correct an error, which he himself had made to the prejudice of another soldier, who was suffering under this ignominy! It cannot be that he wants fair play for General Porter. It cannot be, that any opinion that he expressed, ought to be for one moment considered. There is one other little matter, in respect to General McDowell, to which I call your attention in that same connection, although it seems to me that what I have just shown is enough. That is fatal, is it not, to the impartiality of any opinion of his involving the conduct of General Porter.

But the other fact is quite as bad for General McDowell, as illustrating his bias and hostility to General Porter, and the consequent worthlessness of his adverse opinions. I refer to his suppression on the court-martial of the three despatches of the 29th of August, received by him from General Porter—despatches now produced by General McDowell, but which on the former trial were in his possession, but were not then produced though called for, and which would have gone very far indeed towards the vindication of General Porter. Those three despatches are to be found at page 810 of the new record, and are as follows:

General McDowell: The firing on my right has so far retired that, as I cannot advance, and have failed to get over to you, except by the route taken by King, I shall withdraw to Manassas. If you have anything to communicate, please do so. I have sent many messengers to you and General Sigel and get nothing.

F. J. Porter, Major-General.

An artillery duel is going on now—been skirmishing for a long time.

F. J. P.

General McDowell or King: I have been wandering over the woods and failed to get a communication to you. Tell how matters go with you. The enemy is in strong force in front of me, and I wish to know your designs for to-night. If left to me I shall have to retire for food and water, which I cannot get here. How goes the battle? It seems to go to our rear. The enemy are getting to our left.

F. J. Porter, M. G. Vols.

General McDowell: Failed in getting Morell over to you. After wandering about the woods for a time, I withdrew him, and while doing so, artillery opened on us. My scouts could not get through. Each one found the enemy between us, and I believe some have been captured. Infantry are also in front. I am trying to get a battery, but have not succeeded as yet. From the masses of dust on our left, and from reports of scouts, think the enemy are moving largely in that way. Please communicate the way this messenger came. I have no cavalry or messengers now. Please let me know your designs, whether you retire or not. I cannot get water and am out of provision. Have lost a few men from infantry firing.

F. J. Porter, Major-Gen. Vols.

Aug. 29, 6 p. m.

They show many things which General Porter was struggling to show on his former trial, and which the withholding by General McDowell of these despatches prevented from clearly appearing.

They show how completely he was abandoned all that day by both Pope and McDowell, and how eagerly he was waiting and looking for tidings from them. They shed a flood of light on the much perverted and much complained of despatch to McDowell and King, the despatch which was so fatal to Porter in the judgment of President Lincoln, as indicating the purpose to retreat, while the rest of the army were fighting—a purpose which the President was falsely told by the Judge Advocate-General, that Porter had carried out—these show the true meaning of that despatch that he was thinking of retiring in obedience to the injunctions contained in the joint order, because of his belief that the rest had retired behind Bull Run. They show the great strength of the enemy in his front, and on his left—and finally, as we have already seen, they show that at 6 o'clock, when the third of these despatches was written and dated, General Pope's 4:30 p. m. order had not yet been received. The despatches were carefully preserved by General McDowell; they were in his possession; all despatches that he held were pointedly called for when he was under examination upon the court-martial, and these were not produced. While another, which, taken alone, was very prejudicial to Porter, but which these would have fully explained, and to his credit, was vauntingly exhibited and put in evidence. Will it do for an eminent general, swearing away the good name, or perhaps the life even, of a brother officer, to shelter himself from the charge of suppressing such material evidence behind the plea that he forgot them, or did not realize their importance, or look to see what they were?

We submit, therefore, that these three facts, so distinctly proved upon General McDowell, viz.: his statement upon the former trial, now utterly retracted, that he meant by "put your troops in here," to order Porter to make an immediate attack with his whole force; his publication of the falsely dated extract from Jackson's report to defeat Porter's application for a rehearing; and his suppression of these three important despatches, do completely destroy any weight or consideration which might otherwise have been claimed for the opinions of this celebrated witness.

GENERAL POPE'S TESTIMONY

Now, I come to General Pope, whose opinion is so much relied upon by the prosecution, and, in fact, his is now the only remaining opinion. I suppose it may fairly be said to have been abandoned by his contemptuous refusal to come before this Board and support it. But, understanding that it may be claimed differently, let us see how he stands. It seems to me that there is exhibited upon this record, a deadly hostility on his part to General Porter, and a confession by him of personal interest in the question of Porter's guilt or innocence; and there is something more exhibited, if I understand the matter right. He has a most peculiar congenital defect; I mean his way—constitutional with him and peculiar to him—of looking at things and stating things; his method of stating the truth, if that is the proper word. He will tell the biggest kind of a "truth," that is out of all relations, not only with all truths known to other people, but with his own truths as he has seen them, and stated them the day before. Now, if that be so, his opinion certainly ought not to be regarded as of any great force. In respect to that, I shall be under the necessity of calling your attention to only a few instances. There is a disease called "color blindness," when a man cannot distinguish one color from another, when he will look at the red diamonds of a colored window, and say that they are green, or at a yellow light, and declare that is blue. It is no fault on his part. It is a natural, inherent, constitutional defect. So it seems to me that there is such a thing as blindness to the truth, and inability to recognize the existing relations of things. That seems to be the infirmity of this general. Let us see—he did declare, did he not, in the presence of General Ruggles, on the 2d of September, that he was entirely satisfied with all of General Porter's explanations, in regard to these much complained of matters. He met him cordially at Centreville, in the presence of the witnesses, General Webb and General Green, and General William F. Smith. Now, that would seem to be a pretty strong contradiction of all his opinions and charges before. But, as to this natural infirmity of his, I want to call the attention of the Board to certain written statements. At page 234 of the court-martial record, is his account of the battle of the 29th. I will only read one sentence. It was written on the morning of the 30th, at 5 a. m.:

We fought a terrific battle here yesterday, with the combined forces of the enemy, which lasted with continuous fury from daylight until after dark, by which time the enemy was driven from the field, which we now occupy.

If he did not know anything of the presence of Longstreet, it is a very curious thing to find here a statement that he had been fighting against the combined forces of the enemy; and if he knew that, as he swore upon the court-martial, he came upon the field about twelve or one, and practically put a stop to hostilities until about four, it is a very remarkable thing that on the next morning he saw the truth to be in this way:

We fought a terrific battle yesterday with the *combined forces of the enemy*, which lasted with continuous fury from *daylight until after dark*.

Then, at 9 p. m. on that day, he wrote another despatch, which is contained in General Porter's opening statement, at page 101. You know the facts of the battle of the 30th, that it was brought on by an assault which General Porter was directed under General McDowell to make, and that the assault was directed upon the assurance that the enemy were flying and in full retreat. Well, they made an assault. They were almost cut to pieces. Blood flowed like water. Thousands of brave men perished, and this is the account that General Pope gave of it that same night, 9:45 p. m. from Centreville.

We have had a terrific battle again to-day. The enemy largely re-enforced *assaulted our position early to-day*. We held our ground firmly until 6 p. m., when the enemy, massing very heavy forces on the left, forced back that wing about half a mile. At dark we held that position. Under all the circumstances, both horses and men having been two days without food, and the enemy greatly outnumbering us, I thought it best to draw back to this place at dark. The movement has been made in perfect order and without loss. The troops are in good heart, and marched off the field without the least hurry or confusion. *Their conduct was very fine*.

That refers to Porter's troops especially.

We have lost nothing, neither guns nor wagons.

Well, General Ruggles, his aide-de-camp, who was required to pen this despatch for him, says, at the time it was written, "General, I saw some guns lost, I saw some wagons lost; you are mistaken there, are you not?" He said, "Well, write it. We have lost nothing, neither guns nor wagons!" Then he comes to Washington and is stung to madness by the telegrams upon which the Recorder has relied so much, and that madness, as it seems to me, has continued until this day.

Next I want to call your attention to his report of September 3d, at page 1,116 of this record. That is one of the most remarkable manifestations of this peculiarity of General Pope, that I have ever found. We know exactly, now, the orders that General Pope gave on the

morning of the 29th. The history of this report is that it was written for the purpose of laying the foundation for the prosecution of delinquent officers, as claimed or stated in his report to the committee on the conduct of the war. They wanted the actual truth, and here he states it, as he *then* saw it, speaking of what happened on the morning of the 29th. You know what the orders were then? There was a written order to Porter to march upon Centreville at daylight. Then a verbal message, followed by a written order for him to march upon Gainesville, and then the joint order. Now, here is the way General Pope states it.

I also instructed F. J. Porter, with his own corps and King's division of McDowell's corps, which had for some reason fallen back from the Warrenton turnpike toward Manassas Junction, to move at day-light in the morning upon Gainesville along the Manassas Gap Railroad, until they communicated closely with the force under Heintzelman and Sigel, cautioning them not to go further than was necessary to effect this junction, as we might be obliged to retire behind Bull Run that night for subsistence, if nothing else.

It shows also his construction of what he got jumbled up here with the joint order, cautioning them not to go further than necessary to effect this junction. Did the Recorder ever see that?

Porter marched as directed, followed by King's division, which was by this time joined by Ricketts' division, which had been forced back from Thoroughfare Gap by the heavy forces of the enemy advancing to support Jackson. As soon as I found that the enemy had been brought to a halt, and was being vigorously attacked along Warrenton turnpike, sent orders to McDowell.

Now, here are two orders which nobody else has ever heard of.

To advance rapidly on our left, and attack the enemy on his flank, extending his right to meet Reynolds' left, and to Fitz John Porter to keep his right well closed on McDowell's left, and to attack the enemy in flank, and rear, while he was pushed in front. This would have made the line of battle of McDowell and Porter, at right angles to that of the other forces engaged.

Can you conceive of a General who had commanded three or four days before, and had issued these written orders which we have been considering here, that he should state it in this way, unless he was suffering from the disease which I have imputed to him?

POPE'S REPORT OF JANUARY 27TH, 1863

Then what is the next? His official report made to the Government, and withheld, for some reason or other, from publication, until the evidence in Gen'l Porter's case was all in. There are some rousing

statements of "truth" there to which I would like to call the attention of the Board. Referring to the 29th, on page 19, he says:

I sent orders to General Porter, whom I supposed to be at Manassas Junction, where he should have been in compliance with my orders of the day previous, to move upon Centreville at the earliest dawn.

Well, that whole history has been explored, and nobody but General Pope has ever known of any order to General Porter that day, the 28th, but *to stay at Bristoe until he was wanted*, and it was at Bristoe that he was ordered to move upon Centreville.

On page 20:

I also sent orders to Major General Fitz John Porter, at Manassas Junction, to move forward with the utmost rapidity, with his own corps and King's division of McDowell's corps, which was supposed to be at that point, upon Gainesville, by the direct road from Manassas Junction, to that place. I urged him to make all speed, that he might come up with the enemy, and be able to turn his flank, near where the Warrenton turnpike is intersected by the road from Manassas Junction to Gainesville.

And at page 23:

It was necessary for me to act thus promptly and make an attack, as I had not the time, for want of provisions and forage, to await an attack from the enemy; nor did I think it good policy to do so under the circumstances.

During the whole night of the 29th, and the morning of the 30th, the advance of the main body under Lee, was arriving on the field to re-inforce Jackson.

Think of this. Months after the events he still insists that the main army of Lee came through Thoroughfare Gap, during the night of the 29th, and the morning of the 30th, to get on to the field.

Every moment of delay increased the odds against us, and I therefore advanced to the attack as rapidly as I was able to bring my forces into action. *Shortly after General Porter moved forward to the attack along the Warrenton turnpike.*

This is the 30th. See how he recognizes the truth on the 30th.

And the assault on the enemy was made by Heintzelman and Reno on the right (Heintzelman and Reno made no attack on the right, on the 30th). it became apparent that the enemy was massing his troops, as fast as they arrived on the field, on his right, and was moving forward from that direction to turn our left, at which point it was plain he intended to make his main attack. I accordingly directed General McDowell to re-call Ricketts' division immediately from our right, and post it on the left of our line with its left refused.

Now here:

The attack of Porter was neither vigorous or persistent, and his troops soon retired in considerable confusion.

Certainly the mind that penned that sentence knowing and seeing what he did of Porter's conduct and of the conduct of his glorious troops of the 5th Army Corps, on the 30th, is certainly suffering under some serious perturbation. Now, the report to the "Committee on the Conduct of the War" made by General Pope, at page 190, has another startling "truth." It is, however, the one which shows his hostility to Porter. His claim of the authorship of the prosecution, and his claim for reward from the administration for having carried it successfully through show, as I think, his infinite bias against General Porter. And the map which is attached to that report must now be taken in view of the facts as they now stand, as a confession of his bewilderment or ignorance, to state it in the mildest way, of the transactions of the 29th, when he testified on the former trial. I want to read to you a letter that he wrote in answer to General Porter's appeal, addressed to General Grant, recognizing the fact that General Porter is trying to get a re-hearing.

Headquarters Third Military District,

Atlanta, Georgia, September 16, 1867.

General U. S. Grant, Washington, D. C.,

General:—As I am one of the principal parties concerned in the case of Fitz John Porter, and as I learn that he is in Washington City seeking a reopening of his case, on the ground that he has come into possession of testimony since the close of the war which has an important bearing on the subject, and as I suppose it is not unlikely that a commission may be ordered to examine that testimony, and report upon it, I consider it my duty, as well as my right, respectfully to submit to your attention, or that of any commission that may be ordered, the following remarks, for such consideration as they merit. * * *

I am, General, very respectfully,

Your obedient servant,

John Pope, Bvt. Maj. Gen. U. S. A.

Then follows an elaborate argument, a re-hash of all the old errors that he committed five years before at the court-martial, which he adhered to then, as he has ever since, with the tenacity of a Bourbon who can learn nothing and forget nothing.

GEN. POPE'S "BRIEF STATEMENT OF THE CASE"

His brief statement of facts made in 1869, is his next publication, and it is well worthy of a brief inspection. It is at pages 757 and 759 of this record. In the first place it undertakes to state the case against General Porter. It is in answer to another appeal by Porter to the President. In the first place it omits to state any charge or complaint of disobedience of the joint order.

It states this:

McDowell had marched in Porter's rear from Manassas Junction with his corps, but hearing, on reaching the forks of the road at Bethlehem Church the sounds of a severe battle being fought at Groveton, passed the rear of Porter's corps, and following the road to Sudley Springs, brought his corps in upon the left of our line and immediately pushed forward into action.

Do you suppose that he believed that, unless he saw things through diseased optics? He then sets forth Porter's message to McDowell and King, incorporates that in his brief statement and in it he omits the vital part of it as it was in his hands, viz:

I am now going to the head of the column to see what is passing and how affairs are going. I will communicate with you.

The whole spirit of this document is hostile. He repeats the old story about the delivery of the 4:30 p. m. order at 5 o'clock:

The delivery of this order to Porter at five o'clock, at least one and a half hours before sunset, and full two hours before the battle closed for the night, was proved on his trial; but the order was in no respect obeyed, and seems to have produced no effect upon Porter, except that instead of retreating to Manassas, according to his first intention, he only retreated part of the way—far enough to be out of sight of the enemy and out of danger.

Then certainly here is a most enormous statement of "truth" in view of the present facts. At page 760 in the brief statement:

That Porter did precisely what he wrote McDowell and King he intended to do was perfectly well known, of course, to every man in his army corps, and easily proved before the court-martial. It is impossible to believe that any man in this country possessed of the facts can be found so prejudiced as to justify such a transaction, or to ask a modification of the sentence against Porter. It is Porter himself who wrote the charges against himself, and whose own written testimony establishes his crime. It is impossible for any man, especially any military man, to imagine any excuse for, or any satisfactory explanation of, such conduct.

Then, on page 761, he publishes, as of the 29th, an extract from General J. E. B. Stuart's report, which shows that Longstreet was there in force.

In this extract, General Stuart states, that before noon he had been informed of Porter's advance along the Manassas Gainesville road.

General Stuart then says:

*The prolongation of his (Porter's) line of march would have passed through my position, which was a very fine one for artillery as well as observation, and struck Longstreet in flank. * * * Immediately upon receipt of that intelligence, Jenkins', Kemper's and D. R. Jones' brigades, and several pieces of artillery, were ordered to me by General Longstreet, and being placed in position, fronting Bristoe, awaited the enemy's advance.*

Upon this, General Pope asserts:

It will be observed, also, that when Longstreet was duly notified of his danger, and asked to send troops to resist Porter's advance, he sent only three brigades, viz., Jenkins', Kemper's and D. R. Jones' (all he could spare, as will appear from Jackson's report), *and this was positively all the force ever in front of Fitz John Porter from first to last, placed there with no purpose whatever to attack, but, if possible, to prevent his advance.*

Rather remarkable, in view of the clear proof of Wilcox's three brigades being transferred in addition, to withstand Porter. He publishes in this same brief statement an extract from Longstreet's report, which omits, however, a very important part of that report, cutting out a preceding sentence and giving the sentence immediately following that which would have set forth somewhat more, as other people understand it, and as it is now known, the history of the movements of that day. He left out this, (showing Longstreet's presence and line of battle.)

EARLY ON THE 29th (August), the columns were united, and the advance to join General Jackson resumed. * * *

On approaching the field, some of Brigadier General Hood's batteries were ordered into position, and his DIVISION WAS DEPLOYED ON RIGHT AND LEFT OF THE turnpike, at right angles with it, and supported by Brigadier Evans' brigade.

Three brigades, under General Wilcox, were thrown forward to the support of the left, and three others, under General Kemper, to the support of the right of these commands. General D. R. Jones's division was placed upon the Manassas Gap Railroad, to the right, and in echelon with regard to the three last brigades.

Having omitted these important sentences, General Pope proceeds to quote the subsequent portion thus:

* * * At a late hour in the day, Major General Stuart reported the approach of the enemy in heavy columns against my extreme right. *I withdrew General Wilcox, with his three brigades, from the left, and placed his command in position to support Jones in case of an attack against my right. After some few shots the enemy withdrew his forces, moving them around towards his front, and about four o'clock in the afternoon began to press forward against General Jackson's position. Wilcox's brigades were moved back to their former position.*

Then General Pope, assuming that General Wilcox's division of three brigades, were the same as the three brigades mentioned by Stuart in the passage quoted from him, (which they were not), and ignoring the fact that Jones upon the right was in command of a division, and that Kemper with his division was there also, and the fact, that Wilcox and Hood, if needed, were within easy reach, exclaims:

It seems, then, that as soon as Porter retreated towards Manassas from this overwhelming force, Longstreet immediately withdrew these brigades, and, joining Jackson's right, immediately pressed forward with them against that portion of our army concerning whose defeat Porter expressed such doleful apprehensions in his letter to McDowell.

Thus falsely imputing to General Porter a retreat which he did not make, and from forces in front of him vastly less than he (Pope) knew were there.

Then he incorporates what he got from McDowell, that extract from Jackson's report of the 30th, making it of the 29th, turning Porter's own guns against himself, and charging him with lying inactive at Dawkin's Branch all that day although in full hearing of a great battle, that is to say, of Porter's own memorable attack of the 30th, which so nearly overwhelmed the rebel army of Jackson, until Longstreet came in obedience to his urgent call for re-enforcements. Here is an extract or statement of "truth," as of the 29th:

But Lee, according to the testimony of the chief engineer on his staff, took breakfast that morning (i. e. the 29th) on the opposite side of Thoroughfare Gap, full thirty miles distant, and it was utterly impossible to re-enforce Jackson before a very late hour of night, long before which time the whole affair would have been ended.

This taking breakfast on the opposite side of Thoroughfare Gap, full thirty miles distant, is one of the most astonishing statements that I have ever heard. Thoroughfare Gap is about six miles from Gainesville. There is a map published in connection with his report to the Committee on the Conduct of the War, which seems to have some bearing on this statement of General Lee's taking breakfast on the other side of Thoroughfare Gap, full thirty miles from Gainesville, a very singular thing, which ought to be explained by somebody. Here is Thoroughfare Gap; this is Centreville; and this map reverses the true positions of the Gaps and puts Thoroughfare Gap where Manassas Gap should be, thirty miles to the west. That is one of the maps made and annexed to General Pope's report to the Committee on the Conduct of the War. It is very strange that a man should read history wrong and geography wrong too; I cannot understand it. It seems to me that must be an accident. Of course General Pope must have known, as well as General McDowell, that the statement in Jackson's report incorporated in his "Brief statement," to refer to the 29th, did, in fact, refer to the 30th, and to Porter's glorious conduct on that day. Yet he insisted, and by-and-by I will show you that he insists to this

day that that is right. But General McDowell when brought face to face with his error, conceded that he was wrong. General Pope not only still insists upon it that it is right, but still insists that it is no business of his to correct it if it is not right.

GEN. POPE'S EXPLANATORY LETTER ON BRIEF STATEMENT

Now I come to his letter of October 23d, 1878, showing why he put out the brief statement. This is worthy of attention in considering whether he is an unbiased person in speaking of General Porter. It seems that some question had been made, and it came to his ears about these extracts, and he publishes them again in a letter to General Sherman, dated October 23rd, 1878.

He says:

Although General McDowell states, in his testimony before the Board, now in session in Porter's case, that he made this extract and sent printed slips to me, I still think it proper, fully to explain my connection with its subsequent use in the paper (brief statement), above referred to, and my authority for using it.

Then he states how he got it from the War Department, and got it verified. But we know what that meant, that it was a verified extract from the book, but the extract which was verified, not giving the date, the date was put on by somebody else, viz, General McDowell.

Having thus called attention in the statement itself to Porter's assertion, that the extract from Jackson's report referred to the 30th, and not the 29th of August, 1862, and given my authority for using it, *and my belief that Porter was mistaken*, and an additional statement that the case was complete without considering the extract from Jackson's report; so that it was, and is, practically out of consideration, *I supposed, and still suppose, that I did everything demanded by fairness and justice.*

The "Brief Statement," with the above note inserted at the bottom of it, was then filed in the War Department, and copies were furnished Colonel Schriver, General Townsend, and others, so that the note at the bottom has been known to them for eight years past, *and neither of these officers has ever suggested to me even that there was any mistake about them. The opinion of Colonel Smith, and the assertion of General Porter are, therefore, left to be balanced against the certificate of General Townsend and the letter of Colonel Schriver, and whatever the facts may ultimately prove to be, I do not see what I have to do with it.*

But, how are these mistakes of history to be corrected, if the two men who got up that circular say when they are brought face to face with the glaring error, the one that "he does not think that it is his province to correct it," and the other that "he does not see what he has to do with it." There is one singular fact in this letter, which

bears rather hardly upon General McDowell, as showing how unnecessary it was for General McDowell to come here and say that he furnished these statements to General Pope, when he procured them from the War Department in 1869. He says:

It is proper to say that the "Extracts" in question were sent me in 1867 from Washington, I do not know by whom.

That was two years before General McDowell went through the supererogatory work of furnishing them to General Pope; he had them already, and had been laying them by for future use against General Porter. Then he has written various letters to General Belknap and the Comte de Paris, which are in evidence, full of these re-assertions of the exploded mistakes against General Porter, and all testifying in the strongest manner to his absolute and undying hostility to Porter; which, as I have said, is also fairly deducible from the oral evidence in this case. There is nothing left adverse to General Porter but this opinion, and you can fairly estimate the weight that is to be given to it.

General Roberts has been cited. He is no longer living. But to show you how much weight is to be given to General Roberts' testimony, he is the author of this false and malicious libel against the Fifth Army corps, which was contained in the 4th specification of the second charge against General Porter's corps and its commander in respect to the action of the 30th, which General Roberts, as a Brigadier-General and Inspector-General of General Pope's Army, could not but have known all about. That specification is as follows:

Specification 4th.—In this: that the said Major-General Fitz John Porter, on the field of battle of Manassas, on Saturday, the 30th of August, 1862, having received a lawful order from his superior officer and commanding general, Major-General John Pope, to engage the enemy's lines, and to carry a position near their centre, and to take an annoying battery there posted, did proceed in the execution of that order with unnecessary slowness, and, by delays, give the enemy opportunities to watch and know his movements, and to prepare to meet his attack, and did finally so feebly fall upon the enemy's line as to make little or no impression on the same, and did fall back and draw away his forces unnecessarily, and without making any of the great personal efforts to rally his troops or to keep their line, or to inspire his troops to meet the sacrifices and to make the resistance demanded by the importance of his position, and the momentous consequences and disasters of a retreat at so critical a juncture of the day.

That was too much, even for the court-martial. General Roberts stands as the author, with his name subscribed to that statement of Porter's conduct of the 30th, probably about as gallant and determined a fight and series of charges as was ever made by an army corps in

the American army, or any other army. How can you give any weight to the remnant of his opinion? So I leave that part of the case, stating, that against the solid facts that we have proved, it seems to me you can attach no value whatever to the opinions of these three reckless and ruthless personal enemies of Porter.

THE ANIMUS OF GENERAL PORTER

Finally, a few words as to the *animus* of General Porter. On the present solid facts, this charge of evil animus seems to me to be not the least material. It never was resorted to even by Judge Advocate General Holt, except to throw in as a make-weight to determine the scales which he thought were, upon the evidence, doubtful. But now it is apparent to all the world, and no longer doubtful, that Porter did his whole duty, no matter what his estimate of General Pope might have been. If his feelings were such as General Burnside testified to, that he entertained, in common with all the officers of the army, or a great part of them, namely, a distrust of General Pope's ability to conduct a great campaign, and yet, notwithstanding that, he did his whole duty, the performance of his whole duty is all the more meritorious, is it not? But what was General Porter's animus? I shall not consume the time of the Board in developing all that is shown by the despatches and telegrams of Porter, from the time of starting from Harrison's Landing, from the time that he first knew that he was to co-operate with, and finally to join the army of Pope in Virginia. There is everything in those despatches which is to his credit—sleepless vigilance, untiring activity, implicit obedience as an officer, evidenced by all the despatches, by all the telegrams, by all the orders. I will not consume the time of the Board in doing it, but I would like the Board to take these telegrams, these despatches; covering the movements all the way from Harrison's Landing up to the 26th of August, where his telegrams are first called in question as offensive. They show that he did all that could become a gallant and brave general, as in all our previous history where he was concerned he had done. They do not indicate anywhere any hostility to Pope, or any purpose not to do his duty. They testify all the time, that he was doing his duty to the utmost. What were the relations in which he stood in sending these telegrams? To whom were they addressed? Were they telegrams for publication? Not at all. Were they orders to subordinates? Not at all. Were they for the public eye? Not at all. But General Burnside had requested him to keep him informed, as a

means of communication with the President of what was going on. Now, I challenge the doctrine of the prosecution in this case, as to the relative attitude of corps commanders. I deny that they are not at liberty to criticize the movements of their superior general, to a superior or to the supreme source of all military authority. I agree that they must not criticize to subordinates; that they must not criticize in the public ear; that they must not so speak as to create disaffection. But, has it ever been known, in any country, that subordinate generals might not send criticisms to head-quarters, even upon the conduct of a campaign by their immediate commander? In what army has it not been done? In what country has it not been permitted? Why, the theory of the infallibility of the Pope, to question which is heresy, is now for the first time sought to be applied to military matters—they set up the infallibility of this Pope, and that all questioning of it is treason. That will not do. Even Napoleon, in the zenith of his glory, allowed criticisms upon himself, and of superior generals by those under them. It is a new theory in this free country, that because a man happens to be a major-general and a corps commander, he is tongue-tied, that he has lost all freedom of thought—all freedom of speech. A pretty good specimen of what a co-ordinate, if not a subordinate, commander can do in the way of criticism of a commanding general, appears in General Pope's criticism to President Lincoln about General McClellan, which is contained in his report to the Committee on the Conduct of the War, at page 105; and as his authority will not be questioned here, I would like to read that. He says:

In face of the extraordinary difficulties which existed, and the terrible responsibility about to be thrown upon me, I considered it my duty to state plainly to the President, that I felt too much distrust of General McClellan to risk the destruction of my army, if it were left in his power, under any circumstances, to exhibit the feebleness and irresolution which had hitherto characterized his operations.

Well, I think that is a pretty good sample of the kind of criticism which is allowable. It seems to me that it is necessary to allow criticisms, for the safety of the army. Suppose that, instead of a great master of the art of war like General Pope, a great army had an incompetent commander, with skilful generals under him, the whole army might be destroyed, if you take from them that power of criticism. Now, I undertake to say, that Porter's allusions in these telegrams are all true, all perfectly justifiable; although the discreteness of sending them or making some of those remarks, knowing what General Pope is, might possibly be questioned. I have stated his relations to Burn-

side, and the object of sending the telegrams. It is true that Pope's whole campaign is not in review here; but something is in view which is referred to in these telegrams, and that much I must bring to the attention of the Board. It appears that General Pope took command in the summer; I think it was June or July of 1862, and began the formation of this army of Virginia. He came from the west and imported new doctrines of military science, which certainly startled, if they did not shake the confidence of all military men in the east; and as these telegrams of Porter, so much objected to, refer expressly to these new theories of war, I desire to bring the new theories of war once more to the attention of the Board. I refer to his famous introductory order of July 14th, on page 278 of the Board Record. If such an order cannot be criticized, then General Porter was wrong in criticizing it; if it cannot be ridiculed, it was wrong for General Porter to laugh at it. But I shall insist that even a military saint, if there be such a person, could not help laughing at it. This was the order which was proclaimed, not only to his own army, but to the rebel army, when he assumed command of the Army of Virginia.

Washington, Monday July 14th.

To the Officers and Soldiers of the Army of Virginia:

By the special assignment of the President of the United States, I have assumed command of this army. I have spent two weeks in learning your whereabouts, your condition and your wants, in preparing you for active operations, and in placing you in positions from which you can act promptly and to the purpose.

I have come to you from the West, where we have always seen the backs of our enemies, from an army whose business it has been to seek the adversary, and to beat him when found; whose policy has been attack and not defence. In but one instance has the enemy been able to place our Western armies in a defensive attitude. I presume that I have been called here to pursue the same system and to lead you against the enemy. It is my purpose to do so, and that speedily. I am sure you long for an opportunity to win the distinction you are capable of achieving; that opportunity I shall endeavor to give you. Meantime I desire you to dismiss from your minds certain phrases which I am sorry to find in vogue amongst you. I hear constantly of taking strong positions and holding them [as Porter did on the 29th], of lines of retreat and of bases of supplies. Let us discard such ideas.

There, I think, you see the source of his condemnation of Porter's acts of the 29th.

The strongest position a soldier should desire to occupy is one from which he can most easily advance against the enemy. Let us study the probable lines of retreat of our opponents, and leave our own to take care of themselves. Let us look before us and not behind. Success and glory are in the advance. Disaster and shame lurk in the rear.

Let us act on this understanding, and it is safe to predict that your ban-

ners shall be inscribed with many a glorious deed, and that your names will be dear to your countrymen forever.

John Pope, Major-General Commanding.

This was a public proclamation, made on the 14th of July. It was not only proclaimed to his own army, but to the army opposed to him. What did it promise them? It gave them an understanding of how he was going to act; it assured the enemy that there should be no more such conduct on the part of the federal army, as taking strong positions and holding them; that they would not preserve any lines of retreat, or maintain any bases of supplies; the only strong position he would look for would be the one from which he could most easily advance upon the enemy, by which, I understand, he means to be always upon the road; that he would always leave his own lines of retreat to take care of themselves; that he would never look behind him, because disaster and shame lurked in the rear. That is his proclamation. Was it merely for the purpose of buncombe, or was he going to act on this understanding? On that we have some light thrown in his report to the Committee on the Conduct of the War, which shows, as it seems to me, that it was a genuine thing—a deliberate method of warfare—because eight days previous he had been examined as a witness by Mr. Covode, before the Committee on the Conduct of the War, at Washington, and when asked how he proposed to fight, he said:

At the same time I shall be in such position, that in case the enemy advance in considerable force towards Washington, I shall be able to concentrate all my forces for the defence of this place, which I propose to defend, not by standing on the defensive at all, or confronting the enemy and intrenching myself, but *I propose to do it by laying off on his flanks, and attack him from the moment he crosses the Rappahannock, day and night, until his forces are destroyed, or mine.*

By Mr. Odell: Q. Is it your design to act on the defensive alone?

A. *Not at all.*

Q. So that you mean to attack?

A. *I mean to attack them at all times that I can get an opportunity. * * **

These declarations had been already made and published when he took command of the Army, and it is the reference to this sort of thing in these despatches of Porter's, that has been so much complained of. We do not see the whole of this campaign, but we have certain glimpses of it which show that he acted upon this understanding and view of the art of war, and provoked the criticism, not only of General Porter, but of all soldiers. I invite your attention to the position at 7 p. m., on the 26th of August, to see how it was, that Jackson got in

behind him, while he was "looking before and not behind." Pope's despatch is contained in Porter's statement, at page 86, and it shows where these forces of his were posted. It is a despatch from Warrenton Junction, August 26th, 7 p. m., to General Porter.

Please move forward with Sykes' division, to-morrow morning through Fayetteville, to a point within two and a half miles of the town of Warrenton, and take position where you can easily move to the front, with your right resting on the railroad. Call up Morell to join you as speedily as possible, leaving only small cavalry forces to watch the fords. If there are any troops below, coming up, they should come up rapidly, leaving only a small rear guard at Rappahannock Station. You will find General Banks at Fayetteville. I append below the position of our forces, as also those of the enemy. I do not see how a general engagement can be postponed more than a day or two.

McDowell with his own corps, Sigel's and three brigades of Reynolds' men, being about thirty-four thousand, are at and immediately in front of Warrenton; Reno joins him on his right and rear, with eight thousand men, at an early hour to-morrow; Cox with seven thousand men, will move forward to join him in the afternoon of to-morrow; Banks with six thousand is at Fayetteville; Sturgis, about eight thousand strong, will move forward by day after to-morrow.

There they were at 7 o'clock, p. m., on the 26th of August, facing towards the Rappahannock, facing the enemy. At 12 o'clock that night in a despatch from General Pope to McDowell in his official report, at page 234, we have this extraordinary state of things growing out of this policy of "looking before" and not "behind"; and letting his lines of communications "take care of themselves." Jackson had, in fact, got through Thorroughfare Gap, on the 26th, in the morning, without General Pope's knowing or suspecting it. That appears in Jackson's report, printed in the Board record, at page 522. He had gone perhaps twenty miles and struck, and Pope knew nothing of it, until he was informed by report next morning, when his whole army was still "looking before" across the Rappahannock; and Jackson, twenty-four hours previous, had slipped in behind him. This is dated August 26th, 1862, at midnight, just at the very moment, as I understand, that Jackson was striking in his rear upon the railroad, between him and Washington.

General Sigel reports the enemy's rear guard at Orleans, to-night, with his main force encamped at White Plains. You will please ascertain very early in the morning whether this is so, and have the whole of your command ready; you had best ascertain to-night, if you possibly can. Whether his whole force, or the larger part of it, has gone around, is a question which we must settle instantly, and no portion of his force must march opposite to us to-night without our knowing it. I telegraphed you an hour ago, what disposition I had made, supposing the advance through Thorroughfare Gap, to be a column of not more than ten or fifteen thousand men. If his whole

force, or the larger part of it, has gone, we must know it at once. The troops here have no artillery; and if the main forces of the enemy are still opposite to you, you must send forward to Greenwich, to be there to-morrow evening, with two batteries of artillery, or three if you can get them, to meet Kearney. We must know at a very early hour in the morning, so as to determine our plans.

Jno. Pope, Major General.

Now, there is an illustration of leaving lines of retreat to take care of themselves, and emphatic proof that disaster and shame lurked in the rear of this very movement. Stuart struck at Catlett's Station on the night of the 26th, throwing everything into confusion, and at day-break of the 27th, Jackson's force captured Manassas, the base of supplies, destroying an immense quantity of stores upon which the sustenance of Pope's army depended, and actually cutting off that army from communication with the capital which he was defending, by "laying off on the flanks of enemy." This appears by Stuart's report in the Board Record, at page 525; and Trimble, who was in that affair, puts it at 12:30 a. m. on the night of the 26th and morning of the 27th. There was an illustration of the practical working of his plan of "looking before" and not "behind"—of letting his lines of retreat and communication take care of themselves and of not caring anything about his bases of supplies. Then you have the illustration of the pursuit of Jackson to Centreville when Jackson was not at Centreville, and had not been there. Reno and Heintzelman were ordered to Centreville on the 28th and Porter on the 29th. There was an instance of studying the *probable* lines of retreat of the enemy. I claim that all the fighting on the 29th illustrates his method of attacking wherever he "could get an opportunity to do so," as he swore before Covode's Committee that he intended to do; and his insisting that the enemy were running away on the 30th, and attacking them as if they were, is a specimen of his policy of attacking under all circumstances and never standing on the defensive. * * *

Well, now, with these glimpses of the method of the campaign, let us come to these telegrams that are so much complained of. At page 84 appears a telegram of August 25th. It will be remembered that at that time General Porter was under General McClellan's direction. He telegraphs to Burnside, giving a full account of all that transpired; he was then in the advance proceeding up from the Rappahannock.

To General Burnside:

Have you received my despatches indicating my movements to-morrow? You know that Rappahannock Station is under fire from opposite hills, and the houses were destroyed by Pope. I do not like to direct movements on

such uncertain data as that furnished by General Halleck. *I know he is misinformed of the location of some of the corps mentioned in his despatches. Reno has not been at Kelly's for three days, and there is only a picket at Rappahannock Station; and Kearney, not Banks, is at Bealton, Reno and Reynolds are beyond my reach. I have directed Sykes to go to Rappahannock Station at 5 to-morrow, and will go there myself via Kelly's Ford. Does General McClellan approve?*

Now, what harm is there in that? McClellan was his superior commander. Was it wrong for him to seek to have the approval of General McClellan? The next telegram that they complain of is that of August 27th, when General Porter had, as we claim, voluntarily joined General Pope, and made himself a part of his army. But whether voluntarily or not, it was the disconnecting from one army and attaching to another; and the thing complained of is, that he asked General Burnside to inform General McClellan that he had done it; that he might know that he was doing right. He did not ask for any advice from McClellan; he had no communication from or with McClellan; and it seems to me, that as a wise soldier he informed General McClellan, so that he, Porter, might know that McClellan was informed that he was with Pope, and looking no further to McClellan for orders. Is not that the fair construction of this despatch? Let me read it:

From Advance, 11:45 p. m., Aug. 26th. Received, August 27, 1862.

Major-General Burnside: Have just received orders from General Pope to move Sykes to-morrow to within two miles of Warrenton, and to call up Morell to same point, leaving the fords guarded by the cavalry.

You see the vigilance which all these telegrams display, notwithstanding they contain these objectionable passages.

He says the troops in rear should be brought up as rapidly as possible, leaving only a small rear guard at Rappahannock Station; and that he cannot see how a general engagement can be put off more than a day or two. I shall move up as ordered, but the want of grain and the necessity of receiving a supply of subsistence will cause some delay. *Please hasten back the wagons sent down, and inform McClellan, that I may know I am doing right.*

Now, what harm there is, in a commander of a corps departing from one army and coming, whether by orders from Washington or by his own voluntary act, to constitute a part of a co-operating army, sending back word that he had done so, for the information of his former commander, nobody has yet undertaken to explain. They said it was looking to McClellan. Well, were not those circumstances under which it was proper for him to look to McClellan for the purpose I have indicated?

The next complaint is in regard to a telegram of August 27th, from Warrenton Junction. Now, we are coming to the time when General Porter, having a clearer insight as to what was going on, and of the method in which the campaign was being conducted, could not help expressing his natural instincts, as it seems to me, as a soldier, and he indulged in a little criticism upon the performances which were so startling and so different from the theories of war upon which, I suppose, he had been educated. At page 88 of the statement this despatch enclosed an order from General Pope, which I will presently refer to; but this is what is complained of:

Warrenton, 27th, p. m.

To General Burnside:

Morell left his medicine, ammunition and baggage at Kelly's Ford; can you have it hauled to Fredericksburg and stored?

General Porter was looking all this time to General Burnside for supplies.

His wagons were all sent to you for grain and ammunition. I have sent back to you every man of the First and Sixth New York Cavalry, except what has been sent to Gainesville. I will get them to you after awhile. *Everything here is at sixes and sevens, and I find I am to take care of myself in every respect. OUR LINE OF COMMUNICATION HAS TAKEN CARE OF ITSELF, IN COMPLIANCE WITH ORDERS. The army has not three days' provisions. The enemy captured all Pope's and other clothing; and from McDowell the same, including liquors.*

Now, what does he refer to there? Is it not absolutely true? What had happened? Jackson had got in behind Pope while Pope was looking out for him at the front, and while disaster and shame were thus lurking in the rear—there they were, Stuart at Catlett's Station, in the shape of disaster, and Jackson, as shame, at Manassas. Everything was at "sixes and sevens." Had not the commanding general proclaimed that he was going to act on the understanding that lines of communication and retreat should take care of themselves, that he would not take care of them, and that his subordinate commanders should not take care of them? This was one of the results of his novel policy. Was it criminal? Was it more than human for General Porter, in writing to General Burnside, with whom his communication was lawful, communicating, if you please, with the President, who was the superior of Pope, to indulge in this irresistible and spontaneous criticism upon the results of this novel method of warfare which had here, for the first time, been inaugurated and so forcibly illustrated? You observe General Pope's very words in his proclamation are the words that Porter uses in this despatch.

The next one that they complain of is that of August 27th, 4 p. m., on page 89 of the statement.

I send you the last order from General Pope, which indicates the future as well as the present. Wagons are rolling along rapidly to the rear, as if a mighty power was propelling them. I see no cause of alarm, though this may cause it.

That referred to the wagons by the thousand that were pouring on towards Alexandria, rolling night and day over those roads, especially that road from Warrenton Junction to Bristoe, which we have so carefully examined. Had he any authority for the statement? This order from General Pope, which it transmitted, contained the very facts upon which he was commenting. Let me read it. Here is the order from General Pope, directing the flight of all wagons and of all trains towards Alexandria:

Headquarters of Army of Virginia,

Warrenton Junction, August 27th, 1862.

* * * Major-General Banks, as soon as he arrives at Warrenton Junction, will assume the charge of the trains, and cover their movement towards Manassas Junction. The train of his own corps, under escort of two regiments of infantry and a battery of artillery, will pursue the road south of the railroad, which conducts into the rear of Manassas Junction. As soon as the trains have passed Warrenton Junction, he will take post behind Cedar Run, covering the fords and bridges of that stream, and holding the position as long as possible. He will cause all the railroad trains to be loaded with the public and private stores now here, and run them back towards Manassas Junction as far as the railroad is practicable. Wherever a bridge is burned, so as to impede the further passage of the railroad trains, he will assemble them all as near together as possible, and protect them with his command until the bridges are rebuilt. If the enemy is too strong before him, before the bridges can be repaired, he will be careful to destroy entirely the train, locomotives and stores, before he falls back in the direction of Manassas Junction.

This was an order for a precipitate and universal flight in the direction of Alexandria, of all wagon trains. It was the execution of that order that blocked up the road on the night of the 27th, so that General Porter, up to three o'clock, could not move. Now, was it a serious or wicked criticism for General Porter, writing as he was, this message to Burnside, to say:

Wagons are rolling along rapidly to the rear as if a mighty power was propelling them. I see no cause of alarm, though this may cause it.

This also, is seriously complained of in the same telegram:

I found a vast difference between these troops and ours; but I suppose they were new, as to-day they burned their clothes, &c., when there was not the least cause. I hear that they are much demoralized, and needed some

good troops to give them heart, and, I think, head. We are working now to get behind Bull Run, and I presume will be there in a few days, if strategy don't use us up.

How true that was! How prophetic! Strategy did use them up, and those that were not used up did, upon the night of the 30th, quietly withdraw behind Bull Run, and take their places in safety on the heights of Centreville.

The strategy is magnificent, and tactics in the inverse proportion. I would like some of my ambulances. I would like also to be ordered to return to Fredericksburg, to push towards Hanover, or with a larger force, to push towards Orange Court House.

Now, what does that mean? A suggestion of what I have heard military men say was, even in the then wretched situation, a wise expedient. What was it? To strike behind Lee, at his lines of communication, and compel his instantaneous retreat. If that had been done, all this useless slaughter of the 29th and 30th would have been avoided. That was Porter's suggestion, of which they complained. That was his idea of getting away and doing something; of dealing an effectual blow at the enemy, with whom they were all contending.

I do not doubt the enemy have a large amount of supplies provided for them, and I believe they have a contempt for the Army of Virginia.

Do you not believe it? What else but such a sentiment could have inspired Jackson to make that dash through Thoroughfare Gap, and put himself in the trap in which he did put himself, surrounded by the Army of Virginia? Facts are to be looked at in analyzing this case, now that the passions of the war are over. Is it not true? What but that very sentiment could have brought Jackson in there? Will any military man say, that if he had not entertained such a sentiment, he would have dared to do so? He had read Pope's proclamation—to him a proclamation—as well as to Pope's own army, which notified him that Pope was not going to look behind him, nor at his base of supplies; that he was to look before and not behind, because disaster and shame lurked in the rear. He knew that there was a great supply depot at Manassas, and in he went in obedience to General Pope's invitation, and destroyed it utterly.

I wish myself away from it, with all our old Army of the Potomac, and so do our companions.

What does that mean? Has he not suggested what he meant, that he would like to be ordered to make a strike in Lee's rear. But what sensible officer was there under Pope's command that did not wish

himself out of it? Ask any of the survivors, and they will say the same thing, to a man.

I would like also to be ordered to return to Fredericksburg, to push towards Hanover, or with a larger force, to push towards Orange Court House. I wish Sumner was at Washington, and up near the Monocacy, with good batteries. I do not doubt the enemy have a large amount of supplies provided for them, and I believe they have a contempt for the Army of Virginia. I wish myself away from it, with all our old Army of the Potomac, and so do our companions. I was informed to-day by the best authority, that, in opposition to General Pope's views, this army was pushed out to save the Army of the Potomac, an army that could take care of itself. Pope says he long since wanted to go behind the Accoquan. I am in great need of the ambulances, and the officers need medicines, which, for want of transportation, were left behind. I hear many of the sick of our corps are in houses by the road—very sick, I think. There is no fear of an enemy crossing the Rappahannock. The cavalry are all in the advance of the rebel army. At Kelly's and Barnett's fords, much property was left, in consequence of the wagons going down for grain, &c. If you can push up the grain tonight, please do so, direct to this place. There is no grain here or anywhere, and this army is wretchedly supplied in that line. Pope says he never could get enough. Most of this is private, but if you can get me away, please do so.

What does he refer to? Has he not stated what it referred to? Has he not laid out principles of counter-attack, which, if acted upon, would have avoided the partial destruction of this army?

Well, what is the next that is complained of? It is the despatch of August 28th, 9:30 a. m. at Bristoe.

I hope all goes well near Washington.

Now, McClellan was back, near Washington.

I think there need be no cause of fear for us. I feel as if on my own way now, and thus far, have kept my command and trains well up. More supplies than I supposed on hand have been brought, but none to spare, and we must make connection soon. I hope for the best, and my lucky star is always up about my birthday, the 31st, and hope Mc's is up also. You will hear of us soon by way of Alexandria.

That is complained of as a very contemptuous reference to the movements of the army.—“You will hear of us soon by way of Alexandria.” I want, in that connection, to read to you a passage from General Pope's report to the Committee on the Conduct of the War at page 172, containing, as it seems to me, a passage bearing on this. Three years afterwards, when his passions were somewhat cooled, and he had got over the excitement of the campaign, at least, he makes this confession, giving an account of this campaign of the Army of Virginia.

At no time could I have hoped to fight a successful battle with the immensely superior force of the army which confronted me, and which was able at any time to out-flank me, and bear my little army to the dust.

Is not that an extraordinary statement after all the boasting proclamations of the campaign? This is a cool statement of fact three years afterwards. Of course, he knew, and everybody knew that he might be looked for, as is here stated by Porter, and as the fact turns out, by way of Alexandria. What else could possibly be hoped for in the situation, as it was on the morning of the 28th? Then they complain of this:

All that talk about bagging Jackson, &c., was bosh.

Well, it had so turned out, had it not?

That enormous gap—Manassas—was left open and the enemy jumped through; and the story of McDowell having cut off Longstreet, had no good foundation. The enemy have destroyed all our bridges, burnt trains, &c., and made this army rush back to look at its line of communication, and find us bare of subsistence. We are far from Alexandria, considering the means of transportation. Your supply train of forty wagons is here, but I can't find them. There is a report that Jackson is at Centreville, which you can believe or not.

There is a sneer in that. But is it not justified? This was at Manassas, at 2 p. m. of the 28th. The next morning the raid by Longstreet, who was cut off, took place. It shows that General Porter's sagacity and soldierly instinct led him to see, and foresee, the situation in a clear manner, the information of which, to the Government, was of the greatest utility. Again is his despatch of 6 a. m., on the 29th, at Bristoe.

I shall be off in half-an-hour. The messenger who brought this says the enemy had been at Centreville, and pickets were found there last night.

Sigel had severe fight last night; took many prisoners; Banks is at Warrenton Junction; McDowell near Gainesville; Heintzelman and Reno at Centreville, where they marched yesterday, and Pope went to Centreville with the last two as a body-guard.

There is the only personal reflection that I can find in these despatches. It seems to me to be very harmless and innocent.

At the time, not knowing where was the enemy, and when Sigel was fighting within eight miles of him, and in sight. Comment is unnecessary.

The enormous trains are still rolling on, many animals are not being watered for 50 hours; I shall be out of provisions to-morrow night; your train of 40 wagons cannot be found.

I hope Mac's at work, and we will soon get ordered out of this. It would seem from proper statements of the enemy that he was wandering around loose; but I expect they know what they are doing, which is more than any one here or anywhere knows.

Is that not true? What had just happened? What was true that morning? What is sworn to by General McDowell as being true dur-

ing all that campaign, from the 12th, when he went to join General Pope, up to the 29th, when this despatch was written? General McDowell swore before you at Governor's Island, that on all these days, from August 12th to August 29th, he and General Pope were hunting for each other a good deal. Now, does not that justify this observation, that knowing what other people are doing is "more than any one here knows"? This was written at the very time when McDowell was taking his famous ride, when Pope himself was saying, "I have not been able to find out anything about McDowell for a long time, or until a late hour this morning."

I submit that at this late day, when we look at these things coolly and dispassionately, there was no wickedness, no malice, no evil animus in these despatches. They were almost irresistibly prompted and called forth by the extraordinary situation; they were confidential to Burnside and the President. General Burnside testified that it never occurred to him that General Porter, in writing them, had any evil motive or purpose towards General Pope: he only thought that it showed that General Porter felt about the commanding general as everybody else did, a certain distrust in consequence of his new methods of warfare practically carried out. It is stated in the statement, and it may not be improper to repeat it here, that the President thanked General Porter, personally, for those very telegrams, on the battle field at Antietam, where he met him. Now, we say, that if you want to find General Porter's animus in these despatches, you must find it in what he was doing at this time, as evidenced by the despatches—working to his utmost, night and day, pressing forward with irresistible vigor, as it seems, and with a wise application of what he knew of the rules of war. However he may have felt about General Pope, these very telegrams demonstrate that all the time he did his whole duty. What more is wanted? Did not the authorities at Washington think so? Why was it that the week after they put him in command of 18,000 troops in the defense of the fortifications at Washington? Why was it that they left him in command afterwards during the great battle of Antietam, and only checked his course when they were pursuing the enemy after Antietam down towards Fredericksburg? Those are questions that are very hard to answer. I do not wish to discuss this question of animus further. I only want to say that actions, as the Recorder says, speak louder than words, and if you want Porter's animus, you must find it in the whole history of his life; you must find it in all his record from the time he left this Academy, all through

the war with Mexico, upon the peninsular where he achieved great and glorious deeds; you must find it in that day of the 30th; yes, and in this day of the 29th, which is among his proudest, and will stand in history as one of his wisest and best days.

In closing this case, I must refer, by way of general observation, to certain evidence that has been introduced unnecessarily, as it seems to me. The facts nobody can complain of; but when it comes down to small scandals, is it not better to reject them, as Judge Advocate Holt rejected them—this evidence of Lord and Ormsby, and their absurd stories of what they say took place in General Porter's quarters in Washington during his trial there. There he was one day in great excitement coming in from the trial. Do you doubt, on what you know now, that he had cause for immense excitement? He is a very cool man, but do you question that his blood must have been up and that all there was in him of indignation and rage was stirred to its utmost depths? They said that they heard him say, "I war'n't loyal to Pope. I was loyal to McClellan." Well, what was that? Was it addressed to them? No; it was an exclamation, excited and wrathful. What did it mean? Did it not mean simply an outbreak of wrath, that he could not contain, at something that had been said or done at the court-martial that was trying him that day? Instead of being a statement, a proposition, an admission, a confession, as it is claimed, it was a wrathful repudiation of the idea, and is incapable of any other construction. I will not dwell upon that. The Judge Advocate rejected it. Lord and Ormsby swore each other to secrecy, and then ran and told the Judge Advocate, and he treated it with the contempt that it deserved. Yet that which could not be used in the days of the heat and passion of war is brought in here to serve a certain purpose, in this era of peace and goodwill. Then, what do you think of Dr. Faxon's story? Was it necessary to bring in these absurdities? Dr. Faxon who had heard that there was a charge against General Porter of being dilatory on the march from Warrenton Junction to Bristoe, comes and testifies that as he was marching along with his regiment, going through Bristoe, at 2 o'clock in the afternoon, he passed where General Porter was standing at his headquarters with some gentlemen, one hundred feet off, and although his regiment did not stop, although *they went tramping along on the road, he heard General Porter say to one of his aides that he "didn't care a damn if they didn't get there." But they had got to Bristoe already; it was beyond Bristoe, at 2 o'clock, where General Porter had arrived at 8 in the morning, that

this took place. I think that Doctor had better have been left in charge of his patients in Massachusetts. Then, what do you think of John Bond? He was sent to carry rations up the Sudley road on the afternoon of the 29th, and he saw a man, who somebody told him was General Porter, and General Porter asked him how the battle goes, and he made an explanation of how the battle went. He described General Porter's person, that he had a moustache and no beard, that he had a hat and a Major-General's uniform; but it turns out that he had a cap and a full beard, and no Major-General's uniform at all. Now, might not John Bond have better been left carrying rations to the end of his days than to have been called here? And Bowers, the scout. The learned Recorder tries to find points of distinction between a scout and a spy. Well, Bowers was at head-quarters one day, when General Porter was surrounded by his staff. Porter says, "General Pope is coming through this command this afternoon, and I don't want any attention paid to him," absolutely denied by all the survivors of his staff. Was there ever any more ridiculous stuff than that sought to be imported into a serious controversy. I suppose that all these witnesses are absolutely worthless, in every point of view.

And now, if the Board please, enough has been said.

The fate of the petitioner is in your hands. His sufferings under this sentence for the last sixteen years have been peculiar, unlike those that any other General or soldier has ever sustained. I do not propose to depict them; they cannot be exaggerated by any language. Only eminent soldiers, such as compose this Board, can fully realize and appreciate them. He is not the only person who now stands awaiting your judgment; not only he, but his family and his comrades in arms, that glorious Fifth Army Corps, which never yet met without re-affirming their faith in his innocence, the whole army, as I believe, and every faithful man who has ever been connected with it, stands expecting and hoping for the restoration of his good name and fame; because, it is not his good name and fame only that is concerned, but the army's and the country's. I believe that this nation is too great, that it is too magnanimous, to suffer the continuation of such a wrong when once it has been ascertained. If the exigencies of those times required that this shame and contumely should be borne by him during all this interval, his patriotism and his loyalty have stood the test. Nobody has ever heard a whisper or a murmur against his country, or its cause, from him. He has always been faithful. He knew, or hoped he knew, that time would bring his relief. There were

historical instances which would justify the hope. There was the case of brave old Admiral Cochrane, Earl of Dundonald, who suffered a similar, but by no means equal ignominy, convicted of a crime of which he was wholly innocent and ignorant, in 1814; and he had to live until 1832, before the brand of infamy was taken from him. But the British nation was magnanimous, and restored him at last to all the honors and titles of which he had been unjustly deprived. If any such indirect purpose as I have referred to made Porter's punishment and humiliation necessary; if he was a sacrifice to discipline, has it not answered its purpose? If it was necessary to strike down an innocent man to enforce discipline upon suspected men in the army of the Potomac, has it not done its work? Look at them under all commanders, before and certainly afterwards—look at them from Antietam to the last struggles in the wilderness, under the successive commands of McClellan, Burnside, Hooker, Meade and Grant. When, anywhere, did a man of them fail to do his whole duty?

We think the time has come at last for this gross wrong to the petitioner to be righted. He has looked for it hopefully and faithfully for the last sixteen years. He has looked for it because he was sure of his innocence, because he had absolute faith in his cause, faith in his country, faith in justice, faith in God. The question now is, whether God and justice and country shall all forsake him. We have no fears. We leave the result confidently with you. It seems to me that the time and place are both propitious for his vindication. In ten days more will be the anniversary of his humiliation. Here, where his military life began, is the place where his star should be restored to its true and native lustre, and so in his name, and in the name of the brave army corps which he commanded, in the name of the army which he did his best to honor, in the name of truth insulted, and of justice outraged, we demand for the petitioner full and complete reparation.

BURDEN v. BURDEN

ARGUMENT IN EQUITY FOR THE PETITIONER, IN THE NEW YORK
SUPREME COURT, TROY, NEW YORK, DECEMBER 20, 1890

STATEMENT

The litigation in this suit was begun in 1884, and terminated in 1899. Thus was fulfilled the joking prophecy of Mr. Choate made in a letter to his wife written on December 11, 1889, from Troy, New York, in which he said, "Our case went on to-day at the City Hall, but so far as I can see, it is likely to last a long time yet. The Burdens are famous for protracted lawsuits. The father of these men had one about spikes that lasted for twenty years, and why should this one about horse shoes come to an untimely end?"

Henry Burden, a Scotchman of great talents as an inventor, was the father of three sons, William, Isaiah Townsend, and James A., with whom in 1864 he formed a copartnership in the iron business at Troy, New York, under the name of Henry Burden and Sons. William died in 1867, and Henry, the father, in 1871, and thereafter, until June 30, 1881, Townsend and James continued the firm. They then terminated a ten-year partnership agreement that had been made in 1878, and together with John L. Arts, these three being the sole associates, organized the Burden Iron Company as a corporation under the Manufacturing Act of 1848. James was elected President; Townsend, Vice President; and Arts, manager, the three constituting the Board of Trustees. The two brothers had been of divergent views upon questions of business policy, and such were their grievances that they communicated only in writing. In this situation James retained counsel for the purpose of instituting proceedings for dissolving the partnership. The proposal to incorporate was then made, and was accepted by both brothers after James had rejected the proposition that part of the partnership property should be withdrawn from the corporation, and also that the capital stock should be equally divided. He insisted that the distribution of the capital stock should be such that by no combination could he be ousted from the Board of Trustees of the corporation. The plan of incorporation of the \$2,000,000 business, as set forth in the "Promoters' Agreement," was that James should hold 1,000 shares; Townsend, 998 shares; and John L. Arts, two shares. If James "shall at any time sell or assign 998 shares of his said stock, then in such case he will, without any consideration for the same, transfer the other two shares of his said stock" to Townsend. The profits of the corporation were to be divided equally between the two brothers. Arts was to receive a salary but no share in the profits; and he agreed not to dispose of his stock except to the brothers.

The corporation was managed without friction under this plan for less than a year. In May, 1882, Townsend presented to the Board of Trustees a written protest against his exclusion from participation in the management of the business. In July, 1882, he proposed that he be allowed to purchase one of James' shares. On July 19, 1883, he offered a series of resolutions which were not entertained for want of a second. In 1883, Townsend went to Europe; and in the Spring of 1884 James, being ill, went also. They met in London. Townsend then returned and took charge of the affairs of the corporation. This resulted in much friction with Arts. James re-

turned in October, 1884. On November 20, 1884, James and Arts, constituting a majority of the trustees, passed a by-law making Arts general manager, having "general and exclusive charge and management of the business of the company in all of its details * * * subject to the control of the Board of Trustees." On November 22, James transferred one of his shares to each of his brothers-in-law, William Irvin and Richard Irvin, Jr. On November 26, James and Arts filed a certificate increasing the number of trustees from three to five, by the addition of the two Irvins. On December 27, 1884, suit was begun by Townsend.* On February 27, 1885, the trustees repealed the by-law concerning the management of the business by Arts, but immediately, with a slight change, re-enacted it. They also abolished the office of vice president.

In the suit, over 400 propositions of fact and law were submitted by counsel, including on the part of the plaintiff, Isaiah Townsend Burden, the claims that the additional trustees were unlawfully appointed, and that the increase in the number of trustees was in contravention of the Promoters' Agreement; that the sale of stock by James to the Irvins was illegal, and that no profits could be paid to them; that certain contracts with the Hudson River Ore Company, in which James was a director, were void; that the by-law granting unusual powers to Arts as general manager was void; that the Woodside property, residences of the brothers, should be severed from the corporation property; and that the corporation should desist from the business of "fancy farming" as not being within the scope of the corporation's business.

Mr. Choate's argument before Judge Edwards, printed below, came midway in the long series of proceedings which are too complicated to be rehearsed here. It brings the story of the controversy down to December, 1890. In the hearing in which he made this argument, he was opposed by James C. Carter, but neither Mr. Carter nor Mr. Choate appear in the subsequent appeals as found in the law reports. The opinion of Judge Edwards, adverse to Mr. Choate's contentions, with the one exception that the corporation must be enjoined from continuing the business of "fancy farming," is given in full in 8 App. Div. 160, 40 N. Y. S. 499, where, without writing an opinion of its own, the Appellate Division, on July 22, 1896, affirmed the judgment of the court below. The opinion of the Appellate Division was affirmed by the Court of Appeals on June 6, 1899, 159 N. Y. 287, 54 N. E. 17.

If the Court please: I shall spend no part of the precious time allotted to me for the discussion of this case either in eulogy of my own client or in denunciation of his adversary. I have too much regard for each of them to do either of those things. Each of them has a character of his own entirely sufficient to take care of itself. Nor do I purpose to say a single word, if I can help it, that will widen the breach that now exists between these two brothers whose interests are and always have been so closely bound up in the common ownership of this magnificent inheritance which they received from their honored father, and whatever may happen in this suit, whatever differences may hereafter ever arise between them, in which they will

* Reports of the preliminary skirmishes will be found in 23 W. Dig. 289, 3 N. Y. St. Rep. 776, and 106 N. Y. 668, 13 N. E. 668.

still continue to be bound up together in like manner until they shall transmit it, as they have in substance and in fact agreed to transmit it, each his share to his children.

I listened with more than my accustomed pleasure to the very eloquent exordium with which my learned friend opened his argument in respect of the peculiar, extraordinary and delicate powers of a court of equity, and in respect of his regard for the plaintiff who seeks the aid of that court. I noticed that Your Honor was visibly impressed by it. I should have felt it even more deeply myself if I had not often heard it before. It is my brother Carter's usual exordium where he appears for the defendant in a cause in equity. It is only ten days ago that we were together, as I am sorry to say we are together on adverse sides always, where he made the same exordium, with his same favorite citation from Lord Camden, in the defence of the Electrical Sub-way Company, in New York, to have the claims of its adversary absolutely dismissed. I agree with him that this is an extraordinary cause. I think that the diligence which has been exercised on both sides with about equal degree has failed to discover any cause in the books that is similar to it, and that is the reason why the authorities that have been so profusely cited by my learned friends as precedents have no application to an unprecedented case like this. In the first place, there never was such a corporation as this. Never so little of a corporation, that could yet boast of being a corporation, as this. Invented by one of the most ingenious minds of the State of New York as a cover for the continuance of a co-partnership interest, but hardly covered enough to conceal the nakedness of the co-partnership. Never intended to be anything but a form to regulate the conduct of the business and the mode of holding the property. Never set in operation really as a corporation until after this suit was commenced. Its books kept as co-partnership books always, until after the complaint in this suit was filed, and then altered back to the beginning, by order of Mr. Levi Smith. There never was such an extraordinary instrument created for controlling the conduct of and the interests in this corporation, as this "Promoter's Agreement." So obscure, and so disguised—the creation of the same astute mind. Where he invented it, where the thought came to him, he does not say. He claims the invention of it. Was it at his office? Was it at the Troy House? Or was it between visits to that famous hostelry to which he confesses to going? It requires a stimulated mind before and after its production; no doubt about that.

And yet, if Your Honor please, there are certain features of that agreement so clear, so controlling, and so conclusive of the rights of these parties that "he who runs may read." So it is an extraordinary case; more extraordinary than the circumstances out of which it arose; more extraordinary than this "Promoter's Agreement" the authorship of which can only be attributed to this single mind, are the extraordinary circumstances which provoked this suit, the extraordinary devices resorted to by the majority that decides absolutely to exclude their associate, the owner of the half of the property, in the least participation in its affairs, either as officer, trustee or stockholder.

A great deal of complaint has been made relative to the pleadings. I do not like them any better than do my learned friends. Your Honor, your predecessor in office (Judge Parker) who sat upon this case for a year was not any better pleased with the pleadings than either Mr. Carter or myself, but, if the court please, when those pleadings were framed on the part of the plaintiff the plaintiff himself had been shut out from this company for more than two years—wilfully, wantonly and deliberately shut out, and with the utmost persistency. Judge Parker saw that, and what did he say? Why, that the court had jurisdiction of the case, and that he would take all the proofs relative to the grievances claimed at the time of the trial to be sustained by this plaintiff, and upon those proofs he would give judgment; and if the pleadings were not sufficiently broad to cover the proof he would see at the close of the trial that they were adapted to the proof. Thus the case has proceeded from that hour to this. If my learned friend desires it I will call his attention to that very ruling of Judge Parker which perhaps is of some importance in this case. It appears that at page 423 of volume 2, of these proceedings, where this Hudson River ore matter was discussed as not being sufficiently in the pleadings, in connection with the Henry mine; and the judge said, "I think the matter has progressed so far that I ought to admit it, even if it is necessary to amend the complaint in this request. I think it is open to doubt whether it covers it or not." Is that method of trial now after the case is closed, to be reversed? That common sense of justice which inspires every judge would necessarily forbid it.

Great apprehensions are indulged at the close of the argument by my learned friend that we will get some judgment. He knew, of course, that we should; that the decisions of this court already made absolutely entitle us to that. But of whatever we are entitled he

has urged Your Honor on moral grounds and on personal grounds to deprive us even of that. Mr. Cowen said that our object is to throw this company into confusion and ruin; that our object is to ask this court as a court of equity to ruin the Burden Iron Company. Why, Your Honor, we never had such a thought or purpose as that. We claim that the plaintiff has been deprived of certain rights that belong to him as stockholder, as trustee, as officer, and as contracting party; and that it is within the power of this court to see that, for the future at least, he shall no longer be deprived of such right: and we shall seek for a specific injunction as to each one of these wrongful deprivations as to which I claim it has been fully decided by this court by an authority which Your Honor is bound to follow, that the court has jurisdiction, and that the plaintiff, if he proves the facts alleged by him, is entitled to relief.

I have said that this is a peculiar corporation; that the rules applicable to ordinary corporations do not apply to it. It was peculiarly formed under a statute of this State which provided that a corporation might be formed by three persons, and it was formed by only two persons. The third party's interest was purely nominal as this court has finally decided; decided upon the faith of the co-partnership articles, and the Promoter's Agreement; and as to that fact I desire to call Your Honor's attention now because it will relieve this case of many of the questions that have been unnecessarily argued upon the part of my learned friends as to what is the state of adjudication in this very case upon this very subject. Ordinarily, of course, the mere stockholder in a company has no right of entrance into its place of business; no right of inspection or overhauling of its visible property; no right of investigation of its books of account. And yet Judge Peckham, who knew more about this action, it having been before him for three respective hearings, on the 29th of September, I think it was, in the year 1885 or 1886, made an order for the temporary, and immediate relief of this plaintiff from one of the grievances by which he was afflicted, to wit: the persistent refusal of the defendants, Burden and Arts, to permit him to exercise what he claimed to be his legal right as an owner of half of that property—as actual owner of the property, although it was under a corporate cover—and to have just such an inspection as that to which I have just referred. I want to call the attention of the court to that order because its terms as approved by the General Term, are conclusive of many questions now pending before you. It was claimed that an ordinary stockholder in an ordinary corporation

had such rights as were given to Townsend Burden by this order. I will hand a copy of this record to Your Honor, which I cite as authority and not as evidence. In it, it was ordered that "the plaintiff, his attorney, counsel, expert accountant, and assistants," as granted in a previous order made on the 29th of April, 1886, "may have an inspection and discovery, with leave to take copy of all the books, accounts, documents and papers," etc. Who ever heard of such right being claimed by or accorded to a stockholder in a corporation? Would he have sought it unless there was something in the character of this corporation which distinguished it from any other that ever existed? My learned friends on the other side saw fit to appeal from that order of Judge Peckham, and it was heard by the three very eminent judges composing the General Term of this district. It was affirmed on the ground that he had this right as owner of half of this property; on the ground that Townsend Burden had an equal, and perhaps a greater interest in the property of this company than any other man; on the ground that he was not a mere nominal party in the company; and on the ground that he had a greater interest in the property of this company than any other man, as I will point out later on when I reach the construction of the Promoter's Agreement. He had 998 shares, which were absolutely his; he had the reversion of at least one of Mr. Arts' shares; he had the preemptive right upon two of Townsend Burden's shares. What is the decision of the General Term? It is put expressly upon the peculiar nature of this corporation, and the jurisdiction in this plaintiff to maintain this suit; in the conceded right of the plaintiff to recover if he could make out the grievances of which he complained. This decision was rendered on the 13th of January, 1887. We had been for two years struggling for this right that we claimed, stayed by this appeal from having this power of inspection, and entrance. What a shocking spectacle has been exhibited upon this trial. The proof before you that the two defendants claimed the right not to exclude Townsend physically from coming into the works, but from coming in with any adequate assistants to examine the books and property. Why, even his counsel were stopped by the policeman at the gate and turned back! Now let us see what the General Term say. They recite the nature of the order appealed from, and that the original order had been interfered with: that it had been extended by the further order of Judge Peckham, and then they come to the situation as it appeared to them from the copartnership articles, and the Promoter's Agreement, and they say: "The plaintiff is a trustee and stockholder of the Burden Iron Com-

pany; he owns 998 shares, James A. Burden owns 1,000, John L. Arts nominally two shares." Now I shall cease to argue that his ownership was merely nominal, because the General Term has so deliberately decided. "But the dividends were divided equally between the plaintiff, and James A. Burden. James A. has since transferred one share to each of his two brothers-in-law, and these five persons above mentioned are the trustees. There are but 2000 shares. Thus it will be seen that although the Burden Iron Company is a corporation, yet that the plaintiff is the owner of nearly one-half of the property and entitled to dividends on one-half. James A. Burden is the president." Mr. Cowen argued before the General Term that the plaintiff showed no right to maintain his suit, and no right to entrance such as he claimed by this order. The court then proceeded to say: "Of course no one questions the doctrine that where there is a corporation that body is the legal owner of the corporate property, and the stockholders are not owners. But still, the object of incorporating individuals is, to a great extent, to facilitate their acting as a unit. It is not the object to deprive them of all rights in the corporate property, and to give the trustees of the corporation absolute control without regard to the interest and wishes of stockholders. And this is peculiarly true of a case like the present, where the plaintiff is the owner of one-half of the stock; and yet, by the mode above shown, the majority of trustees act in opposition, as he claims, to his views and his interests. We are not now speaking of the merits of the controversy. We merely say that though the legal title of the books, and accounts, and materials is in the incorporate company, yet that the plaintiff is as largely interested in them as anyone, perhaps more largely, and that in a just, and equitable sense it is an examination of his own books, and accounts, and property which he is seeking." What he was seeking for was not an examination of the books alone, but of what this gave him—of the property. The General Term continues, "He is directly interested in the profits and is entitled to have the property managed fairly and honestly. Of course we do not mean that every stockholder may, at any time, interfere with and have an examination of the books and accounts and property of a corporation in which he holds stock. In many instances stockholders are obliged to submit to the action of trustees and are practically remediless. But the plaintiff insists that when there was an attempt, in the language of a former order, 'to thoroughly measure, estimate and determine the true amount of all the coal, ores, products and

supplies,' etc., the plaintiff was prevented by defendants and their employees from doing this. That plaintiff was so prevented appears, we think, from the affidavits. And the Special Term, in view of such prevention, granted the order now appealed from specifying in further detail the plaintiff's right and directing the defendant specifically to permit the inspection and measurement. It is not necessary to specify in detail the affidavits on both sides relative to the acts of the parties under the former order; the attempt of the plaintiff to act and the alleged prevention by the defendants. As is to be expected, the affidavits sometimes conflict, but we think that an examination shows (and so the Special Term must have thought) that the defendants were endeavoring to obstruct the plaintiff so far as they safely could do so; and that there was not, as there should have been, a compliance with the meaning of the order."

Thus, for all the condemnation by the General Term, even after the court had asserted the plaintiff's right and insisted upon the defendant's yielding it, Arts and the defendant Burden endeavored to obstruct the plaintiff so far as they safely could, without getting into the Rensselaer County jail for contempt in defying the order of the court.

Mr. Carter: Here are some further observations of the same General Term; perhaps you would like to read them in order to make the thing complete.

Mr. Choate: I have read what I rely upon as asserting the view incumbent upon Your Honor to take of this corporation, and especially of its peculiar character.

Mr. Carter: I do not want to interfere, but I was merely reciprocating.

Mr. Choate: All right; I am very much obliged to you. Now one thing is settled. The proof remains the same as it was there, increased and enlarged by a further proof taken in this action—affirmative proof upon our part—of the exclusion of this plaintiff; a trustee and owner of half of the property, and, as the General Term says, "of perhaps more than half," from an adequate access to and inspection of the books of the company. I claim an injunction restraining defendants from further exercising that wrongful exclusion. I claim it upon the proof in the case and upon the decision already made by the General Term. Is there anything else desired? There is certainly one thing; that is, that we are absolutely now entitled to a permanent injunction for all the restraint which now exists by the temporary

order of Judge Mayham on substantially the same proofs presented to him as are presented before Your Honor, restraining defendants from a wilful or wanton abuse in building the road through Woodside which he commenced before that injunction was granted.

Mr. Cowen: Townsend didn't have time to do it.

Mr. Choate: I am obliged for these suggestions that are dropped; they aid me as I go along; I hope my learned friend will continue them. There is one fact shown here in regard to that, viz.: that when Townsend built a road there in 1884 upon these grounds he talked with somebody of the desire at some time or other to build another road. He did not do it. He never attempted it, and the claim is made upon their part, in the evidence and in the argument, I suppose to sustain the proposition that because Townsend once thought of doing an unlawful thing, which he did not see fit to carry into execution, he is thereby deprived of the power to restrain the defendants from doing that thing when the defendant James Burden wantonly undertakes that violation of law. I do not know of any such principle as that. Your Honor will not fail to read Judge Mayham's elaborate opinion. It was debated before him from the rising of the sun to the going down thereof by two counsel on both sides of the case, and it is law for the purposes of this case unless the facts are changed to the detriment of the plaintiff, as I submit they are not.

Another thing we are entitled to, and that is a decree against the resumption of "fancy farming" by the defendant, James A. Burden. His part of it was in the importation and raising of Jersey bulls. They say, "why we have stopped." Yes, you have stopped that, but never until the compulsory order of the court came in this action to compel you to.

Mr. Cowen: There is no such order.

Mr. Choate: Although Townsend almost from the beginning of the corporation had been urging its discontinuance, James refused to stop. The presumption must be that he will resume it when the restraining hand which interrupts it, is taken from him. He has too much sympathy with Jersey bulls to readily desist from their company, too much of that very nature of the animal in him, as is perfectly manifest to everybody who meets him. No, it was his persistent determination from 1882, 1881 even, when Townsend began urging a discontinuance, until Judge Peckham said: "If you do not desist upon this intimation I will enjoin you next week." He did for the time desist. The moment that restraint is taken off from him there is every reason to believe that he will again resume it, and we are entitled, upon Judge

Peckham's decision and upon the facts as they stand in this case, to a permanent decree to that effect.

I gladly accept the challenge which my learned friend has thrown out to me as to the good faith of the plaintiff in this suit. Conscience, good faith, diligence are required of a party who comes to a court of equity for relief. I accept the challenge. I undertake to demonstrate from the evidence in this case, by which only Your Honor is to be governed, that the plaintiff has both conscience and equity on his side, and good faith absolutely. I do not think that I can spend my time to any better advantage than recalling the history of this case during the period for which it is material. I do not propose to explore the dusty records of forgotten generations; but from the moment this corporation, so called, (we call it so, they call it so, the General Term with doubt and hesitation, also calls it so) from the time it begins to come in sight there is a period during which the acts and proceedings of these parties are in the highest degree material. But it does not begin back in 1870 or 1876. It begins, if the court please, on the 14th day of June, 1881. What happened then? Why, the cancellation of the agreement under which these parties had been proceeding up to that time and under which, (if not sooner abandoned) they had agreed to continue it for ten years from 1878. I shall begin my considerations of the facts with that. I ought, perhaps, to refer to one or two immaterial matters that have been said here as to previous occurrences because they were efforts to cast a slur upon my client. They blow hot and cold upon him. They pretend he is a gentleman, and an honest man, and then charge him from step to step with the most atrocious and malignant motives. It has been argued here, as if it were an undisputed fact, that Mr. Beach having been made arbitrator between these parties, that he said if Mr. Beach came on the grounds he would kick him off. Why, if Your Honor please, his evidence is—and I commend it to Your Honor's judgment—that Mr. Beach told him that if Mr. Arts intruded upon his private premises under the guise of an order of the company, he could kick him off. Which is the more probable? Reference has been made to a quarrel that arose between them as to the invention of the swaging machine in 1876, which was quieted in 1878 by an agreement. One word about that swaging machine and the right of the parties in regard to it. This company was not formed simply for the purpose of manufacturing horse shoes. It had not been engaged merely in the business of manufacturing horse shoes. There was another part equally dear to the heart of the original founder of the establishment,

Henry Burden, equally dear to William, the older brother, who to the infinite misfortune of these two survivors, was taken untimely from them, and that was the development of the arts that were used in the manufacture of horse shoes and of merchant iron. It was the great pride of Henry Burden to have contributed to that art; it was the equal pride of William Burden to have contributed to that art; and it is the greatest boast of James A. Burden that he too was able to contribute to it. He invented, with the aid of competent assistants, employed in the inventing department of this very concern, this swaging machine which was of so great value to the concern. But when Henry Burden made an invention he did not claim it as his own against William, James A. and Townsend. When William made an invention he did not claim it as against James and Townsend. When Henry Burden handed over to this concern the property which carried with it the patents—

Mr. Cowen: Mr. Choate, there is not only no such proof in the case but it is not the fact: Henry Burden—

Mr. Choate: Will you take the stand?

Mr. Cowen: Henry Burden, the father, did charge for the use of his inventions.

Mr. Choate: When Henry Burden departed from this company and sold out to these boys, all his patents went with the sale. When William Burden died they did not recognize the rights of William's children and widow to the inventions that he had made. This case then comes exactly—

Mr. Cowen: I would like to know upon what ground counsel states facts that he knows nothing about, and which are not in evidence in this case? I am informed it is not true William's inventions went to the firm, that they stand in his name.

Mr. Choate: Your Honor will look at the evidence, you will see what they got when William died and what they got when the father died. You will see what the invention was. I agree with my friend this is a material question, but I want to state what my position is in regard to it. That the business consisted not only in manufacturing horse shoes, but developing the art of manufacturing. That there was an expensive department of this establishment set apart for that purpose. That James by availing himself of that, and of the assistants, and facilities, and information, and advice, and inventive faculties that were there contained at the expense, and for the benefit of the firm, invented this swaging machine, and then claimed he was the absolute owner of it.

If Your Honor will take a reference to the case of Burr against De La Vergne in 102 New York, you will find that under such circumstances it has been held without hesitation by that court unanimously that the party inventing under any claim of absolute exclusive right, that it was the property of the firm.

Now I call Your Honor's attention to the agreement of James and Townsend, as the joint and equal proprietors of the works, for a continuation of its business for ten years from May, 1878. It recites that "whereas, we have heretofore associated with the conduct of such business various properties," referring to the very properties that we are now seeking to get out of this corporation because they are not necessary to its business, "whereas, we have heretofore associated with the conduct of such business various properties, and choses in action not necessarily connected therewith, treating the same as part thereof. * * * Now, therefore, this agreement made this eleventh day of May, one thousand eight hundred and seventy-eight, witnesseth, that we hereby agree to continue the said works, and business with the property, and appliances heretofore used, connecting therewith as heretofore the aforesaid properties, and choses in action" for the period of ten years.

I cite that to Your Honor as demonstrating that both of these parties knew, and agreed that this Woodside property, these private stocks had no particular connection with the partnership business, and were not necessarily involved therein. A fortiori, it follows they are fully agreed that they had no right against the consent, and protest of either to be carried on or continued in the copartnership after it was formed.

If the court please, on the 14th day of June, 1881, that agreement was terminated. What can I argue from that? I can argue as I do, that no serious differences existed between these brothers prior to the 14th of June, 1881; none that they were not perfectly capable of settling themselves. They never had to resort to Mr. Cowen as the successor of Mr. Beach. Twice, I believe, Mr. Beach came up, and in friendly discourse settled the questions which they submitted to him as arbitrator under the agreement, according to the evidence. I do not mean to say there were not jars, that there were not differences. Your Honor cannot have sat in the presence of James A. Burden and Townsend and not realize that they could not exist together for any definite, or indefinite period without some jarring. James is a born despot; it is his pride to be so; Townsend gentle, manly, submissive to a great degree, but yet knowing his duties, knowing his rights,

and daring to maintain them. There couldn't but be occasional conflict. But on the 14th day of June, 1881, they had been together for more than twenty years without anything really to disturb their harmony. Now what happened? This brings me, if the court please, to the formation of the company, and the making of the "Promoter's Agreement"; and first it brings me to the most extraordinary feature in the case, namely, to the evidence of Smith, Fursman & Cowen. Never, I believe, in the history of jurisprudence has it been known that three eminent lawyers, having been employed about a business, and engaged in advising the party employing them for a period of sixteen days, afterwards were willing to come into court, and attempt to swear away that client's rights. Your Honor, upon Mr. Smith's preliminary statement admitting the evidence, I venture to say that upon hearing all he had to say afterwards, which stands in this record, you will, you must, repudiate, and ignore it. You will, and you must, come to the conclusion that although they claim to have been the counsel of James, they were in reality, as Mr. Smith admits, the counsel of Townsend too. Let me call Your Honor's attention to Mr. Smith's cross-examination on this point, because it is very vital to this case. Mr. Smith's evidence on the cross-examination is no more or less than this. In one respect it is obvious from the date that I have called attention to, that he is clearly mistaken, namely, that Townsend came to him some time in May or the early part of June. He did not. James says that after that paper of the 14th of June was signed he went to Mr. Smith. Of course he did. Why should he go before? They had not dissolved the existing arrangement, why should he go before?

On the 14th Mr. James Burden testifies that after that old agreement was cancelled he went to Mr. Smith, and in a moment of petulance he directed him to take proceedings for a dissolution of the firm. Did he mean it? I do not know. It was never acted upon. It was used for all it was worth to influence the mind of Townsend. Now, what were the relations of those gentlemen as disclosed by this evidence, to Townsend and James at the time of the dissolution of this agreement? They were under a standing retainer, a general retainer from the firm of James and Townsend Burden, whatever its name was. They were in receipt of three thousand dollars salary per annum for that service which did not include litigation, but did include advice, and consultation freely whenever they chose to come. James came to them and says: "I want you to prosecute a suit against Townsend for a dissolution of our firm." Whether they had a right to accept such

a retainer I will not discuss. I doubt it very much. No such suit could possibly be prosecuted without disclosing confidential matters that had come into their hands as the counsel of both. But let that pass. They saw the mischief of that and they determined, as they swore in their joint affidavit, (all four of them put their heads together and determined) to prevent it if they could. No suit was ever commenced, and it never was thought of from the moment that Mr. Smith first suggested to Townsend that the firm should be merged in a corporation. He claims the originating of that idea. They charge it upon Townsend. Townsend had talked about it years before, but as a dream, as a fancy. Mr. Smith says: "No, I suggested that, I alone advised Townsend." Now, if your Honor please, the retainer from James which they accepted, but never entered upon was for a special purpose, the conducting of hostile proceedings for the purpose of a dissolution in invitum. From that moment they acted for Townsend. In pursuance of this very request of his, and his promise that if they could get the firm merged in a corporation he would see that they were paid five thousand dollars. Now what happened? They went to James and made the same proposition, and he rejected it; but he said: "In this matter I want you to act for me." They had already agreed to act for Townsend according to Mr. Smith's statement. He says: "I want you to act for me," and Mr. Smith added warily, "and nobody else." Mr. Smith, did he say, "and nobody else?" "No, he did not." He did not say "and nobody else." He had already entered upon the employment for Townsend, he was already the retained attorney of both of them, both of them had his assurance that he would act for them. Did he? Did he act for Townsend? Why, from that moment he was carrying out the employment imposed upon him by Townsend. He was earning the five thousand dollars which Townsend had promised him and which both concurred in paying him after the service was accomplished. Now, let us see. He was the author and finisher if not the author of the first letter that passed between these gentlemen on the subject. The letter of June 18, 1881. Your Honor cannot have forgotten it. I call Your Honor's attention to that. Mr. Smith says: "This letter was brought to me and revised by me and carried by me from Townsend to James." What does it say? What is the meaning of it? This letter of June 18: "Dear Jim—I have had several interviews with Mr. Smith with regard to our business affairs. He thinks the only way to get rid of our existing differences is to put our concern into a stock corporation, and then transfer all our joint

property to the corporation, excepting such stocks, etc., as we may own together, not connected with our works, which in the meantime we may divide among ourselves. I agree with Mr. Smith and propose to you so to do." Then he goes on and details a sketch of the plan of incorporation, and concludes, "my purpose is peace and success. This will be handed to you by Mr. Smith, by whom I should be glad to receive your views and suggestions."

From that step forward, according to the sworn affidavit subscribed, as if to give it greater strength, not only by Mr. Smith but by Mr. Cowen, by Judge Fursman and their deceased partner, Mr. Kellum, they swear that each and every paper, step, proceeding and instrument from beginning to end was fully explained by them to the plaintiff, Townsend Burden. By what ingenious device and sophistry does Mr. Smith attempt to escape from the position that he was acting for Townsend? He admits that he undertook the service. He admits that he performed it. He admits that he received the stipulated compensation for it. He admits that Townsend acted under his advice as from his infancy almost he had been acting under his advice; he knew of no other adviser that he had; McClellan was talked of in case of hostilities, but there were no hostilities. There was no suit. Nothing was ever heard of McClellan after that. He knew that Townsend Burden had inherited him, Levi Smith, from his father as a precious possession, as an adviser. By what device does he get out of it? He says: "Yes, my affidavit says I advised him, but I didn't give my advice as a lawyer. I gave him my opinion as a lawyer at every step." Can Your Honor swallow that? Has even a court of equity maw enough to take that in? I do not believe it. Mr. Smith is much amused; he knows that nobody can credit that.

Let us go along a little further. It is recorded between these parties what was the agency and instrumentality of Mr. Smith. The defendant replies on the second day but one: "I have your letter" and am "alive to the dangers of the situation." "As the proposition is incomplete in some important particulars, perhaps unavoidably so, I have not been able to discuss it fully with Mr. Smith." Townsend's adviser—I take that back, opinionator. "I can see how some things in it would most certainly prolong our troubles * * * therefore, I have told Mr. Smith I must decline it."

Smith kept Townsend up to the idea of a corporation. On the 24th he writes another letter. This time the letter coming from James. Let us see whether they were acting for Townsend as well as for James.

"Woodside, June 24, 1881.—Dear Towney: Messrs. Smith, Fursman & Cowen yesterday invited me to call at their office, where they sub-

mitted to me, at your request, the requisite papers for formation of a stock company.

"Upon examination the plan submitted proves to be substantially the same as outlined in your letter of the 18th inst."; and therefore he declines it.

If Your Honor please, was he not acting for Townsend when he prepared those papers? He thinks he did not prepare them so early as that. How could Townsend Burden, how could James Burden write that he had been at their office and gone over the papers if they had not been prepared? If Your Honor would enjoin both of these brothers from writing letters you would do them a tremendous service. I am not sure but that it would go farther to heal the breach existing between them than anything else that a court of equity could do. I will only call Your Honor's attention to one point in this letter as showing the spirit in which James wrote to his loving brother: "The practical knowledge which must come to every one, however dull, by long experience in manufacturing, was cheerfully recognized, and had due weight in our counsels." That is a sample of the complimentary manner in which he interlarded these business letters to Townsend. However, I am not on that point now. I am speaking of Smith, Fursman & Cowen.

On the 25th of June another letter came from Townsend still pressing the matter, and on the 27th of June there is a final declination in a letter from James. But I challenge Your Honor's attention to the fact that from the beginning to the end of that business, from the 15th day of June when Townsend was called into their office to respond to the threat of James to dissolve—a threat never acted upon, and as I believe never seriously contemplated—Mr. Smith had him in charge, took him under his custody, professed to be his friend, gave him his fostering advice and counsel, which he now says was only opinions. If Your Honor please, Mr. Cowen demonstrates the situation exactly as I claim it to be in his evidence. Mr. Cowen says, "I caught them at it one day. I caught Smith and Fursman talking with Towney."

Mr. Cowen: Not Smith.

Mr. Choate: Fursman, your indiscreet junior. He caught his indiscreet junior, Fursman, talking with Townsend about this very matter of dissolution. What did he say? "Fursman, you ought not to talk with Towney about that."

Mr. Cowen: Mr. Choate, he was not talking about the dissolution.

Mr. Choate: Talking about these very affairs, about the formation of a corporation.

Mr. Cowen: No, he wasn't doing any such thing.

Mr. Choate: Your Honor will read Mr. Cowen, I do not like to read and hear him both.

Mr. Cowen: I do not like you to read statements which are not true about my testimony, Mr. Choate.

Mr. Smith: I like to hear him about mine.

Mr. Choate: Mr. Smith understands, he knows what the situation was, he even makes light of it, if Your Honor please, in the presence of the Court. Mr. Cowen caught them at something, I do not know what. They were there, Fursman and Townsend, together, cheek by jowl, lawyer and client, and which was the cheek and which was the jowl they could not select themselves. Mr. Cowen says, "You must not do that, we are retained for James," what the retainer was Mr. Smith has testified and that was in a very early part of these talks. Now, what happened? Did they desist? No. They went on talking. They continued this talk from the 14th day of June down to the 30th of June when the corporation was formed, because they knew full well that James proposed antagonizing it, and originally had nothing to do with it; and because they knew full well that the question was of merging the firm in which they were both equally interested into a corporation in which they should both be equally interested. So, if the Court please, knowing how ready Your Honor is and ought to be, (and believing that Your Honor is as ready as anybody) to correct a first impression that may have been erroneous, may have been upon imperfect data, I appeal to Your Honor to strike out that evidence which never should have been admitted, which never would have been admitted if all these facts were known, from this record, and not leave it, as it is to be if it remains there, a blot upon the jurisprudence of this state. That a client's rights can be sworn away by his chosen and devoted counsel. So I proceed to the examination of the acts of these parties, and to the consideration of the agreements they entered into, and what construction ought to be put upon them; for that is the next step.

On the 30th of June, 1881, this momentous step was taken, this corporation, so called, was formed, this promoter's agreement being first signed. Now, we all agree on the proper baptismal name for the extraordinary agreement, the offspring of the mind of Levi Smith. It was sufficient for its purpose. It is a little obscure, it is a little disguised, but, as I said before, certain facts stand out there which are controlling, certain stipulations which can never be blotted out or forgotten. In the first place, what was the object of making it? What is the object of making any promoter's agreement? There is no mis-

take about the law on that point. There is not any dispute of law in any of the questions arising in this case. There are matters of construction. I accept all my friend's law. I never dispute Mr. Carter's law. It is his struggle to misapply it to the facts in the case that constitutes his chief infirmity, and it is a prevailing infirmity with him. What was the object of the promoter's agreement? It was to control the conduct of the corporation, was it not? It was to control the ownership and the holding of shares. It was to control the action, so far as it points to it, of the associates. With what view? Why, with the view of every promoter's agreement, that as long as they remain the sole associates it might be altered at their will. That is the peculiarity of this corporation from the moment that it was formed until the illegal step was taken of admitting outsiders in it who had no right there, that the people who made it could destroy it at any moment by a mere signature as they had created it. Now, if Your Honor please, there is one fact here in evidence upon a most overwhelming authority to which my learned friend, Mr. Carter, has not referred, namely, the undisputed fact that at, and before the time of the formation of this corporation it was agreed between the three that there should be only three trustees of the corporation. How was that proved? The defendants all said so in their first answer. Was that a mistake on their part into which they had been led by the inadvertence of counsel who prepared the answer? Why, if Your Honor please, the answer was presented by Smith, Fursman & Cowen, so they all assert, and they instructed James to swear that it was agreed at and before the formation of the company that there should be only three trustees. They said I stood upon a "semicolon." I do not. Your Honor will find it there exactly as I have stated to you. Then what happened? We availed ourselves of that admission in the amended complaint, and then they took it back, and said the only agreement was that they should be the first trustees. When parties come to make a promoter's agreement, they do it for a purpose, and with intent to control what would be the ordinary action of the corporation. What did they agree here? They agreed that Arts should stand as a nominal party with two of Townsend's shares, two of the shares representing Townsend's half of the property and of which he, notwithstanding the holding by Arts, should be the owner and receive the dividends; they agreed that Arts, whom they could not control, of course, could go out at any time, but he was to surrender his stock to them at par. Then they agreed that a thousand of the shares, subject to Townsend's right of preemption in two shares when James went out, should be held by James, and that 998 shares should

be held by Townsend, and then they put in a controlling agreement which, unless it is changed by common consent, remains there to govern the whole instrument, and what was that? It was that all the profits should be equally divided between the said James A. Burden and the said I. Townsend Burden. It was not put in that each separately should have half. That was not what they were contending for, that was not what they were struggling for, that was not what they were forming this corporation for. As James' letter shows on his part and as Townsend's shows too, they were struggling to keep that property through their lives and to transmit it unimpaired to their children. That is what James says in his letters. Therefore, they agreed that the profits should be equally divided between them. When did that cease to be an agreement? Let them tell Your Honor how that could cease to be binding upon them until both agreed to its discontinuance? Was it not made for the purpose of controlling the interest in the property? Was not that particular feature inserted for this very purpose and no other? Was it not binding? We all agree to that. Could it be altered except by mutual consent? How could it? What a light it sheds upon those other two clauses, obscure as they were without it, but from the luminous mind of the author of that paper came this light which made the whole clear of all disguises, "Until further agreed, as long as I, Townsend, live, as long as you, James, live, (unless we otherwise agree in the meantime) these profits shall be equally divided." It does not state its meaning to say that Townsend is to get one-half. It does not state its meaning to say that James is to get one-half. Nothing states it but that both are to hold on as long as they live, or until they change the agreement, and that the company should be so worked as that from its proceeds, while that agreement stood, each should receive,—they two, not any successor, not anybody else,—but they two, should have each a half, it should be divided between them. So that, if Townsend had undertaken to transfer some of his stock so that the profits instead of being divided between the two should be divided, a half to James and a quarter to Townsend, and a quarter to his transferee, that would be in direct defiance of this agreement. They knew that perfectly well. Just so it was when James undertook to transfer one or both of his shares, in spite of this agreement, so that the dividends should go on one share to Richard Irvin, and on one share to William Irvin, that was in plain violation of this agreement. Their lives continued, and there had been no change in it. So I leave that point with this consideration which I

have suggested, to corroborate what seemed to me the unanswerable arguments that Judge Countryman presented upon that subject.

If the Court please, I agree with the learned counsel upon the part of the defendant, that the promoter's agreement is to be read with the articles of formation of the corporation as if they were one agreement; and I also claim that this admitted agreement, in addition, that there should be only three trustees of the company, is also to be coupled with the other two. Of course, when they came to prepare the articles for the formation of the corporation, they were obliged to follow the form described by the statute, or even their imperfect attempt to form a corporation would fail. It would not present itself even in the guise and appearance of a corporation without that. So it must be that the formal parts of that agreement yield in force to the overruling weight of the promoter's agreement. There is nothing in the statement in the copartnership articles that the trustees who shall manage the business for the first year shall be James and Townsend Burden and Arts, that controls the conceded agreement, that there should be only three trustees and that those should be the ones. There was no sense in the admitted fact, there was no sense whatever in making such an agreement as that there should be but three trustees at and before the formation of the corporation, if it was not to run parallel with and during the existence of the promoter's agreement, which I claim is during the lives of the two brothers, the joint lives, unless it should sooner be dissolved by consent, or unless Mr. Arts should exercise his privilege of going out, and surrendering his shares upon the agreed terms, to the other two. If Your Honor looks at the situation of the parties as they stood, I think you will see at once that it never could have entered into the heads of either James or Townsend that anybody else should be a trustee. I mean, from any meaning that they could gather from these agreements. I mean not that there could not be physically a substitution of another trustee, but there is a great difference between physical right and a legal right, a physical power and a legal and moral right. Suppose, if the Court please, that Townsend, being inspired by the devil, on the first day assigned for a meeting of stockholders, James being sick, if you please, or, trusting in the good faith of his brother, did not attend, and Townsend, exercising his vote as he had the physical power to do, had ousted James from the board of direction and elected himself and two other people as trustees, leaving him and Arts out, as he had the physical power to do in the case. And then we will suppose that the next day following this device so ingeniously contrived by Smith, Fursman & Cowen for

these defendants, Townsend and one of his chosen associates had said "I think we will fix this so that James can never return" and had filed a certificate and brought in two of his brothers-in-law for trustees—there is a test of the situation, of the understanding and the agreement of the parties on these papers. It was within the physical power of Townsend just as it was within James' physical power as he did two years afterwards to bring in his two brothers-in-law. Upon the facts known to Your Honor here what would you have said if James had filed his bill to annul such a proceeding as contrary to the good faith of Townsend and contrary to the implied, yes, the expressed understanding of the parties? Would you have said this case is for the attorney general *quo warranto*? These men are in possession of this office, Townsend and his two brothers-in-law, and a court of equity has nothing to do with it? You would have said, no! it is a question of contract, it is a question not which of the two parties is entitled to the possession of a particular office, but whether there is any such office. Upon a bill filed by James under those circumstances, and a presentation of that case you would have said it was constructive fraud, it was a breach of the agreement, the office that they had purported to create was not created, and though, perhaps, you might not have been able to interfere with the two trustees who had been elected by the stockholders at the annual meeting, you would have enjoined any action on the part of the two bogus trustees who would thus have been thrust upon the company and upon James. It is often wise in cases like these to put the boot upon the other leg and see how it will fit. I submit that proposition to James Burden and his counsel as a test of what was meant by this promoter's agreement, overruling and bound up with the articles of incorporation.

Now, we find these three parties in a corporation deliberately formed. Formed why? Because they say and I say, that they had both concluded that the plan of running with two heads as a copartnership was no longer practicable. Formed for the purpose of government, and government how? Is there any dispute about the law here? Do we differ about legal propositions on anything so simple as the government of a corporation? No matter how little of a corporation it be, how can we? We are not tyros, students, although we have been in attendance so long upon the Troy Law School represented by the office of Smith, Fursman & Cowen; about elementary principles we cannot differ. Not only that, but the statute defines how corporations formed under this statute shall be governed, namely, they shall be managed by a board of directors. They say we are trying to plead

out of what we have been trapped into. I make no such pretence. I say that Townsend Burden is chargeable with the legal, fair, equitable, honest meaning of the papers that he signed. He is bound by the legal and necessary results of whatever he went into. He went into it at his own request and with his eyes open. What did he agree to? What was this scheme that he entered into? It was a management by a board of trustees of which he was to be one of three and only one of three, and where the others agreed he was to be overruled. How can there be any doubt about that? How can my friends upon the other side impute to us anything so puerile as to deny that? The majority was to govern, but how were they to govern? Were they to govern arbitrarily? Were they to govern in the dark? Was the majority to keep out of meetings and skulk behind the "steam mill" or the "water mill" and arrange all the affairs of the company without the knowledge of their third associate and without giving him an opportunity to be heard?

Now, we come to the dividing point. The dividing point of assertion, but I do not believe the dividing point of opinion between my friends upon the other side and myself. Mr. Cowen is good at definitions. He says stockholders, officers, directors of corporations—all have rights as such. A stockholder has a right to attend a meeting whenever there happens to be a meeting of stockholders, and to take a dividend when the company pays it. Officers have a right to perform duties assigned them by the board. Directors have a right to attend meetings of trustees, to unite in the election of officers, and to vote upon all matters that may properly be brought before the board. A pretty good definition, but it leaves out one material thing, namely, that the affairs of the company shall be managed by the board. I place Townsend Burden in this corporation upon that understanding, bound by those obligations, limited by those rights and I say he has been wantonly excluded from the very rights which they profess to accord to him. Excluded by the unreasonable and unfounded combination of this defendant, James Burden and Arts against him, formed almost as soon as the corporation was formed and that upon their own confession. See how he stood. Your Honor will remember something about the formation of this corporation as it was sketched forth in these letters. Townsend's proposition was that of the corporation to be formed James should be president and he should be vice president. That was agreed to. Townsend's proposition was there should be five trustees. That was objected to and repudiated and changed to three and three afterwards agreed to; and it was after-

wards agreed that the three should be the two brothers and Arts. According to the definition of my friend, Mr. Cowen, Townsend had a right to the office of vice-president, and if they are to be bound by the agreement upon which they entered into a corporation, it cannot be taken away from him until there is some change in the promoter's agreement. He had a right to insist that the business of the company should be managed by the board of trustees and that his voice should there be heard, his vote should there be considered, for the law will never assume that a trustee shall speak to absolutely deaf ears. What is this theory of the management of corporate affairs by a board of trustees? That each is essential to the composition of the board. That every man has his voice and his vote and that no matter what the personal relations between them may be, no matter what personal traverse they may wish to accomplish, the law presumes that the voice of each one will be heard by the others, and it is only the result of the contention, the discussion, the consultation and the conference that there takes place between them, that is to be the action of the board.

My friends upon the other side were kindly willing to bring here this morning the book of minutes. I do not know whether they will object to my reading from them how these three trustees conducted this business at first. At first Arts says there was no trouble, things went on as they had gone on before; Townsend was permitted to attend to portions of the business, so was James, so was Arts. The correct way for the affairs of such a corporation to be conducted involving millions of dollars of value, of which each of the two trustees was the owner of a million, was to have the affairs, the projected changes in business, the projected new ventures, anything important enough to be the subject of conference presented to the board, there discussed, there acted upon and the vote that resulted from the conference of the three was the act of the board. That is the way it should have been until this day. But, if the Court please, after the 19th day of July, 1883, until the commencement of this suit nothing was brought before the board. They met once, twice, three times, for what? To declare dividends. To vote by-laws, by-laws for the destruction of this plaintiff. By-laws, as avowed by my friend Mr. Carter, for the express purpose of preventing him from participating in the affairs of the corporation at all.

Mr. Carter: No, interfering in the management.

Mr. Choate: To prevent him from having any participation in the management. He says "interfering," do I give an improper definition

to his word "interfering," to the participation in the management. The object of that by-law was to destroy his standing and his privilege, right and duty as a trustee. Nobody knows better about it than my learned friend, better than his client who stands behind him, and who took the action on purpose, and who was advised by all of the counsel on the other side, except my friend who has so lately come into it. If that did really happen and happen anyhow, it is sufficient to give us the right to the preventive arm of equity to restrain them from transacting the business of the company any longer in that way.

What I deliberately charge upon this evidence is, that without provocation of any kind on the part of Townsend, it matters not whether there was provocation or not, but what I charge upon the evidence is, that without provocation of any sort upon the part of Townsend, very shortly after the formation of this company, James and Arts combined deliberately, and formed the determination of excluding him from all participation in its affairs. That they adhered to that determination and acted upon it down to the commencement of this suit. Have they admitted it? If Your Honor please, nobody knows better than Mr. Arts, I suppose, about that. He admits it. He says that was exactly as I have now stated it. I wish I had time to read at large several passages from his testimony, but as to that there is no dispute. I read from page 104, Vol. 4. "Q. How much earlier than January, 1882, did you form the determination that Townsend should have nothing further to do with the affairs of the company?" Did I overstate the concession of the other side. My friend says "interference," remits me to the word "participation." I take Arts' words: "Q. How much earlier than January, 1882, did you form the determination that Townsend should have nothing further to do with the affairs of the company? A. I don't think there was anything before that. Q. From the time when you formed that determination, ever since the commencement of this suit, you persisted in that determination? A. I persisted in it so long as he persisted in his opposition. Q. You persisted in it until this suit was commenced? A. He was in opposition until the suit was commenced, and since then of course he has been. Q. Your persistence in the determination that he should have nothing further to do with the affairs of the company—didn't you persist in that determination down to the commencement of this suit? A. Yes."

Is that the right of a majority? Is that the way in which this statute, and the common law requires a corporation to be governed? What was this plot? They do not disagree about it. James Burden

says the same thing. Vol. 3, page 390. There he persists, he remembers nothing that they permitted Townsend to do, and over and over again in the cross-examination he concedes that he determined that Townsend should under no circumstances be permitted to do anything. I have not the time to read the passages, they must be fresh in Your Honor's recollection. It was the leading feature of the testimony of both of those important witnesses. I want nothing but their concessions to establish our right to a decree in this case.

Mr. Carter: Have you time enough to state what they had a right to do?

Mr. Choate: Yes, I am going to state it.

Mr. Carter: I am glad of that.

Mr. Choate: There was the plot they prepared. It is conceded. They determined and acted upon the determination that the affairs of this company instead of being managed by the board, should be excluded altogether from the board; that the board should have nothing to do with it, that the trustees as trustees should have no participation in it, but that James Burden individually, half owner of this stock, not as trustee, but as James the man and John L. Arts, should conduct it by themselves, without giving Townsend an opportunity to know what was going on, without giving him the least opportunity to be heard in regard to anything, or even to put on record his veto. That will not be denied. That is the confessed situation in this case. I want no more to entitle my client to a decree, and a very broad decree from Your Honor, that the business of this corporation shall not be thus transacted in defiance of the statute and in violation of the rights of this plaintiff, as trustee and stockholder.

Now I come to some pretenses that they set up, shabby, puerile, indecent pretenses under which they try to cover and excuse this conduct. That is a part of it that stands equally upon their own statements and their own admissions, and as to a very little of it I shall ask Your Honor to let me call your attention to one or two passages of the evidence. You will remember the proof that for a while the business of this company proceeded as it should proceed. If you open this book of minutes, you will see how one important matter after another was brought up, considered, voted upon and decided and the minority had to submit. Why did it not continue? It was because James was so sensitive, jealous, and afraid that Townsend would undertake to exercise some power, would undertake to oppose his management or his policy that he and Arts put their heads together in this combination which they so successfully carried

out and which we appeal to Your Honor to reverse. Townsend very soon after the incorporation began to complain of this fancy farming. That was the first thing he complained of. They said it was opposition to the majority. He continued his complaints, his entreaties to have it discontinued and by and by he did some other things which James believed were acts of hostility. Let me call Your Honor's attention to those. It was in July, 1882. They say he asked James to let him have a share of his stock. Well, he did, and Mr. Arts swore in his affidavit that the moment he found that Townsend was trying to force James to transfer to him a share of his stock, he regarded him as in opposition, and no longer entitled to have anything to do with the affairs of the company. When I confronted Mr. Arts with that affidavit he was obliged to confess that he knew nothing of any attempt at forcing. How could there be? It was a simple request proffered upon the one side, as he had a right to proffer it, refused on the other instantly as he had a right to refuse. But James Burden was set all by the ears by that, and Townsend from that moment was declared by him and Arts to be in opposition and no longer entitled to have anything to do with the affairs of the corporation. Well, when they came upon the stand to justify their acts by general charges of hostility upon the part of Townsend, we had a right to make them state what those acts of hostility were, and we did so. It appeared glaringly upon their own confession that there never was one act of hostility. Let me call Your Honor's attention to what their pretenses were, and I got Mr. James Burden to state what the first act of hostility was at Vol. 3, page 378, and that is worth reading and can never be blotted out, I think, from the mind of anybody that heard it, or any judge who has to pass upon this case at any stage. I was insisting he should tell the first act of hostility, and it was this, that in the summer of 1882, Townsend having charge of the greenhouses, undertook to paint them the same color his house was painted. He had had absolute charge of the greenhouses from the beginning, since that—they called it extravagance, I do not see any extravagance in it—since that indulgence of their taste was entered upon he had charge of them and he painted them the same color as his house. James came along, and seeing that done, without calling a meeting of the board of directors, without even consulting his confederate, Mr. Arts, sent a painter there to paint them back the color they were before. That was the first act of hostility to the corporate policy on the part of Townsend

that justified this exclusion of him from anything to do with its business! James' theory was that there was a color for all the buildings of the works, that he and Arts had agreed upon originally. He did not deny, however, that Townsend had exclusive charge of the greenhouses. He did not pretend that the reversal of Townsend's act in regard to it was authorized by the board. It was his own wanton act. My friend revoked his accusation that Townsend countermanded orders. There is not one instance in all these books of his countermanding an order. Let us see what James says about this. I told him that Mr. Arts had suggested painting the buildings and decided upon this color. "Q. He went to work and painted them a different color? A. Yes, sir; the color of his house. Q. That made you angry? A. No, sir; I was cool about it; it was conflicting counsel. Q. You acted coolly throughout? A. What do you mean? Q. In what you did in reference to it? A. Yes, sir; to meet the issue of conflicting counsel at once. Q. What did you do—you waited until he got them completely painted? A. No, sir; when I noticed that it was the beginning of conflicting counsel that brought the whole company to grief, I thought the issue should be met at once and the question should be decided as to what power the company had, and I told him to paint the buildings a fresh color. Q. This was the first strife after the incorporation of the company, wasn't it? A. I can't remember. Q. The first you can remember? A. The first I can remember at this moment. Q. You thought it should be met at once with a stern face? A. Yes, sir. Q. And put down? A. Yes, sir. Q. And that was what actuated you to do as you did? A. What do you mean? Q. That was what actuated you to order them painted over again your color? A. I told him to paint them. Q. The thing that actuated you was this insubordination on Townsend's part that it should be put down strongly and with a stern hand? A. Yes, sir; on the start. Q. Don't you think that was a very silly thing on your part? A. No, sir. Q. You thought it would lead to the destruction of the company? A. That was the beginning of divided counsel. Q. You thought if not met at once with a stern hand ruin stared you in the face? A. The company was on trial. I apprehended divided counsel would continue under the company as it had under H. Burden & Sons."

There is Townsend's first act of hostility, act of insubordination under which they claim to justify this abominable exclusion of him from his rights as a trustee and stockholder in this company. All the

others are equally frivolous, if the Court please. So frivolous that it almost causes a blush to my cheek to have to refer to them, and that requires considerable. Townsend, mind you, had charge, by agreement of all parties, until they were destroyed, of all these greenhouses. Now what happened?

Here is the next, the so-called famous hennery business. "Q. This hennery business, do you think that is a ground of quarrel between you and Townsend? A. Yes, sir. Q. That is part of the 'war'? A. Yes, sir. Q. State it as you understand it, for I don't understand it? A. It is a hennery 40x20, two stories high, lathed and plastered inside, and contained a heater, incubators and fancy feeding apparatus, and partitioned into apartments by wire, and yards outside for fowls, and stained glass windows, and everything for fancy fowls. It was removed to make room for a greenhouse. He said it was moved on account of shading the greenhouse," and Townsend ordered it to be removed. That was his second offense.

If Your Honor please, is this not wanton on the part of these defendants? Is it not purely arbitrary, as arbitrary as it was successful and complete?

In May, 1882, Townsend seeing how things were going, made a most conservative, dignified, respectful appeal to his associates which Your Honor will find at page 387 of Vol. 3. "To the Directors and Executive Committee of the Burden Iron Co.: Gentlemen—At the time this company was formed, it was understood that I should actively participate in the management and control of its business."

Your Honor will observe that this communication was never answered. The statements in it are admitted by the defendants by their absolute failure to answer.

"It was established as a substitute for the firm of H. Burden & Co., composed of my brother, James A. Burden, and myself. Its capital consists of the real estate which belonged to that firm. While it existed I, as one of its members, had an equal voice in the conduct of its business. For more than ten years my brother and myself prosperously managed the affairs of H. Burden & Sons, and for about twenty-four years both of us have been practically engaged in the extensive and flourishing manufacture to which the Burden Iron Co. has succeeded. In that service I have become qualified to co-operate advantageously to the company in the promotion of its many operations. It was perfectly understood that I should do so, I have been always ready to do it and have again and again endeavored to do so. But by the action of my co-directors I have been gradually

excluded from co-operation in the business of the company, my orders to workmen have been countermanded and disregarded, the most important affairs transacted without consultation with me, until I am substantially excluded from all opportunity to contribute my experience of twenty-four years and my willing labor and attention to the work of the company. I am an equal owner in the profits of the company. I am one of its two founders. And yet by the action of one to whom I transferred two shares to qualify him for the position I am reduced to this inefficient and humiliating position. I protest against it and claim my right to be actively employed in the affairs of the company and to be regarded with the consideration to which my interests in it and experience and merit may entitle me."

That communication was made to his associates. They treated it with the utmost contempt and defiance. They had formed their plan of action, they adhered to it without swerving to the right or left.

Now I come to another matter in which this determination of theirs culminated and from that moment became absolute. It was put in operation from the 19th day of July, 1883, down to the commencement of this suit. There was no way in which Townsend could assert his right to act as a trustee of that company, except by resorting to the aid of a court of equity. I call Your Honor's attention to the resolutions which he offered on the 19th of July, 1883, found on page 176, vol. 2. My friend, Mr. Cowen, says that a trustee has a right to vote upon all propositions properly brought before the board. Let us see if these were properly brought before the board and whether his right to vote on them, which is a conceded right according to Mr. Cowen's own definition, was accorded to him. Here were the resolutions on the 19th day of July, 1883. The first resolution offered by the plaintiff was this: "Resolved, that the Woodside farm, containing about two hundred acres, be withdrawn from the funds and property of the Burden Iron Company, and that the same be partitioned between the owners thereof according to their respective interests." This was refused even to be entertained. We have some law contributed to this case by my friends upon the other side, but here is a piece of law contributed by my friend Arts without their authority. He says the reason that those were not considered was that they were not seconded. Only think of that, Your Honor. He comes before the board and offers respectful resolutions in regard to the policy of the company and these two men, who are plotting to deprive the third of his rights, refuse to entertain them because not seconded. I venture to interpose my feeble, professional, legal opinion against that of Mr. Arts on that

subject and under such circumstances there is no need of seconding to have a resolution entertained by the board.

Next he offered a resolution at the same meeting "for the division of the mansion houses and the grounds appurtenant thereto, known as Woodside."

Again, a resolution for the division of the Port Henry stock and of the Lake Champlain and Moriah Railroad stock, and the New Jersey Steamboat Company stock, and for various other matters which Your Honor will find on succeeding pages. They treated them all alike. All refused to be entertained. All refused to be considered. All refused to be voted upon. From that moment not only was Townsend excluded from any participation, by that act, in the board, but his associates never brought anything of the affairs of the company before the board, except to pay the one dividend and pass these atrocious by-laws.

I want to call Your Honor's attention to one or two passages of testimony about this business, found on pages 388 and 389 of Vol. 3. This is the evidence of James A. Burden. "Q. What action did the board take upon receipt of this communication? (That is his protest). A. I don't think they took any. Q. Did they enter it upon the minutes? A. I don't think they did; I don't remember that they did. Q. Who kept the minutes at that time? A. When was that? Q. May, 1882? A. I think Mr. Gable. Q. You did not in any respect comply with the request contained in this communication? A. No, sir. Q. You made no answer to it? A. I can't remember; my letters are so voluminous I couldn't say. Q. You have no recollection of making any answer to it? A. No, sir; I can't recall the answer. I wrote a great many letters and I can't recall them all. Q. You took no measures to admit him into a participation in the management of the company? A. In what way? Q. In any way? A. We were co-directors. Q. Individually? A. No, sir; never took any to have him act individually. Q. What did you mean by saying you wished at all times his co-operation in the management? A. Subject to the action of the directors. Q. You wished him to do nothing outside of the board? A. Individually, no. Q. You wished him to do nothing about the affairs of the company except what you did as a trustee at meetings of the board? A. No; we wanted him to act just as Mr. Arts and myself. Q. You were determined that he should not? A. No, sir; that he should not act individually. We had come to great losses in that way."

Then some things he said the court struck out.

"Q. It was your absolute determination from the beginning of the incorporation until this suit was brought, that he should have nothing to do individually with the management and affairs of the company? A. No. Q. Wasn't it? A. It was subject to the board of direction. We wanted to test the action. Q. Was it or not, your absolute determination from the beginning of the incorporation that he should do nothing individually? A. That he should act like the other directors. Q. Was it your absolute determination from the beginning of the incorporation until this suit was brought, that he should have nothing to do individually with the management? A. Can't I couple with that the fact that we didn't any of us act individually? Q. No; and I repeat my question. A. It was not my action, it was the action of the board. Q. Your determination was that his participation should be confined to action at the meeting of the board? A. No, sir; that he should act under the direction of the board; not under his own direction. Q. What did you ever permit him to do under the direction of the board at any time from the time of the incorporation down to the beginning of the suit? A. There is where the split began—he wanted to act individually. Q. Answer the question. A. I can't answer yes or no. (Question repeated.) A. I would have to look at the books to tell; I can't recollect. Q. Can you remember anything you permitted him to do under the direction of the board? A. I can't remember anything."

That is the way this owner of a half of the property of the Burden Iron Co., and perhaps more, as the General Term says, this trustee charged with the management just as the majority were charged with the management, was treated by his associates. A determination to confine his action to the meeting of the board, coupled with a determination to have nothing about the affairs of the company come before the board.

If Your Honor please, what happened during this period? Hundreds of thousands of dollars spent in new construction, and he not permitted to have a word or voice as to how that money, of which he was the half owner, should be spent. All this policy of increasing the consumption of Hudson River ore done during that administration by the board? No; never a word of action by the board about it. By these two men acting individually. And so it has come about that under the pretence of not permitting Townsend to do anything individually they themselves individually have absorbed the entire functions of the company, not as trustees, but as individuals. That is plaintiff's complaint.

So affairs stood at the time that Townsend went to Europe. I do not know that it is stated exactly at what time Townsend went to Europe. I do not wonder that he went. He was frozen out from his just participation in the affairs of the company just as completely as if he did not own one dollar of the stock. He went to Europe. Let me call Your Honor's attention to Arts' confession that he participated in this exclusion of Townsend, and without him, of course, it could not have been accomplished. It stands confessed that he joined in it, that he was a willing party to it and that he did it on the same grounds, because he thought Townsend's request for another share of James' stock was a piece of hostility to the company. But prior to that, in Vol. 4, page 99, we find: "Q. You have said that he (Townsend) attended to the business of the company after it was formed for a while just as he had attended to the business of the firm? A. He attended to the business. Q. And that was with your full approval as a trustee? A. Yes, sir. Q. When did you withdraw that approval and determine that he should have nothing more to do with the conduct of the business of the company, at what date? A. I don't remember the date. We went along very well, Mr. Choate, for a time, and then Townsend— Q. (Interrupting) Was it in the year of 1881? Name the date as near as you can. A. Well, I can't be precise about it. There were several months we went along pleasantly together. Q. Name the date, was it before or after the 19th of July, 1883? A. It was before. Q. How long before? A. I should suppose about the beginning of 1882. Q. That was about six months after the formation of the company? A. As near as I can recall it. Q. Now what had he said about the beginning of 1882 that led you to withdraw your approval about his participation in the business of the company and your determination that he should have it no more? A. Well, he wanted to have the whole thing undone; he wanted to have the distribution of shares changed; he wanted to have the property divided."

Then on page 101: "What do you mean by saying that was a reason why you made up your mind he ought not to have anything more to do with it? A. Because it seemed to make him dissatisfied and find fault with the firm. Q. I ask about your judgment? A. I am giving my reasons. Q. Is that as near as you can come to the reason, viz.: that he seemed to be dissatisfied? A. I speak of the causes of his dissatisfaction, because the trustees could not agree with him in his views as to what duties should be assigned to him. Q. Was that any reason why he should not be permitted to go on doing as he had

been doing since the organization? A. If he didn't show a disposition to work in harmony with the trustees, I think it was. Q. In what did he show a disposition not to work in harmony with them? A. He didn't show any disposition to work at all after that."

Then if Your Honor will look again at page 104 you will find that conclusive part of it to which I called attention, that he persisted in the determination that he should have nothing to do with the affairs of the company from about the first of January, 1882, down to the commencement of this suit, and that James A. Burden concurred with him in that determination.

Now I come to the time when they went to Europe. Townsend, under this condition of affairs, cleared out and went to Europe with his family. He was a trustee, he was vice president, he was absolutely excluded from part or lot in the administration of the affairs of the company whether as an individual or as a trustee, or as vice president. Then James fell sick, with his much to be regretted illness, in the early part of 1884 and he fled to Europe for his health, which he fortunately recovered about the end of that year. Now comes a circumstance which I wish to fix indelibly on the mind of Your Honor. Under what circumstances, under what agreement did Townsend come to take charge of the affairs of the company? Was it in defiance of James' wishes, or was it with his consent? I will not enter upon a technical discussion what authority a trustee in Europe had to exercise over the affairs of the company in America. But James was president of this company and disabled from acting. Townsend was vice president. My learned friend, Mr. Cowen, with his usual confidence, but I think with much less than his usual wisdom, said in his definition of an officer's powers, that they were only what were conferred upon them by the board of directors. In answer to a suggestion of my own he admitted that there might be in the conduct of the business of the company some obvious duties and powers of a president. If Your Honor please, we have the whole record before you. The witnesses are Arts and James and they demonstrate what the duties of the president and vice president here were. In the first place, the president. Although Townsend had been excluded from all participation, in consultation, in voting, in hearing, in knowing what was going on, not one act of importance had ever been done in the affairs of the company except under the supervision of the president. Not one. Arts swears to that with the utmost positiveness and it is a very important point to be considered. I think I must call Your

Honor's attention to that at page 115 of Vol. 4. Let us see whether the president had any powers.

The Court: Folio 559.

Mr. Choate: Your Honor is even more familiar with this evidence than I am. There he shows the very large extent of the affairs of the company. Vol. 4, page 115, all summed up in a single question and answer at the end of a long examination of Mr. Arts about it, and this covers the whole period from the time of the formation of the company until Townsend's return: "Q. Didn't you understand you were acting under the general direction and supervision of the president? A. Yes."

The details of his testimony are these, that all the affairs of the company, which by this ingenious device they had taken away from the board, required constant consultation between themselves, two individuals in their individual capacity, or if you please, in their official capacity. They did consult. Sometimes they differed, and when they differed they came to a conclusion. How? By a wanton overriding of one by the other? No. By consultation, by discussion, by the one accepting the opinion of the other. What were the powers of this president, and in his absence what were the powers of the vice president? Do my friends deny that if the president has powers the very object of having a vice president is to have him exercise those powers in the absence of the president?

Mr. Carter: Do you claim implied powers in a president, conferred by a course of dealing, are conferred upon another man?

Mr. Choate: I claim if you have a vice president and you have established powers and functions of a president, and the president is out of the country and disabled from acting, the law supposes the vice president in his place, and vests him with the same power; and I would like to have my friend find any whisper of authority in any book to the contrary of it.

Mr. Carter: I should like to find some authority in support of it.

Mr. Choate: It is the object of the election of a vice president. But it went a great deal further than this. By agreement of Townsend and James, Townsend brought back those powers with him. I hear some grumbling among my friends on the other side. I do not wonder that they feel the shoe pinches at this point because it is a very important point in the case. There is some little controversy as to what occurred when James sent for Townsend. James was ill at a hotel in London and Townsend somewhere in Paris with his family. James communicated to him that he had left the company in charge of Arts;

Arts, who until that moment never had done a thing except under the supervision of the president. Townsend says that James instructed him to come home and take charge of the business in his place. There they were. Between them they owned everything that ever could be made out of the company, and they owned at least three thousand nine hundred and ninety-eight four-thousandths of this stock and the right of pre-emption of these other two shares. There is a dispute between Townsend and the counsel on the other side as to whether he is right about that. If Your Honor please, on this point, as on every other point of importance in this case, I appeal to the evidence of James Burden who agrees with Townsend substantially and to the full extent of Townsend's statement. That is very important. It seems to me to be one of the most important things in this case. I call your attention to Vol. 3, page 581, because if it is true that Townsend came home to take charge of the affairs of the company with the assent of James, no man can take exception to anything he did. At page 580 you find this: "Q. Where were you when you saw your brother Townsend in this hotel? A. In the hotel at London. Q. In your room? A. No; I think it was in the sitting room. Q. You walked about the street with him, didn't you? A. I don't remember about that. Q. Your interviews were for several days? A. I think I only saw him in the room to my best recollection. Q. And the subject of discussion was his coming home? A. No, sir. Q. Didn't say anything about coming home? A. I think he told me he was coming home. Q. He did tell you he was coming home? A. I think he did. Q. How came you to say on direct examination that in your talk there was no conversation about his coming home? A. I don't remember the conversation; I am not sure about that; I think he told me he was coming home, or I knew of it. Q. Did you object to it? A. No, sir. Q. You knew he was coming home? A. Yes, sir. Q. Was anything said about the business at home? A. I don't remember that there was. Q. Did he state to you what he was coming home for? A. I don't remember that he did. Q. Will you swear he didn't tell you he was coming home because you were obliged to be in Europe on account of your health? A. I don't remember that he did. Q. Don't you know he left his wife and children over there and came home alone? A. Yes, sir. Q. Didn't you know at the time that his coming was occasioned by your illness and absence? A. Yes. Q. And yet you thought that it had nothing to do with the company's affairs. A. I didn't say that; if I did, I said wrong. Q. You did think it had something to do with the company's affairs? A. Yes,

sir. Q. Didn't he tell you so? A. I don't remember that. Q. Didn't he tell you he was coming home to attend to the business of the company? A. I knew that, but he didn't tell me so, I don't think. Q. Did it excite your alarm? A. I am trying to remember; I think it did. Q. Did you write to Arts about it? A. I don't think I wrote any letters at that time. Q. Did you object to Townsend to his coming home to look after the business? A. No, sir; I don't think I did. Q. You knew he was coming home to take charge of the business, and did not object—that is your account of it? A. Yes; I think that is true."

Mr. Carter: That is your evidence of his assent?

Mr. Choate: That is my evidence of his assent. It is complete and conclusive evidence. No man can get behind it.

Mr. Carter: What volume is that?

Mr. Choate: Vol. 3, page 581. I shall not stop to discuss the technical question whether two trustees, a president and a vice-president abroad, in the situation in which this company had fallen for the want of a supervising head, as to their technical power, the president to transmit to the vice-president the duty of taking charge of the affairs of the company, and the vice-president, of asserting them with, or without, his consent. But when they two owning all of this property and all of this business unite in saying that shall be done, it is with their united authority that it is done. Townsend was looking after his own property when he wanted to go to the yard; when he came home with the consent of James to take charge of the property, he was coming to take charge of their joint property, and he was coming to supervise Arts just as James had always supervised him; and it did not lie in the mouth of Mr. Arts to say he could do anything without Townsend's supervision.

Your Honor sees no duties have been assigned to the general manager as such. It turns out by Arts' and James' own evidence that he had no duties to perform except under the president or the vice-president, in the absence of the president. Townsend comes back to America and here some things happen that are insisted upon by the other side as justifying the iniquitous by-law that they passed in November, so they require examination. One wanton outrage that they say Townsend committed,—namely, to repair his house at Woodside; built a new pantry; introduced water from the neighboring stream, I do not know but from the waterworks of the company's own place; introduced steam and spent upon the grounds and in making a

new road thirteen thousand dollars. And the complaint is, that he did it without a vote of the board; that he did it without consulting Mr. Arts. If Your Honor please, upon the precedent that had been established and set in force for two years why should he have a meeting of the board? In Heaven's name, why should he consult Arts, his underling, who could do nothing except under his supervision? He was acting president; he was vested with the powers of the president; he was entitled to the supervision of all the work done on that place. Well, there is not much about that pantry business after all. It cost \$13,000. What did James do when he got home? He ratified it. How was that? He had the accounts made up showing how much, including that \$13,000, Townsend had spent on his house since the incorporation of the company; took Mr. Arts with him into the board and voted \$9,100 more for him to spend to make that equal.

Mr. Carter: That was fair, wasn't it?

Mr. Choate: That can't be pointed out as a cause of offence on either side.

Mr. Carter: We do not so point it out.

Mr. Choate: They point it out in the evidence, I do not care what they do in their argument, as a justification for this atrocious by-law to which I am coming by and by and to which all this leads up.

Mr. Carter: Not the slightest. We point it out as an inconsistency, that he should complain of fancy farming when he spends \$13,000.

Mr. Choate: If that is all there is of it let that go.

Mr. Carter: That is all there is of it.

Mr. Choate: Very well.

Mr. Carter: Good plan to answer it, though.

Mr. Choate: Now let us have another thing. Townsend committed another atrocious offence. In the absence of James, in one of the working places where the eyes of the workmen were suffering by the use of gas-light, he introduced the Edison electric light. I believe Mr. Arts did object to that and he did it as he had a right to do it over Mr. Arts' objection. He did it for the best interests of all concerned, believing it was a better thing for the company and for the workmen's eyesight as everybody knows it was. The idea at this late day of anybody who knows anything disputing the superiority of Edison's electric light above gas, for such purposes, is simply preposterous. When James came home he saw that it was done, and without consulting Townsend or by any action of the board he ripped it out; and on what pretence? On the pretence that many years before when electric light was in its infancy they tried it in one of their

establishments and it did not work well. Your Honor will be amused at his efforts to ignore and belittle what everybody knows the perfected system of electric light by means of the Edison system. That is what they call "conflicting counsel."

But I must come to another thing that happened in the summer while James was still abroad and Townsend was here. James drew a draft for \$18,000, I think, in favor of Drexel, Morgan & Co., to pay for some purchases that he was making in the Hudson River Ore Co., of stock. Townsend objected to its payment. Had he a right to? Arts was going to pay it; Townsend objected and what happened? Arts hesitated as well he might. He was authorized to draw drafts and sign checks, I know; but Townsend, from whom information as to the condition of the company had been withheld, objected, thinking that perhaps James was not entitled to draw so much. What did they do? They called in the intervention of the inevitable firm of Smith, Fursman & Cowen again, and Smith, Fursman & Cowen said, "It is not regular; it is not right. But to prevent any discredit coming upon the name of the company, we think it had better be paid." So Townsend and Arts agreed upon its payment. In the course of that dispute a thing happened about which there has been a great deal of harping here, that Townsend threatened to discharge Arts from the service of the company; and three or four of the selected employees of the Burden company have been brought here to testify to it, that he said he would discharge Arts if Arts did not consent to submit to supervision. Arts testifies about it and he says what he said was, "Well, if we can't agree about these things, I shall not want you here." That is the mild form in which Arts states it. He did not pretend to discharge him. About his power to discharge him there can be no question in the situation in which he was there with James' assent and authority. But he did not, he refrained from it. If he had, I am inclined to think this law suit never would have taken place. But Smith, Fursman & Cowen having assented to this doubtful act, it was performed with the consent of both.

Mr. Gable was examined as a witness on that transaction and he sheds light on it. He says there was excited talk between them. He says there was this threat of Townsend to discharge Arts, if he did not yield, which Arts put in this mild form that I have expressed.

It was in reference to that transaction, so doubtful that the counsel of the company had to be called in to solve it as between them. Whenever other questions came up between them just as questions arose between the president and Arts when he was here, how were those

solved? One of them I remember, in regard to the east wall of the water mill. Townsend saw the plan, saw the new east wall in the course of erection and he protested against it. I have forgotten now the exact detail in which he objected to it. What happened? Did he overrule Arts as he might have done? No, he yielded to him and Arts had his way; the wall went up as Arts intended and wanted to have it go up. And Arts says that in all other questions that arose between them other than those which I have now referred to, and the harmless character of which Your Honor perceives, in all other questions that arose between them, he had his way. There is the misconduct of this plaintiff which is made the foundation for this wicked by-law to which I will presently refer. But I am not through with the absence of James. There was a very startling thing that happened while James was abroad which I think a judge of this court can never overlook and never forget. When Townsend came home and asserted the rightful authority that belonged to him, Arts, who was so sensitive for James and for himself from the beginning, took the alarm; correspondence passed between James and Arts the substantial purport of which is admitted, that it was instructions from James substantially that Townsend should not be permitted to have anything to do with the conduct of the business. That is Arts' confession. Correspondence took place between the wife of James Burden and Arts substantially to the same effect. Kellum, the junior of this ever-living law firm of Smith, Fursman & Cowen, was sent over to Europe to see James and get from him written orders to every foreman not to obey Townsend. Well, if Your Honor please, all those documents would have shed a glowing light upon the questions involved for decision here if we could have had them. What became of them? Now, I summon Mr. Arts, this man whom they say is beyond question and above reproach, to picture himself to Your Honor and see whether he is the man that ought, by common consent, to be trusted with the absolute control of countless millions, countless property going through those works all the time; see whether he is the man that can be trusted to do everything except sell the works. For there is nothing under that by-law that he may not do, without asking the consent of anybody. After this suit was commenced, and in the spring of 1885, an application was made on the part of the plaintiff to Judge Peckham for an order that the defendants should show their books and papers. Mr. Arts heard of it. He did not wait for that order to be served—not he. He made a bonfire and into it he thrust all the letters from James Burden, all the letters from James Burden's wife, copies of

all the letters that he had sent, and these orders from James Burden to the foremen. That he states. That he almost boasts of on the stand. Why did you do it? I was afraid that under the order of Judge Peckham they would be required to be produced. That was the temptation under which Arts fell and brought himself, I believe, within the grasp of the criminal law if this plaintiff had seen fit to assert it.

Mr. Cowen: He had better see fit.

Mr. Choate: It was a criminal act; it was open defiance of this court; it was open defiance of the rights of the plaintiff; it was flagrant contempt of the predecessor who sat where Your Honor now sits. I say Arts under that temptation fell and committed that crime. Who shall measure the temptation which shall induce him to commit any crime that can be committed, with the custody, the uncontrolled, and irresponsible custody of this two millions and a half of property in his hands.

If Your Honor please, I present this point, as I have presented everything else from the beginning of my argument, not upon the evidence of Townsend Burden; lay Townsend Burden's evidence out of this case. They say they do not like it; do not read a word of it. I stake my case on the statements made on oath here by James Burden and by John L. Arts, and most conspicuous among them is this flagrant defiance of justice, this wanton trampling upon the rights of this plaintiff and his obligations to this court, to justice itself, to the community of which he was a member, of which he confesses he was guilty. He did not do it once, he did it twice. Apprehending that Judge Peckham would make a second order, he ransacked his papers and made a new bonfire. His confession stands to that.

James came home in October, 1884. Your Honor sees I have not much time left to discuss the law of this case. What I am strenuous about is to bring freshly to Your Honor's mind the conceded facts of this case. I shall have discharged my duty when I have accomplished that, James came home. What was done on the 26th of November, 1884? This by-law was passed. Does Your Honor remember what Judge Peckham said on the considerations that were to govern this court in passing on this by-law? It is worth while to revert to that: "That by-law is certainly a most extraordinary enactment. Every power of the corporation which could be exercised by the board of trustees so far as the working of the corporation is concerned, is placed in the exclusive charge and under the exclusive authority of the general manager, who is subject, as it states, to the

control of the board of trustees of the company. But upon the adoption of this by-law there seems to be no great necessity for a meeting of the trustees. By-laws must be reasonable, and their reasonableness is a question of law. Whether this by-law is or is not reasonable ought to be decided upon the trial of the case. After all the evidence is in, all the circumstances surrounding the company properly proved, and the inferences to be drawn therefrom duly considered and decided, it ought not to be held invalid upon a preliminary motion to continue the injunction." There comes up for your consideration the reasonableness of the by-law under the circumstances in which the company was placed. I think I have shown Your Honor that there was no just ground of exception to any act on the part of Townsend Burden up to that date. I think I have demonstrated that for more than two years prior to that date they had wantonly excluded him from any participation, any opportunity to discharge his duties as trustee of the company. It is a material consideration. What was their object in enacting this by-law? Do we need to discuss it after the frank confession that has been made here by the counsel? It was, as James says in his evidence, to legalize what they had been doing before, to make it impossible for Townsend to get a finger in anyway, individually, as officer, or as trustee in the affairs of the company. Mr. Carter says that was the object. Mr. Cowen has said that that was the object. Not only that, when the board consisted of three trustees, but the object was that even if it should be reduced to two trustees, if Townsend should be absolutely disabled, if James should be absolutely disabled, that Townsend owning half of the stock and being half the board of trustees, should have no voice in its affairs. Mr. Carter rightly says that that by-law was the immediate occasion of this suit. Mr. Cowen and he differ. Mr. Cowen says the key note to this suit is the demand of Townsend to get another share of the stock of the company. But Mr. Cowen forgets that that demand was made in June, 1882, he says the resolutions offered by Townsend were offered as a means of getting a law suit. He guesses some lawyer advised him to do it as the basis of a lawsuit. Well, if Your Honor please, is it not a little queer, if that was so, that those resolutions should be offered by Townsend on the 19th of July, 1883, a year after his request had been made and refused for another share of stock, and that he did not commence the suit for a year and a half after those resolutions were offered and rejected? No, Mr. Carter is right, as he generally is, where he agrees with me, especially. He is right in saying that the passage of that by-law was the immediate occasion

for the commencement of this suit, and it was high time for him to act. He had a million and a half of property there and he did act. What was the first thing that the board did after the commencement of this suit and this question of the reasonableness of that by-law had been submitted to Judge Peckham, and he had delivered himself of the somewhat oracular and sphinx-like opinion on the subject which I have read to you? What did they do? They repealed the by-law. What did they do then? They re-enacted it. These wise trustees, these conspirators repealed it in one breath, and at the same meeting, in another breath, they re-enacted it. They left out the word "exclusive" which Mr. Cowen testified in his opinion as a witness lawyer and counsel combined, made no practical difference—and I agree with him upon that—they re-enacted it and it is for a court of equity to restrain them from acting under that by-law. We throw ourselves, in full claim of our rights, upon the sense of justice of this court. They were not content with passing this by-law, about which I will speak presently. What else did they do? Townsend had been vice-president until that time. It was a part of the cardinal agreement from the outset that he should be vice-president. It was upon the strength of that agreement that he surrendered his property to the company. He proffered in his first letter, and it was accepted and acted upon, that he should be vice-president. What did they do? They abolished the office of vice-president. If Your Honor please, was that according to the fair scope of the agreement between them? Are we not entitled to relief on that? Ever since that time they have attempted to prevent him from exercising the duties of vice-president, which office it was agreed he should have when this company was organized and he gave his million of property for it. Then they did that utterly void act, as we claim it to be, of filing a certificate for the increase of the trustees to five. In respect to that it is true that Judge Peckham, with nothing but the certificate and the statute before him, rendered an opinion. He did not render an opinion from the facts as they are presented here. No attention was paid to them, and I am informed by Mr. King that there was no presentation to him of the important considerations that control the action of the trustees in this respect; namely, that it had been agreed from the beginning that there should be but three associates and three trustees. How did they proceed? They did it clandestinely. They say they had a right to do it clandestinely. If they had a right at all, perhaps they had, but I am looking at the motive and purpose of their action. Whom did they select? Anybody who knew anything about the business of the works? No, a clergy-

man, very worthy, I believe, and none the less worthy because he happened to be the brother-in-law of James Burden. How he could act intelligently, nobody knows. Then Richard Irvin, Jr., another brother-in-law, in New York, was selected; and the same criticisms I think will apply to him. Judge Peckham has decided that in the absence of agreement, upon the mere naked face of the statute, it is the individual act of trustees, and that they do not require a board meeting to accomplish it, and that they do not require to ask the consent of the other trustees. That is a point which we hope to meet them on at Phillipi, if the case ever gets there. Judge Peckham has not decided that where the three associates have agreed that they shall be the sole associates, and that they shall be the sole trustees, that the two, or majority, have any right to increase. At any rate it is on that proposition that we shall submit that part of the case to this court.

Now, if Your Honor please, I have faithfully endeavored to present to the court the facts as I understand them to be established. I think they may be summed up something in this wise: That Townsend Burden entered into this corporation, surrendered his property to it upon the faith of the law, about which nobody disputes or dissents, that a majority should control; and it is fairly to be imputed to him, and he has never sought to escape from that imputation, that he was bound to submit his judgment to the judgment of the majority. But there is involved in that proposition this, that he should be permitted to exercise his judgment; that he should be permitted to assert his judgment; that it should be considered by his associates before they undertook to act in the cardinal transactions of the company. My friend, Mr. Carter, says I wish you would point out what they might have permitted him to do.

Mr. Carter: No, you mistake me, Mr. Choate, on that.

Mr. Choate: Then he does not want it. I will tell Your Honor what I think.

Mr. Carter: What I want you to say you have forgotten, you omit.

Mr. Choate: What do you want me to say?

Mr. Carter: I want you to point out some things.

Mr. Choate: I point out this thing; for instance, that when buildings for new construction to the amount of \$360,000 were to be erected, one-half with his money, he should be heard upon the question. Isn't that fair? Does it require a learned judge to pass on that question? Does it require any great array and display of the doctrines of equity to pass on that? I think not. It was his money, so the General Term says, half of it. When they were acting in harmony at

first, all such questions were submitted to the board. If my friends doubt or dispute that, there is the book of minutes which will bear me out in it. Why was not his right just as good after he had asked and been refused by his brother the transfer of another share of stock, as it was before, to have that? There has been a tremendous array of legal learning here. I make no pretense to legal learning or to any occasion for legal learning here. I think anybody, a child, a layman, any workman at the works can understand this doctrine on which we stand; namely, that a trustee is entitled, especially if he owns half the stock and perhaps more, to the exercise of his judgment. Why should he not have it? Does not the statute say that the affairs shall be managed by the trustees? How can they be managed by the trustees? That means all the trustees. This idea that the law means that a company can be managed by a majority without consulting the minority—what a horrible doctrine that is. Farewell forever to the rights of the majority to rule if that is to be accepted and propounded as the law, that they can rule without consulting the minority. That is despotism: that is James Burdenism personified and concrete. That is what this case is about, and neither of my learned friends upon the other side have even referred to it. Not one from beginning to end have ventured to dispute the doctrine upon which I base this case.

Mr. Carter: This right to be heard?

Mr. Choate: This right to be consulted and to have the affairs managed at the board as they were before this quarrel—it was no quarrel, it was all on one side. It arose from a mere jealousy, mere suspicion, the mere apprehension of James Burden which he has sworn to himself. So that, if Your Honor please, as I said before, if there had been no by-law passed we would have an absolute right to protection.

Take another instance. I shall not have time to add anything to the substantial argument (conclusive as it seemed to me) by Mr. King, on the subject of the Hudson river ore, but I put this to Your Honor as an illustration of the reasonableness and the justice of this course that has been pursued by these defendants and of this by-law into which it was to be crystallized forever. The firm, of which this company was the successor, in the father's time, with the full concurrence of all, the father, of William who was then living, of James and of Townsend, had been working the Henry mine in Vermont. I am not going to discuss any chemistry now for I do not understand it. They had found it so successful that they had concluded to build

a blast furnace upon the present works, and there they are built for the use of them. In 1869 circumstances cut them off from access to this ore so they could no longer bring it down to their works. Mr. Carter says, who from that time ever dreamed of using it? James Burden. In 1871 he went to an expense of \$15,000 to increase the plant up there by buying another adjoining mine to enlarge it. In 1872 he deplored the difficulty of getting the ore down from Vermont. It called for some expense, after that abandonment, forced upon them by circumstances, to re-open it, and, as Mr. King has explained to you they were expending hundreds and thousands and I do not know but millions here in paying off mortgages and increasing their plant. But in 1883 a new event happened. James Burden got into an unhappy speculation in the purchase of the stock of the Hudson River Ore Co. How much he sank there nobody knows, and he won't tell. It was got up in the modern fashion, not by paying in cash for the stock, but going to farmers under whose land ore was found, and a group of one or two gentlemen buying the land and then organizing the company into which that land should be put, for stock, and capitalizing it at least twice and probably many times more, the cost of the land. Well, he had embarked his friends in it, too, originally owning the whole, he had reduced his ownership to about a third and got in some other men situated very much like himself. They got a report from Europe that by roasting this ore, that never was good for anything before, they could make it good for something, and they thought there was a speculation in it, and that a great dividend paying company could be built up upon that; so he got them in. He did not get in any outsiders, as Your Honor perceives, but he got in the men that had iron works who could make contracts with themselves, who could make contracts with other companies of which they also were directors, and in 1883 he got Mr. Arts into it. Mr. Arts and he concluded that it would be good policy to use that ore from the Hudson River Ore Co., which never had been used before in the Burden Works, and they did introduce it at first 5 per cent., then 7 per cent., then 10 1-2 per cent., then 15 per cent., then 25 per cent., and finally 35 and 50 per cent. Their judgment could not be absolutely unbiased. Oh, no. Mr. James Burden had a great deal at stake down there. Not only his two, three, four hundred thousand dollars, or whatever he put in, and which has never come out, not only that but he had his pride, his repute among his business associates whom he had drawn into the enterprise; he could not be wholly unbiased as to that, his judgment could not be very good as to whether it would

be cheaper to get that ore and make pig iron out of it, or to buy the best of pig-iron from the market. So his judgment as a trustee of the Burden Iron Co. was at least subject to bias. He was drawn in two directions, like the ass between the two bundles of hay. Arts could not be quite free from bias because under temptations held out to him by James he with his little capital, comparatively little—they say he is quite well to do and I am glad he is—had bought 2,220 shares of the Hudson River Ore Co. and he could not judge without bias. Under those circumstances, if your honor please, could they not have taken the judgment of Townsend as to whether it was the best policy of this company to go into the use of Hudson River ore, which has been so much disputed here and the result of which is so doubtful as they say. My learned friends ask what they could have done? I think on such transactions as that they could have taken him in counsel. I think on such transactions as that at least they were bound to submit it to the judgment of the board of which he was a member. I think a court of equity, if we could have come in that day when they were intending to make that change of policy and had informed the court they were going to do it without consulting the trustees and without any action of the trustees as such, a court of equity must have enjoined them. Why not? If a court of equity sits to do justice between man and man according to the recognized principle of compelling trustees who are swerving toward misconduct to discharge their duties, to restrain them from misconduct.

Now, I come once more to this by-law. It was the cause of the commencement of this action, and there will be a terrible failure of justice if that by-law remains unaffected by the action of this court. Your Honor sees there were disputes as to policy. These were disputes founded on good reason as to policy. There will always be as long as a majority of the board of these trustees have counter interests. In the first place, how was this by-law passed, this wicked by-law, as I call it? Who passed it? Who made Mr. Arts dictator in this company, and cut the claws even of James Burden himself? It was John L. Arts. Has that no bearing on the reasonableness of a by-law? A trustee cannot vote himself a salary, not of \$500; a trustee cannot vote himself a contract, not for the smallest thing. But here the claim is that a trustee, by his own vote, can compel an abdication by his associate trustees of all their rights and all their duties and all their responsibilities and take complete charge and custody of the property and the business of the company himself. Let

Your Honor, consider, if you please, what John L. Arts cannot do under that by-law and you test its reasonableness. I have studied it. There is only one thing he cannot do, he cannot sell the works. That is all. Everything short of that he can do and this trustee, who is charged as much as either of the others with the responsibilities, cannot be heard to say nay either before or after, because there is an abiding determination, to which they still adhere, that no affairs of the company shall be brought before the board. If he should abandon the manufacture of horse shoes, as by that agreement he may, and if he should put a stop to all business in those works, as by that by-law he may, Townsend Burden, upon the established method of doing business in this company, cannot even after that bring it before the board; because, though he might offer a resolution condemning the conduct and requiring that the business should be restored and reestablished, he cannot get it seconded; because the two associates concur in the system of not having any business come before the board.

Your Honor must take all these things together. We say the object of passing this by-law was in bad faith. It was for a most iniquitous purpose, conceded, boasted on this trial, namely, I cannot express it better than James Burden did, legalize, crystallize the methods which they had adopted. What is that method? That the business of this company shall not be managed by its trustees. There is only one way in which that can be accomplished. They have a board room, I believe, down in this \$40,000 building. It can only be accomplished by shutting up that board room and having no meetings of the board. That is the plan they have substantially adopted. From the 19th day of July, 1882, down to the commencement of this suit, I believe there were two meetings; at one a dividend was declared, at another this wicked by-law was passed. Is that the law? Is that within the reasonable power of the trustees of a company to make by-laws? Mr. Cowen says, "Oh, the statute says they may impose whatever duties they may please on their employees." Does that touch the question? I submit not. They are bound to let the minority have its rights. That is what we are fighting for here; the rights of the minority. Their substantial proposition on the other side is that the minority has no rights. Well, but you can attend meetings. But we cannot get a meeting. How then? You can vote on anything that comes up. Nothing shall come up. Well, but can't I bring it up myself? No, we have established a theory about that, that unless one of us seconds it you can't bring it up. Is it necessary to say anything more about the reasonableness of that by-law? Is there any dispute about the compe-

tency of a court of equity to declare it void and to restrain action under it?

They say, what have you got to complain of, don't we pay you 10 per cent., 15 per cent., every year? Don't it realize to you \$80,000 or \$100,000 every year just as it does to us? Yes. We did not come here to complain they were not making money, but there are wrongs that are not to be measured by money and not to be compensated by money, however profusely it may be poured into our lap. If our honor is trampled upon, if our rights are violated, if our duties are taken away from us, if our responsibilities are torn away from us, what is money to compensate for those? Neither the money which they give us in the form of dividends, nor any money that could be given in damages could compensate us for these losses. The administration of a corporation by trustees cannot be measured by money, can it? Rights and duties appertaining to a vast estate, appertaining to this mass of individual property are at stake here. They throw money in his teeth and say, be satisfied with that. Sit on your piazza and smoke your life away. Go to Europe with your family and spend your days in peace and eat and drink with what money we will send you. This plaintiff is not reduced to that. He is not reduced to that humiliation or to submit to that oppression. He has rights here, he has duties. He owes it to himself, he owes it to his children to assert them as he has asserted them here, and he submits his case to Your Honor knowing that in the bosom of justice they will be safe.

MASSACHUSETTS FISHERIES CASE

ARGUMENT FOR THE PLAINTIFF IN ERROR IN THE CASE OF MANCHESTER V. MASSACHUSETTS, BEFORE THE UNITED STATES SUPREME COURT, JANUARY 17, 1891

STATEMENT

The Commonwealth of Massachusetts, on May 6, 1886, approved an act (Laws of 1886, c. 192) for "the protection of fisheries in Buzzard's Bay," and prohibiting the use of specified kinds of nets for fishing within that Bay, under penalty of not exceeding two hundred dollars fine for each offense.

On July 19, 1889, Arthur Manchester and others of the Newport fishing steamer A. T. Serrell (operating under a Federal license), at a point about one mile and a quarter from Falmouth, in Buzzard's Bay, caught a large quantity of menhaden by means of purse seines. These facts were set forth in a complaint, made on behalf of the Commonwealth; before the trial justice of Barnstable County, and on August 1, 1889, Manchester, being brought before the court, pleaded not guilty. On hearing the case, the justice found the defendant guilty and fined him \$100. Appeal was then made to the Superior Court of Barnstable County where a trial was had before Judge Sherman and a jury, Manchester again being found guilty. The judge declined to rule that the Statute of 1886 was invalid as against a license to fish granted under the laws of the United States; but reported the case for determination by the Supreme Judicial Court of the Commonwealth. That court (*Commonwealth v. Manchester*, 152 Mass. 230), affirming the previous findings, ordered the Superior Court to render judgment on the verdict, and direct the defendant to pay a fine of \$100 with costs, and stand committed until he should comply with the order. Manchester then sued out a writ of error directed to the Superior Court, to review the judgment, assigning as errors, that the Court had ruled and adjudged: "(1) That the place where the alleged offense was committed was not a part of the high seas and was not, under article 3, section 2, of the Constitution, which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, within the exclusive jurisdiction of the federal government; (2) that said place, notwithstanding said provision of the Constitution, was within the jurisdiction of Massachusetts; (3) that the plaintiff in error was not authorized to do the act complained of by a license under Title 50 of the Revised Statutes, and was not protected by such license; (4) that chapter 192 of the acts of the General Court of Massachusetts for the year 1886, as construed by the Court, was valid notwithstanding the provisions of the Constitution and laws above cited, or any provisions of the Constitution and laws of the United States."

The case was argued in the United States Supreme Court (139 U. S. 240) on January 14, 15, 1891, and was decided on March 16. For Manchester, appeared Mr. Choate and James F. Jackson, and for Massachusetts, Henry C. Bliss, Assistant Attorney General, and Andrew J. Waterman, Attorney General. The judgment of the Massachusetts courts was affirmed.

If the Court please, there is some danger that in wandering off into ancient history, and in the examination of minute points of technical

detail, we may lose sight of the broad, general, practical, living question, which, as I understand it, is presented by this record; and that is, as to where lies the power to control and regulate the fisheries in this marine belt upon the high seas outside of the low water mark. The question is, whether along the sea-coast of the United States from the Kennebec River to the Rio Grande, and from the southernmost point of California to Alaska, the regulation of the fisheries, as a matter of public business, trade and commerce, should be and is under the control of the Federal Government, or under that of the individual States.

Of course, it is a very serious practical question, (there being twenty-one seaboard States,) whether we are to be subjected in this matter of national concern, a matter requiring uniformity of regulation, to twenty-one different sets of regulations, or whether there shall be one uniform law. Another point of interest in the matter, as I conceive it, is whether, in this marine belt, the right of fishing, whatever that may be, or, at any rate, the right of regulating fishing, is a matter in which the people of the twenty-three interior and inboard States have any concern.

It is also true that, whatever rule is applied by this Court in this case, whether it be the rule of State property, for which the State of Massachusetts contends, or the rule of national sovereignty, upon the application of which I insist, it must be uniform throughout the entire seacoast of the nation; and, if the (not impossible) contingency should arise that the territory of Alaska should be erected into a State, upon an equal footing with the other States, the question, whether the control of the seal fisheries within three miles of the coast of that vast area of country would belong to that State or to the Federal Government, is very likely to be included within the necessary limits of your decision.

In the first place, the nature and character of this business with which this law is concerned, as indicating and determining whether it is of national concern or not, is of some consequence. I submit that it is not a local affair at all. It is national. It affects the entire community, or all the Atlantic States, at least. If Your Honors care to look into the matter, the whole history of this menhaden fishery will be found prepared and set forth with very great fullness in the report of the United States Fish Commissioner for the year 1877, Appendix A (2nd Session, 45th Congress). From this document it appears that these menhaden occupy the entire year in their progress along the coast from Florida, whence they set out in the dead of winter, to the eastern coast

of Maine, which they occupy by the middle of the summer, in their retrogression coming back again in January to Florida. In all of the States along the Atlantic coast large investments are made in the business of capturing these menhaden. Fleets are sent out from every State, and the threatened conflict between them has led to the consideration of this very subject as a question of power of control between the State and nation. The history of this particular piece of legislation is well worth considering as preliminary to the observations that I have to address to the Court on the general question. It appears by the treaty of Washington with Great Britain in 1871, that the Federal Government by a treaty did completely regulate, or at any rate go far to regulate, this matter of the right of fishing in this three mile limit, and this treaty became the law of the land which was in operation from 1871 until the first day of January, 1886, that thus the Federal Government treated it as a matter within the exclusive national control, because they gave to England the right of fishing upon our Atlantic coast north of the 36th parallel, without regard to distance from the shore. That right of course expired with the treaty in 1886. The people of New Jersey, however, who were quite as much interested as the people of Massachusetts or of Rhode Island in this menhaden fishery, instead of undertaking to regulate it by local enactment, took a very different view and expressed themselves through joint resolutions of their legislature, passed in the year 1883, reciting the very difficulty which this Massachusetts act was designed to remedy, so far as that state was concerned, and by those resolutions recognized that they, the people of New Jersey, had no power to protect themselves against purse seine fishing for menhaden, and that the sole authority in that matter rested in the general Government.

Mr. Justice Gray: Is that in proof?

Mr. Choate: No, sir, it is not. It is to be found in the Session Laws of New Jersey for 1883, Joint Resolutions, page 265.

After reciting the mischiefs arising from menhaden fishing with steamers and purse-seines off the coast, the difficulty which this very statute of Massachusetts was designed to provide against, the resolutions proceed: "And the aforesaid citizens realizing that they have no means of competing with or protecting themselves against so formidable an enemy, are compelled to seek relief and protection from the power which they are assured can render it. Believing therefore, as we do, that the general government exercises jurisdiction over the waters of the Atlantic Ocean a sufficient distance from the beach to answer all practical purposes; therefore

"1. Be it Resolved, That our Senators and Representatives in Congress from this State be and they are hereby respectfully and urgently requested to use their influence and best endeavors for, and to urge such action as it may be the prerogative and right of Congress to adopt in order to afford the necessary relief and protection to the aforesaid citizens of New Jersey by prohibiting the mode and means of fishing referred to for a reasonable distance from the beach, that the natural rights and privileges enjoyed by said citizens from time immemorial may be continued and guaranteed to them."

It appears that Congress did take that matter under consideration. While the treaty of Washington was in operation, it was hardly a matter that could, without interference with the provisions of that treaty, be acted upon either by the State or the nation. But on the 10th day of February, 1886—which was within a little more than a month after the treaty had been finally disposed of—Your Honors will remember that, by its terms, or by ten years' notice, it was to expire in January, 1885, and then by mutual concessions between the two governments it was continued until the first day of February, 1886—on the 10th day of February, 1886—the Senator from New Jersey introduced a bill for the protection of fisheries on the Atlantic coast.

Mr. Justice Gray: What do you read from?

Mr. Choate: It is in the Congressional Record. It is a bill that was introduced but never passed, and is found on page 214 of the volume which covers February, 1886. The act was entitled Senate Bill 227.

Mr. Justice Field: That bill never passed?

Mr. Choate: No, sir. I will read the first section of that bill:

"Be it enacted by the Senate and House of Representatives of the United States, etc., That it shall not be lawful for any person or persons, by day or night, to put, place, haul, draw, or in any manner use any purse-net, pound, fyke, weir, or other appliance for the capture of menhaden upon the high seas within two miles of the Atlantic coast, or in any arm of the sea, river, haven, creek, basin or bay along the said coast within the jurisdiction of the United States, and not within the jurisdiction of any State."

That was referred to the Committee on Fisheries, with a view, I suppose, of adding a section to the Revised Statutes under the chapter relating to the regulation of fisheries. While that committee was taking voluminous evidence as to the expediency of passing such a law for the protection of this national interest, the State of Massachusetts, having by its previous act extended its boundaries three miles into the ocean, passed this law which we now complain of.

Mr. Justice Gray: What became of that law? Was it ever reported in the Senate?

Mr. Choate: My information is that the Senate committee being of opinion that no such law was expedient, advised against it.

Mr. Justice Gray: There is no report, so far as you know?

Mr. Choate: I have here what is evidently a public document. It is headed, "Hearing before the Senate Committee on Fisheries, Wednesday, Feb. 10, 1886—Senate bill 227 for the protection of fisheries on the Atlantic coast."

Continuing the argument in relation to this doctrine as to the width necessary to make a bay part of the high seas, for the purposes of the question involved, the Supreme Court of Massachusetts, Judge Shaw writing the opinion, in the case of *Dunham vs. Lamphere*, on the strength of which this present case was decided, reaffirmed the doctrine that a bay was to be considered an open bay, if it was impossible to discern what was going on from one headland to the other. That would bring us, under the report in this case, within the rule as so found and declared by him. But there is also a further finding in this case, which Your Honors will not lose sight of, that from headland to headland in Buzzard's Bay was more than two marine leagues.

I do not admit for a moment that the islands which lie outside of two headlands are to be included for the purpose of measuring the distance from headland to headland. There are islands there, between which and the mainland and between each of which there is a channel for navigation; so that, I suppose, under either rule, Buzzard's Bay, at the point here described, is a bay in which Massachusetts can only claim jurisdiction under what is generally called the three mile rule. That is to say she can only claim the power to regulate the public fisheries in Buzzard's Bay which is thus a part of the high seas, by establishing that the high seas within the limit of three miles from shore are her territorial waters and not those of the United States.

Now, if the Court please, I recognize the difficulty of arguing before Your Honors a case in which the Supreme Court of Massachusetts has, after a period of thirty years, reaffirmed, upon solemn consideration, the assertion of this right; but nevertheless, as it seems to me that the grounds upon which these cases are put are contrary to the true principles which ought to control in determining the question of the constitutionality of this act, I desire briefly to call attention to the grounds on which the right of Massachusetts to regulate fishing on the high seas within three miles of her coast was put in those cases. In the first case, the case of *Dunham v. Lamphere*, in the 3d of Gray,

where the opinion was written by Chief Justice Shaw, it was put, I think I may say, chiefly, upon the proprietary right of Massachusetts in the seas that surround her for a space of three miles. The right to pass that law, which in that case was a law prohibiting fishing within one mile of the shores of the island of Nantucket, was based upon the right of Massachusetts and her citizens to the water in the sea and to the fish that were in that sea within three miles of her shore, as the property of the people of Massachusetts.

When, however, it came to this act, after Massachusetts had in 1859 legislated the extension of her boundaries over this disputed three miles, this marine league, the present learned Chief Justice of Massachusetts was not quite satisfied to rest the case on that ground. He rested it upon a ground which, as it seems to me, presents to this court the question here to be decided, namely: upon the right of Massachusetts, as a nation exercising national sovereignty in common with and in relation to, all the other nations of the earth, to assert this dominion and authority.

Now, let me call the attention of the court to three passages in the opinion where this principle is strongly brought out by Chief Justice Field. In his opinion, at the top of page 4, he says:

"If Massachusetts had become an independent nation, there can be no doubt, we think, that her boundaries on the sea as she has defined them by the statutes, would be acknowledged by all foreign nations, and that her right to control the fisheries within these boundaries would be conceded."

At the foot of page 7, he says:

"It is to be noticed however, that in all the citations contained in the different opinions given in the case of the *Queen v. Keyn*, wherever the question of the right of fishery is referred to, it is conceded that the control to the extent, at least, of a marine league, belongs to the nation on whose coast the fisheries are."

On page 9 he says:

"We regard it as established that as between nations the minimum limit of the territorial jurisdiction over tidewaters is a marine league from its coast, and that objects wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit, and that included in this territorial jurisdiction is the right of control over fisheries."

That brings us to the consideration of what seems to me to be the vital question here, and that is the nature of the interest which the na-

tion or state or country, whatever you please to name the sovereignty, can have in the high seas over this conceded three mile belt, or whatever width it may be allowed to be, and the source from which that interest or right is derived, and the sanction upon which it is based.

I submit, upon the authorities which the learned counsel has so copiously set forth upon his brief, that there is no such thing as property in the high seas or in the fish that swim in the high seas, even within this three mile belt.

Mr. Dana, counsel for the United States in the Fisheries Award Commission at Halifax, said that he would stake his professional reputation, or rather his reputation as a man knowing anything whatever about international law, upon the proposition that a fisherman or mariner pursuing fish on the high seas up to the low water mark, on the coast of any country, was not a trespasser. I will only say, in addition, if Mr. Dana's proposition be accepted as authority at all, that I have not found anywhere any assertion of any limitation upon that proposition. How can there be property in the high seas—in the ocean? I am not going to contend against the cases which this court and other courts have considered as to property in the soil under the water and to the incidental property in the shell fish in that soil.

I maintain the proposition that there is no exclusive right of property in the citizens of Massachusetts in the high seas, or in the fish in the high seas within a distance of three miles of her shore. There has been no judicial authority cited for such right of property. There has been a claim of it by Massachusetts by legislative act in the colonial times when she could pass what laws she pleased, if they were not prohibited by the imperial government of Great Britain.

Now, there are three decisions in this court on the subject of the right to the land under the water, which I say is an independent and wholly different question. There is the case of *Martin against Waddell*, which was an action of ejectment for a mud flat in Raritan Bay, in the position described by Mr. Justice Bradley yesterday, under a statute which was expressly limited to the right to take oysters therefrom, and excluded any right of fishery whatsoever. It was held that the defendant in that case failed to make out his title to that land, that locus in quo; but the question that I am now presenting to this court was not considered there, and I think has not been considered or even alluded to in any previous or subsequent decision of this court except one, to which I will refer in a moment.

Then came the case of *Smith v. Maryland*, where Mr. Justice Curtis

wrote the opinion, reported in 18 Howard, which case related to the law of Maryland prohibiting the dredging for oysters within her waters. The locus in quo in that case was conceded to be within the waters of the State, and the learned judge who wrote the opinion expressly says that no point was made below as to whether the place in question was within the territory of the State, and the point could not be made in the Supreme Court; that therefore the court must consider the act as having been actually performed in the inland waters of Maryland.

Finally, coming to the case of *McCready v. Virginia*, where the opinion was written by Mr. Chief Justice Waite, on the right to take oysters in the bed of Ware River, an interior river of Virginia, the learned Chief Justice in his opinion emphasizes the right of property of the people of Virginia in the land and water within her boundaries, and says that the right to plant and raise oysters was exactly like, and not to be distinguished from, the right to plant corn upon the upland. It was simply cultivating the ground under the water with oysters instead of corn or potatoes, and that it was therefore the exclusive property of the people of Virginia which they might regulate to suit themselves.

How do any of these cases have even the remotest bearing upon this case which we are now considering, with regard to the right to control free and public fishing on the high seas within this three mile limit, which is outside of the jurisdiction of particular States, unless they can get jurisdiction by extending their boundaries into and through it, as Massachusetts has attempted to do by her statute of 1859?

There is one case that does bear, as I submit, very closely upon the question here presented, and that is the case of *Lord v. the Steamship Company*, reported in 102 U. S., and although it has nothing to do with the subject of fishing, whether sea fish or shell fish, it does bear upon the question of the high seas, and the relation of the individual States to the high seas. Your Honors will remember that there the application of the limited liability act to a steamship company, or a vessel belonging to a steamship company in California was disputed because it prosecuted its business wholly between two ports of the same State—San Diego and San Francisco—and so, as was claimed, within a single state, and that therefore the vessel was neither engaged in foreign commerce nor in Interstate commerce.

But the court said that would not do. It was true that the provision of the Constitution of the United States in respect to commerce related

to commerce with foreign nations and between the States. It was true that this steamship company was limited to visiting two ports of one State; but the court said that the moment she got out on the Pacific Ocean, outside of San Diego, or outside of San Francisco, she was upon the high seas; she was in intercourse with foreign nations, to whom the high seas belonged in common; she was necessarily engaged in foreign commerce, although she spoke to nobody, to no vessel, had no communication with any one, and although, during the transit, she might well be entirely within the three mile belt.

I say that this is a case and the only case in the reported decisions of this court, so far as I can find, that has any bearing, and I claim that it has a strong and vital bearing, upon the relation of the individual States to the high seas and particularly to this three mile belt, about which I will have more to say.

If it be true that the prosecution of fishing upon the high seas is not distinguishable from planting corn upon the upland or cultivating the land under water with oysters instead of with beans and peas, then there is force in the argument that the learned counsel has addressed to you, that there is no distinction between the oyster or clam fishing, and the deep sea fisheries, and that the cases cited apply. But if that be not true, then there is a wide and radical distinction between the three oyster cases which this court has decided and the present case.

I next call attention to the source from which this right of control over the fisheries within three miles is derived, as leading to a demonstration that it is impossible for a State to derive anything from that source.

Your Honors will observe how it is put by counsel for Massachusetts both in the argument below and in the argument here, that, by the Declaration of Independence, as recognized by the treaty of 1783, she became an independent Sovereignty. I do not dispute that although much argument, it seems to me, might be had upon this point, that she belonged already to a confederacy by which she had bound herself to make no separate treaty. There was no treaty between Massachusetts and George III, or Great Britain under him. It was a treaty with the thirteen United Colonies that had agreed one with the other by the confederation that was binding upon them all, not to treat separately.

I desire to say further in this connection that I do not believe there is any authority for the claim, and the utmost search I have been able to make has not revealed anything indicating the fact that, in the period between the Declaration of Independence and the formation of the

general government, there was any assertion by Massachusetts, or by any other State, of an exclusive right of fishing or of regulating fishing in this three mile belt. On the contrary it never seems to have been denied that the right was common all along the Atlantic coast, to all of the fishermen from any of the States that saw fit to engage in it.

But how does whatever right there is—whatever you please to call it—arise? Is there any doubt that Massachusetts cannot acquire any sovereignty, any authority, any right to control in this three mile belt, by virtue of her own assertion of it through her own legislature? It is only by the concession of other nations; it is only by agreement with the other nations of the earth, whether we look to the source and derivation of that authority, or to the nature and extent of it, that any such right can be acquired at all.

This right is clearly set forth and defined in those learned authors to which reference is made upon the brief of the counsel for Massachusetts as a right conceded to each nation, by the consent of all other nations for the purposes of national defence and protection; and, in the same breath, the right to the control of fisheries is mentioned in connection with all other rights that are thereby given, namely, protection of its neutrality, protection of its revenues, protection against warlike invasion, and, in the same connection, always, in all these writers, and as a part of the same thing, the protection of its fisheries.

My learned friend has furnished a great deal of material on that point, and I call the attention of the Court to the fact that particularly in the later writers upon international law, all of this is expressed in the same breath.

Now, if the Court please, what happened when Massachusetts became a member of the Federal Government? She became lost to view, did she not, as to the other nations of the earth and as to the high seas, by the mere fact of her merger in the Federal Union? By that merger she lost all of the sovereignty to which Chief Justice Field refers in his decision, this sovereignty in relation to other nations, and with this sovereignty, she parted with the incidental right of sovereignty which she claims to get from other nations by concession and by continued concession. These rights that arise by international law—do they not arise from the continued concessions of all the nations, each with the other?

Not only by the necessary result of the merger in the Federal Union, which was to and did take her place in all foreign relations, but as the necessary effect of her adoption of the Federal Constitution, and by the

express letter of that Constitution, I claim that Massachusetts was prohibited from any longer continuing a partner with other nations in the concessions of international law, and that these concessions inured at once to the Federal Government, of which she formed a part, and to which she ceded her sovereignty and her rights entirely and absolutely in these respects.

What is more complete than the express provisions of the Constitution in regard to this authority? As affecting Massachusetts and every other State, it is expressly provided that she shall have nothing to do with foreign nations. How then can she have any longer a right of sovereignty on the high seas which can arise and be continued only by agreement with foreign nations? She can enter into no treaty or alliance whatever, and without the consent of Congress she can make no agreement whatever with foreign nations. And now, after one hundred years of that compact, can she claim that for these one hundred years she has possessed, and still possesses, by agreement with foreign nations, some right over the high seas that otherwise she could not and would not have? It seems to me that this is impossible. If the premises are correct, (and I do not see how, upon the authorities that my learned friend has cited, there can be any doubt about it,) and this interest, this control, this jurisdiction, this whatever you please to call it, that a nation acquires and holds over the high seas for its own protection within three miles, or six miles, or whatever distance, off shore, is obtained only by concession and agreement of other nations, then that is the way Massachusetts got it; that is the way Massachusetts claims it, through the mouth of her learned Chief Justice in this case, to whose words I have called your attention; and it is a way in which, it seems to me, no State of this Union can claim anything. A State has no relations with foreign nations. She can have none because the Constitution forbids it and she has no right to claim anything in respect to the high seas as being conceded to her by foreign nations. Massachusetts since her absorption as a member of the Federal Union, has not been able to concede anything to foreign nations in respect to the open sea. The Federal Government has done that. Such concessions were treated, not only by the treaty of 1871, but by the reciprocity treaty of 1854, as a national subject of control, as a national jurisdiction, as a national right, whatever right of the kind exists. Whatever in this matter is conceded by the consent of nations is necessarily conceded and belongs to the Federal Government, and in no degree to the individual States.

Now, if the Court please, if this be the true doctrine, and be the light in which this case is to be considered, it seems to me that all of these conundrums—shall I call them conundrums?—propounded by my learned friend, are unimportant. They are all founded upon the question put by Mr. Chief Justice Marshall in the case of the *United States v. Bevens*, concerning the two imaginary men who step out upon the shore of Massachusetts, a few feet below low water mark, and fight a duel. Could they not be called to account by the people of Massachusetts? Why, of course they could.

It does not seem to me that, in the application of such a doctrine as I have propounded, there is any interference with the right of a State to protect its own shore, in the ordinary way of police supervision, in order to arrest offenders and marauders, or to prevent Fiji Islanders from going in bathing, which my learned friend was so much afraid of.

I submit, on the broad ground I have stated, that there is no such thing as property in the high seas or in the fish in the high seas, even within this marine belt; that all that can be claimed is a right of sovereignty for protective purposes, properly national, which it has been said extends as far as a cannon shot will go—a right for limited and specific purposes, which in every instance is national, to protect and defend the shores and the people of the Nation; that, included in this right as a right of sovereignty and not of property, is the power to protect and regulate the Ocean Fisheries: that this right arises not by assertion of the nation which enjoys it but solely from the concession and agreement of foreign nations; that, as Massachusetts can concede nothing to foreign nations, so she can take nothing by concession from them; that this is only possible to the United States as a nation and therefore the United States only and not Massachusetts can enjoy and exercise the right. There is only one other question that I propose to discuss, for I have nothing to add to what Mr. King has so strongly urged in regard to the interference with the admiralty and maritime jurisdiction of the United States.

Within the commerce clause of the Constitution, this right of regulation belongs to the Federal Government, not to the States. Massachusetts, within her own territorial limits to low water mark, may regulate the taking of fish because within those limits the fish and the waters in which they swim are the property of her people. But outside of those limits she has no property in the high seas, or in the fish that swim. Whatever rights attach to the soil, wherever the soil can be got at and for whatever purposes, may well be conceded to be hers.

But the waters of the ocean are not capable or susceptible of ownership. These belong to all the people and to all nations in common. By common consent the nations have conceded to each other the protection and right of regulation of the fisheries for the distance of three miles from shore, but this they have conceded to each other not as a right of property but as a right of sovereignty, and as between the United States and Massachusetts it belongs exclusively to the former, and without its express consent, which has never been given, the latter cannot exercise it.

The power to regulate the ocean fisheries within three miles from shore is a part of the "common defense" for which the Union was formed and which by the express letter of the Constitution is committed to its Congress. It is a matter of national concern in which the whole people of the Union are interested—those of the interior states as well as those upon the seaboard—just as all alike are interested in the other purposes for which this right of sovereignty is conceded and exercised, as, for example, the prevention of smuggling, the preservation of neutrality, and the prevention of hostile incursions. The extent of this power of regulation has never been settled between nations: it has only been settled that it extends three miles from shore: its settlement may at any time involve us in question and disputes with foreign nations by whose concession alone it exists. Can these be met and adjusted as they arise between individual States and foreign nations?

Again, shall there be as many different laws of regulation along our sea coasts as there are Seaboard States? Certainly there may be, if, as Massachusetts now claims, each is a separate sovereign as to the high seas and as to the foreign nations:

But we confidently submit that whatever right of control or regulation or exclusion exists over the ocean at whatever distance from our coasts belongs alike to all and must be exercised by all. It is true that originally there were none but Seaboard States, but in every instance the new States have been admitted upon an equal footing with old. They have come into an equal share of the national heritage. What belongs to all in common, including international rights and concessions, must be exercised by all in common, that is by the Federal Government alone. Its attempted exercise by any individual State by its courts or by its legislature is a mere usurpation, which it is the business of the court in every proper case to defeat.

We accept the rule as finally laid down by this Court in *Robbins v. Shelby Taxing District*, 120 U. S. 489, in the language of Mr. Justice

Bradley: "The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character or admit only of one uniform system or plan of regulation," and "When the power of Congress to regulate is exclusive the failure of Congress to make regulations indicates its will that the subject shall be left free from any restrictions, and any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom."

We submit in the first place under this head that fishing upon the high seas is in its nature an integral part of national commerce, and that the subject is necessarily national in its character. We are not dealing now with the control and regulation of the fisheries within the borders and territorial jurisdiction of the individual States which is necessarily local in its character and admits of and requires local as distinguished from uniform regulation. The subject involved is entirely different from that; it is the ocean fishery which is free to all mankind except as subjected by the common consent of all to control and regulation within this agreed distance from its shore by each nation. It is national in its character because of this international origin; because its regulation is confided by other nations to our nation as an equivalent for similar rights accorded by our nation to them. It is national in its character because the abuse of the power of regulation would necessarily lead to complications and quarrels with other nations in which the United States as distinguished from the individual States would be the party involved. It is national in its character because the people of all the States are entitled to an equal interest and share in it. The ocean that washes our shores alike on the Atlantic and Pacific and all rights pertaining to it belong as much to the people of Kansas and Indiana as they do to those of Massachusetts and Oregon. It is national in its character because of its liability to become a subject of conflict between the different States. If each shall be permitted to exercise the right of regulations, over so much of the sea coast as washes its shores these State regulations, however framed, whether purporting to be exclusive or not, necessarily operate to the exclusion of citizens of other States with whose right of fishing upon the high seas no particular State can rightfully interfere, and, as is illustrated in the case at bar, they tend directly to thwart the enterprise of citizens of the neighboring States. It is national in its character because it is external to the States and is really a part of our foreign commerce.

When engaged in such ocean fisheries our vessels and citizens are engaged in foreign commerce. The language of the Court in the case of *Lord against Steamship Co.*, 102 U. S. 541, is in this connection exactly pertinent.

"When, therefore, the *Ventura* went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had by usage or otherwise agreed on for the government of the vehicles of commerce occupying this common property of all mankind.

"True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce."

That the fisheries are and always have been regarded as an essential part of commerce seems hardly to require argument in view of the undisputed history of the matter. Indeed, the protection and preservation of the right of the people of all the united colonies in ocean fisheries was commonly put forth as one of the chief and sometimes as the principal object to be attained by the formation of the federal union, and this interest as an interest of commerce and of the Union was universally recognized not only as a valuable branch of commerce intrinsically and comparatively much more so then than now, but as a nursery of seamen and therefore of a commercial marine, which then far more than now was thought to be essential to our national dignity and existence and as the germ out of which our possible federal navy was to grow. The ocean fisheries were uniformly regarded and held out as not only a part of the commerce of the United States, not only a subject of national concern, but as *the* one more important than all others to be secured by the adoption of the constitution as it now stands. All the correspondence, debates and discussions which preceded the treaty of peace of 1783, and the subsequent discussions that intervened before the adoption of the constitution clearly demonstrate this. When John Adams and Mr. Franklin in 1782 were in Paris negotiating the preliminary terms of the treaty of peace, the absolute necessity of preserving in any treaty that should be made the rights of the people of all the Colonies to the ocean fisheries as they then existed as a *sine qua non* of the negotiation was repeatedly and from first to last insisted upon by both of them, and both recognized that it was an interest belonging not to New England alone, but to the people of all the States, southern as well as northern, and throughout the works and

correspondence of John Adams this idea was always found predominant, not only in his mind but in the mind of all with whom he had to deal upon the subject.

So in the debates in the Convention that created the federal constitution, the fisheries were never alluded to except as a great and important branch of our commercial interests which the constitution was expected to preserve and to regulate.

Mr. Hamilton in the *Federalist* says the fisheries are rights of the Union and a matter of great moment to the trade of America. We think that no man can read the history of the quarrel of the Colonies with Great Britain and of the formation of the constitution of the United States without being satisfied that at that period the ocean fisheries were regarded as a part of our national commerce and that one great object of adopting the constitution was to create a government that could effectually preserve and regulate them.

As Gouverneur Morris said—"The fisheries and the Mississippi are the great object of the Union." So in the first Congress when the subject of regulating them—these fisheries—by bounties and by licenses was under discussion the great statesmen of that day sustained the right and power of Congress to interfere because the fisheries were commerce.

"The taking of fish," said Fisher Ames, "is a very momentous concern; it forms a nursery for seamen and this will be the source from which we are to derive maritime importance;" and Mr. Elbridge Gerry said—"It is well known to be the best nursery for seamen; the United States has no other."

We conclude, therefore, that the fisheries of the ocean were in the framing and adoption of the constitution viewed as commerce and as of national importance as one of the principal sources of maritime power and of interstate and foreign commerce, and that it was believed that one of the great benefits to be obtained from the Federal Union was to be their control by a uniform law and protection by national authority. They have always been so regarded ever since if the constant action of Congress is any indication of national understanding and intent. When by the treaties of 1854 and 1871 our national government traded away this right of fishing in the ocean within three miles of the Atlantic coast, is it to be deemed to have been bartering or disposing of the private property of the individual States or of the people of those States? We believe that it has never been determined whether the treaty-making power extends so far, but surely the United

States in dealing with such a subject are to be presumed to have been dealing as the President and Senate must have believed, with what so far as it belonged to anybody, belonged to the nation and not to the States.

Nor do I understand that it can be seriously contended upon the other side that ocean fisheries are not a part of commerce. On the contrary I understand that Chief Justice Shaw admitted in the case of *Dunham* against *Lamphere*, that they are within the commerce clause, but claimed that until Congress has passed some act to the contrary, the Massachusetts act is to be upheld.

The particular facts established in the history of menhaden to which I have already alluded demonstrate that the taking of them upon the high seas is of national as distinguished from state or local interest. What is there local to Massachusetts about the menhaden until they arrive within her borders? Until then they are public property and of only public and national interest. Does Massachusetts own the fish in the high seas? After they get within her territory, Yes; but until then, No. Until then they are of no more interest to her than they are to all the people of the United States along the Atlantic coast, and as we claim, to all the people of the United States.

If Massachusetts can regulate this part of commerce upon the high seas, it must be only because of a right of property and if she has such right of property in the high seas for three miles from the coast and in the fish therein as to uphold her regulations, she can go further and in virtue of the same right of property grant an exclusive right of fishing. It is important to draw the line between regulation and appropriation. If the right of property contended for by Chief Justice Shaw and claimed by analogy from the reasoning of Chief Justice Waite in the case of *McCready* against *Virginia*, is to be applied, what would the Court say to a grant by Massachusetts of the exclusive right to a foreign company or a company of her own citizens to take fish upon the seas within three miles of her coast?

In the next place within the rule established by this Court this ocean fishery within three miles from shore is a subject which admits only of one uniform system or plan of regulation. The menhaden or any other migratory fish in their passage from Florida to Nova Scotia and back are during their whole progress subject to the same laws, exposed to the same perils and require the same protection, and who can deny that the regulation which is to result in this protection not only can be but will be far more effectually secured by one uniform national regulation than by thirteen different and variant state regulations?

Again, the mere fact of the common interest of the people of all the forty-four States in this industry demands that it should be subjected and controlled by a uniform system or plan of regulation. The people of all the States are supposed to be familiar with the law of the United States, but not with the local regulations of the various States outside of whose borders and along whose coasts they pass.

As to the practicability and necessity of a uniform rule of regulation upon the high seas the shad fish furnishes an illustration in so far as it resembles and in so far as it differs from the menhaden fishery. After the shad enter the rivers and local waters of each particular state they become a subject of local concern and admit and call for various local regulations as to times and modes of catching, but in their transit through the ocean within the three mile belt there is no reason why they may not be and should not be regulated by one uniform rule and law. And so of the menhaden, which unlike the shad, are largely caught within this three mile belt and before they come within the boundaries of any State.

It may be asked whether considering the different character of the fish in different latitudes and the different waters along the shore any uniformity of regulation is possible? We answer that it is not only possible but practicable and necessary on the ocean where the fish bear the same character in all the different latitudes and where the water is alike through the whole extent of our sea-coast. The line between what is practicable in uniform regulation and what is not, is exactly this line between the ocean and internal waters of the State.

Within the internal waters of the different States there is no possibility of uniformity of regulation, as for instance, in Maine and in Florida, but on the high seas there ought to be no other kind of regulation. The act which the Senate Committee on fisheries had under consideration when this act of Massachusetts was passed, shows what is practicable in the way of uniform regulation.

And again a controlling reason why this subject ought to be regulated by one national law rather than by twenty-one different and conflicting state laws is the liability in the latter case to conflict between the citizens of different States in their pursuit of the fish upon the high seas. Every few years we hear of a most discreditable conflict between the States of Virginia and Maryland and armed squadrons representing the citizens of those two States being on the verge of actual hostilities in what is called an oyster war, where the citizens of one State seek to maintain, and of the other to invade, the sacred right of

property in the oysters in the soil. Now if different and hostile laws are to be passed by the States along our Atlantic border in respect to ocean fishing, it is not sounding an idle alarm to anticipate similar conflicts in respect to that which a uniform system of regulation by Congress would necessarily prevent.

Finally this interest not only admits of but requires uniform and national regulation because in its nature it is not in any sense local, and its proper regulation requires a broad and national view of the subject. Whether the menhaden fishery can be protected at all or by what means, whether anything that man can do can diminish the number of menhaden, and if it can, how and where and when a remedy may be applied is a subject much agitated and never determined, but certainly it depends upon no local consideration. It calls for a very wide study of the subject. The objects of the fish in all their latitudes is involved in the inquiry and this is one which cannot be made within the limits or boundaries of any State or along the shores of any one State. It is territorially a national inquiry, and one which calls for the exertion of the powers of the Federal Government to consider and determine it, and this, as I understand it, was one of the considerations that led to the establishment of the United States Fish Commission, which, in the consideration of our next point under this head of discussion, comes prominently into view.

We submit therefore, that unless the Court is ready to depart from the rule which it has so emphatically established, that the power to regulate commerce given by the constitution of the United States to Congress is necessarily an exclusive one in all cases where the subjects of it are national in their character, or admit only of one uniform system or plan of regulation, it must be held that the Statute of Massachusetts under which the plaintiff in error was convicted, is void as being an invasion of the exclusive right of Congress to regulate the subject.

But even if the subject matter of ocean fisheries shall be deemed to be of such a nature that the States might make and enforce regulations thereof until a contrary intent of Congress has appeared, we submit finally that the intent of Congress to take this regulation into its own control has been plainly manifested.

How extensive a manifestation of the purpose of Congress in this regard is sufficient on such a subject to exclude the legislative interference of the States has never, perhaps, been expressly defined, but it has never been held that in order to exclude State action the whole

ground must be covered by the action of Congress, so as not to leave any detail open or uncovered in respect to which an intent of Congress to permit the State still to act, might be raised or presumed; it is sufficient we submit if Congress has signified its purpose, to take the subject into its own hands, and has taken action to effect such a purpose. As Mr. Justice Bradley said in *Butler* against the Boston & Savannah Steamship Company, 130 U. S. 527, in reference to a matter coming very near to the subject we have now in hand, namely, the interference by legislative action of the State of Massachusetts, with the law of the sea by her Statute extending her boundaries three miles into the ocean.

"It is unnecessary to consider the force and effect of the statute of Massachusetts, over the place in question. Whatever force it may have in creating liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest. If the territory of the state technically extends a marine league beyond the sea shore, that circumstance cannot circumscribe or abridge the law of the sea. Not only is that law the common right of the people of the United States but the National Legislature has regulated the subject in greater or less degree, by the passage of the Navigation Laws, the Steamboat Inspection Laws, the Limited Liability Act, and other laws."

In the light of this illustration we come to consider how far the action of Congress in respect to the ocean fisheries indicates its purpose to take their regulation into its own hands, and that the States shall let it alone, and we submit that although Congress has not as yet fully covered the ground so as to make it impossible for a State to pass a law which shall not find an act of Congress with which it shall directly conflict on the subject of fisheries, it has done enough to indicate its purpose, that the regulation of the fisheries upon the ocean shall be left to its own consideration and legislation. To begin with, Congress passed repeated acts providing bounties for fishermen and regulating the terms upon which, and the agreements under which the seamen engaged in sea fisheries should be admitted to participate in such bounties. We know it has been said by this court, and by one or two of the Circuit Courts that while there was by the Constitution a concession to Congress of the power to regulate commerce, there was no such concession of the power to regulate fisheries, but it will be found that in all such cases the court was speaking of the shell fisheries in the soil of a particular State, but the only warrant for the power of Con-

gress to provide bounties for fishermen is, we think, in its power to regulate commerce; at any rate it was put upon that ground in the Congress that provided the bounties, and was clearly regarded as a regulation of the fisheries by the men who devised and enacted those laws.

The next act in order of importance, if not of time, by which Congress undertook the regulation of the fisheries, and most important in connection with the present case, was the act by which it originally established, and has to the present time maintained a system of licenses for engaging in the fisheries whether cod, mackerel or menhaden. This legislation clearly is an exercise of the power to regulate commerce and to regulate fisheries, as a part of commerce, and the license was clearly intended to confer an authority emanating from the Federal Government to the licensee to participate in fisheries so far as Congress had the power to regulate them, that is, upon the high seas, within this very three-mile belt which is now under discussion.

The language used by the court in *Gibbons and Ogden* in respect to the effect of the purpose of the license to trade is exactly applicable so far as it goes to the license to engage in fishing, which is the creature of the same act of Congress, namely, that it does what it purports to do, that is, gives permission to a vessel already proved by her enrollment to be American, to carry on a fishing trade, and if asked what is the extent of the privilege given by this license emanating from the United States, I should say without hesitation that it is limited to the privilege of fishing in the high seas, where, as I claim, Congress has the exclusive right of control, and necessarily stops at the boundaries of a State, within which the State has the right of control, which is there quite as exclusive as that of Congress is upon the outside. In discussing the effect of this license in *Smith v. Maryland*, Mr. Justice Curtis was treating of a place, which, by the record in that case, was conceded to be within the waters and boundaries of the State of Maryland, and he was also treating of the subject of shell fish, and he held that whether the act of the State was in conflict with the rights given by the license of the United States, depended upon whether the law of the State in question was a valid law, that is, within the power of the State to pass. The conclusion of the court, as stated by him, was that the locus in quo being concededly within the territory of Maryland, and the subject, namely, oysters in the soil, being one which did not belong to commerce in any sense, that the act was valid and did not curtail the license for fishing; but oysters never have and never could have been regarded

as a part of commerce. As the Court said in *McCready and Virginia* they are like corn or potatoes,—the growth of the soil—the subject of exclusive property of the people in the State that own the soil: but here we have a license by Congress to fish, which must be construed to give permission to fish wherever Congress has the right of control and regulation, and the act of the State which prohibits fishing where Congress is considered even by Chief Justice Shaw, to have the right of control if it sees fit to exercise it, thus clearly comes in direct conflict with the license construed as this court has taught us to construe it; so that we claim, going no further than the acts providing bounties and the acts giving licenses to fish, that Congress has clearly signified its purpose to take the subject of fishing on the high seas in any waters where it had a right of control into its own hands and that the State shall not by inconsistent legislation interfere with rights or privileges granted by it. But the action of Congress by no means stops here. Never a decade has passed—scarcely five consecutive years have ever passed,—when some action of Congress has not been taken on the subject of fisheries, and the Revised Statutes contain a separate chapter, entitled “The Regulation of Fisheries,” which contains provisions upon the subject. Nor can we too earnestly insist upon this, that the repeated exercise by the treaty-making power of the Government—the President and Senate—which to that extent is the legislative department, has manifested the purpose of Congress to take the matter of the control and regulation of the fisheries in this marine belt into its control and to exclude the States therefrom. What is more significant than its repeated granting away of the right to fish in this marine belt to foreign nations? As we have said before, was it in so doing, granting away what belonged to the States, or was it granting what belonged to all the people of the United States, and was therefore subject to the control of all the people represented in its law-making power? It is claimed, I know, that the last of these treaties had expired when this particular act of Massachusetts was passed, but what difference can that make when we are trying to answer the question whether the action of Congress so far as taken, manifests its purpose to regulate this branch of commerce by its own enactment, or to leave it open for the States to regulate?

The treaties of 1854 and 1871 were not merely assertions by the Political Department of the Government of the right and power of the United States to deal with the subject, and a denial of all proprietary interest of the individual States in the high seas and in the fish in those

seas, but was an actual dealing with the subject matter to the exclusions of the States, not only for the periods covered by those treaties respectively, but absolutely. It was a taking into its control by the Congress of the United States of the exercise of the right of regulation as conceded to it by the consent of foreign nations.

But in addition to the legislation of Congress in respect to bounties and licenses, and the treaties referred to, Title 51 of the Revised Statutes entitled "Regulation of Fisheries" demonstrates the purpose of Congress to take under its control this very matter of protective legislation of fish upon the high seas, which is the pretext for the passage of the statute of Massachusetts in question. By the act of 9th February, 1871, now Sections 4395 to 4398 R. S. the United States Fish Commission is established for the express purpose of "prosecuting investigations and inquiries on the subject with the view of ascertaining whether any and what diminution in the number of the food fishes of the coast and the lakes of the United States has taken place, and if so, to what causes the same is due, and also whether any and what protective, prohibitory or precautionary measures shall be adopted in the premises, and shall report upon the same to Congress" and to this end all the executive departments are required by the Statute to render to the Fish Commission all necessary and practical aid in the prosecution of these investigations and inquiries.

It appears from the repeated reports of the Fish Commission that this subject of what protective, prohibitory or precautionary measures should be adopted for the preservation of the fish in the high seas is an intricate one, and involved in much dispute, so that to this very day, it remains an open question whether any precautionary measures by legislation can be devised which will meet the purpose in view of protection to the fish upon the high seas. Year by year Congress repeats the enactment of 1871 by annual appropriations of a large amount in support of the objects of that Commission. Is it not clear that the express purpose of the enactments for the creation and continuance of the Fish Commission is to give notice to all mankind that the Federal Government has taken the subject into its own hands, and will enact such measures as in its judgment may best promote the purpose in view of the protection and preservation of the fish, and that although Congress has not yet devised measures satisfactory to itself and to the Commission to cover the whole ground, its failure to do so is indicative only of its not yet having determined upon the best mode, and not

of an intent to permit the States to intrude upon its exclusive province by local enactments suggested by local interests.

In respect to mackerel, Congress has under the guidance of the Fish Commission come to a conclusion and acted by the Statute of February 28, 1887, Chapter 288, 24 Stats. 434, by which it is provided that for five years after the first day of March, 1888, no mackerel other than Spanish mackerel caught between the first day of March and the first day of June, inclusive, in each year, shall be imported into the United States or landed upon its shores, provided, however, that nothing in this act shall be held to apply to mackerel caught with hook and line from boats and landed in said boats or in traps and weirs connected with the shore, and imposing a penalty for a violation of the act of the forfeiture of license and the forfeiture of the mackerel landed.

Thus stands the legislation of Congress and we confidently submit that taken together it more than comes up to what the court has frequently held to be a sufficient indication of the purpose of Congress that the States shall not legislate in respect to a subject of commerce, the regulation of which rightfully belongs to Congress, and of its own intent to exercise full control on the subject.

I have thus attempted, as fully as the brief time allotted for oral argument will permit, to present the grounds upon which I claim that the statute of Massachusetts under which the plaintiff in error has been convicted, cannot be sustained; that if the court shall hold, as we believe it must, that Buzzard's Bay is not an inland bay, but of such width from headland to headland that the case is to be determined exactly as if the place of capture and offense had been the same distance from the shore at any place along the Atlantic coast of Massachusetts; that then the State of Massachusetts has not and cannot have any property, dominion or jurisdiction in the waters of the high seas at such a place or anywhere within three miles from the shore, and that her attempt to extend her boundaries by her own enactment to that distance from shore, is necessarily futile; that the only right over such waters is an international right conceded and belonging to the United States alone as a national sovereignty and is in no sense a right of property, and that therefore the attempted exercise of control by Massachusetts is wholly without authority under the Constitution, by which she abandoned and surrendered to the United States all international relations; that the

fisheries upon the high seas are a part of our national and international commerce, and as such come within the commerce clause of the Constitution which gives the power to regulate them exclusively to the United States; that this is demonstrated to be necessarily exclusive because the subject is one of national and not of local concern, and is one that not only admits, but requires, a uniform plan of regulation; that if this is not so, still it being a part of commerce and Congress having indicated its clear purpose to take the control and regulation of the fisheries in its own hands, as it has the conceded power to do, all legislation of the States upon the subject in respect to the marine belt in question necessarily falls to the ground.

And in conclusion, I desire to press upon the mind of the Court once more, the clear distinction between this case which involves the right of regulation of the fisheries upon the ocean to whatever extent there is sovereignty to regulate it, and the cases which have heretofore been decided by this court on the subject of shell fishing in which nothing has been involved but the nature of the property right and the consequent right of dominion over the soil of the State, and whatever is attached to or grows out of it.

We make no attempt in this case to exclude Massachusetts or any other State from complete ownership in whatever soil it can reach as a part of its territory or whatever accretion to that soil may result from a receding of the sea, if any such recession occurs; the ocean might recede in front of Massachusetts three miles, thirty miles, or three hundred miles, and the new land so exposed would necessarily be a part of her soil, but this really has nothing to do with the question of sovereignty and dominion and property in the waters of the high seas, and in the fish in these waters, which is the subject presented by this record, and is now for the first time before this court for decision. We submit that the plaintiff in error has made out a clear case for the reversal of the judgment below, and that the decision of the Court must uphold the doctrine that the right of sea fishing upon the ocean is a public right, free to all the people of the United States alike, except as it shall be from time to time subject to regulations that they through their representatives in Congress shall impose upon themselves, and that it is not in the power of any individual State to curtail this right by enactments of its own.

GOFF CONTEMPT PROCEEDINGS

ADDRESS AT THE HEARING "IN THE MATTER OF THE ALLEGED CONTEMPT OF JOHN W. GOFF AND WILLIAM TRAVERS JEROME," BEFORE HON. FREDERICK SMYTH, RECORDER, COURT OF GENERAL SESSIONS, PART II, NEW YORK, FEBRUARY 20, 1893

STATEMENT

On February 14, 1893, after the sentence of the defendant in the case of *People v. Charles W. Gardner*, in Part I of the Court of General Sessions, Recorder Smyth called before him Mr. Goff and Mr. Jerome, counsel for Gardner, and addressed them in regard to their conduct during the trial as follows:

"The specifications, some of them, which in my judgment bring you within the provisions of the statute, in reference to Mr. Goff are, first, that you, being engaged in the cross-examination of one Thomas F. Moore, a witness called for the People upon said trial, and an objection having been interposed by the District Attorney to one of the questions propounded by the said John W. Goff to the said witness, I said, 'I will allow you to go on a little longer;' that you, Mr. Goff, then said insolently and contemptuously to the Judge presiding, 'I object to Your Honor's remark that you will let me go on a little longer; I submit with respect that I have a right to cross-examine this witness.' To which the Judge replied, 'The Court has not said that you could not; on the contrary, when the District Attorney objected, the Court said it would allow you to go on a little longer.' You thereupon insolently and contemptuously said to the Court, 'That is the remark I objected to, Your Honor saying that I might go on a little longer.' The Court replied to you, 'You may take your objection to that remark and your exception to it; go on with some business.' You then replied insolently and contemptuously, 'I object again to Your Honor's remark to me to go on with the business; I am going on with the business in examining this witness as to his memory and reliability.'

"Second, that while one Catharine Amos, another witness called for the prosecution upon the trial of the said indictment, was being examined by Mr. Jerome, and Mr. Jerome having propounded to the said witness the following question: 'Had you seen Devery again before that—you saw Devery on the 19th of October? Now, when did you next see Devery?'—the Court reminded the defendant's counsel that the witness had previously testified that she had seen the said Devery on the 21st of November, and the said Mr. Jerome then propounded another question as follows: 'You had not seen him before those times?' And the witness having answered, 'No, sir; I was told to go ahead, and I did not go back to the station house to find any more about it, but go ahead; I said I would and went ahead.' Mr. Goff thereupon insolently and contemptuously said, 'We object to Your Honor refreshing the memory of the witness by an observation from your minutes.' The Court replied to Mr. Goff: 'Your associate asked the witness some time since when she first saw Devery and she said on the 19th of October. He then asked her a question or two, when did you next see Captain Devery, and she said on the 21st of November, that is what I referred to. I am not refreshing the witness' memory, and I have no desire

to do so, and you have no right to say that.' Mr. Goff then and there insolently and contemptuously said, 'I have a right, and it is manifest here, and I do it with respect.' The Justice thereupon said to Mr. Goff: 'Let us understand each other. I have declined now to hear any further from you on that subject. I have referred to the witness' testimony in order to call the counsel's attention to the fact that she said she next saw Devery on the 21st of November. I decline to hear any more.' Mr. Goff then and there insolently and contemptuously said to the Justice: 'I submit that we have a right to cross-examine this witness without any aid from the bench or from the prosecuting attorney, and without regard to what she has previously testified to. This witness may have answered that question that she had seen Devery and it would be for Your Honor and the jury to determine as to the credibility of her testimony in that respect. Your Honor refreshed her memory.'

Third, that upon the direct examination of one William F. Smith, another witness called for the prosecution upon the trial of the said indictment, the said witness having testified that he would know the defendant if he saw him, the Court thereupon having directed the defendant to rise in order that the witness might see him, and the defendant's counsel having objected to the defendant's standing up as directed by the Court, and the defendant having refused to do so, and the Court having thereupon directed two of the attendants of the court then present to lift the defendant to his feet, whilst the said attendants were undertaking to do so as directed by the Court, the said John W. Goff, together with Mr. Jerome, did then and there contemptuously and insolently, and whilst the said attendants were undertaking to lift the said defendant to his feet pursuant to the direction of the Court, as aforesaid, resist the said attendants and attempt by force to prevent them from lifting the defendant to his feet as they had been so directed to do.

"Fourth, that Mr. Goff during the course of his argument to the jury on behalf of the said defendant, having quoted from the testimony of the witness Catharine Amos, and the Justice having called his attention to certain evidence given by the said witness to which Mr. Goff had made no reference, Mr. Goff thereupon insolently and contemptuously said amongst other things, in substance, and to the effect following: That the said Justice had a remarkable memory, which had enabled him in the course of the said trial to suggest many things to the counsel for the said defendant which might prove prejudicial to the defense, and which had likewise resulted in his suggesting points to the representatives of the prosecution in favor of the prosecution, thereby meaning that the said Justice had during the said trial been partial, and had manifestly favored the prosecution and had endeavored to prejudice the said defendant and his defense."

Both Mr. Goff and Mr. Jerome then addressed the Court, apologizing for any unintentional appearance of disrespect, but differing with the Court as to some of the facts specified. On request of Mr. Goff the proceedings were then adjourned until the following Monday, February 20, 1893, at 11 a. m. At that time, Mr. Choate appeared on behalf of Mr. Goff, and delivered the address printed below. He was followed by Mr. Robert Sewell, in behalf of the New York Bar, and by Mr. Jerome in his own behalf.

The Recorder then reviewed the proceedings and announced his decision as follows: "I have come to the conclusion, in the case of Mr. Jerome, to discharge the proceedings as against him based upon the evidence which has been produced, and based also upon the statement which he has made here upon the last occasion the Court met, in which he apologized for any-

thing which might have been deemed from his manner to have been disrespectful, and in which he disclaimed on his part any intention to do anything that was disrespectful.

"In the case of Mr. Goff, I have arrived at a different conclusion. After hearing the counsel, upon an examination of the entire case, and after a great deal of consideration, I shall adjudge him guilty of contempt upon all the specifications except the third, and shall impose a fine of \$200 upon him, or commit him not exceeding thirty days until such fine is paid."

Mr. Choate then said: "By advice of his counsel, Mr. Goff will not put the Court to any further trouble, but will pay this fine although he feels very seriously aggrieved, and if there were appellate power where he could take it, he would like to appeal further."

All of the parties to this proceeding were of great professional prominence. Mr. Smyth had been Recorder since 1880. At the next election after these contempt proceedings, Mr. Goff was elected Recorder in succession to Mr. Smyth. He had a distinguished career on the bench, being a justice of the New York Supreme Court from 1907 to 1918. Mr. Jerome was a justice of Special Sessions from 1895 to 1901, and he was District Attorney of New York County from 1901 to 1909.

If the Court please, I have been very much gratified to be called upon by Mr. Goff to represent him on this occasion, if Your Honor will permit me to do so.

The Court: I will be very glad to hear you.

Mr. Choate: In the first place I will read the affidavit, which I suppose to be the proper practice, in answer to the charge and specifications which were served upon Mr. Goff upon Thursday or Friday last.

The Court: If you will state the affidavit, I won't put you to the trouble of reading it unless you prefer to do so.

Mr. Choate: I think Your Honor will be satisfied by the reading of it. Mr. Goff's affidavit states that he is an attorney and counselor at law, a member of the Bar of this state and has been practicing in the courts of this state for the past 17 years. (Reads affidavit.) The charge of Your Honor in relation to preventing the defendant from rising (the third specification) is wholly denied, not only by Mr. Goff, but by a very large number of witnesses who were present, from actual observation of the incident, including a large number of the members of the jury.

The Court: What do you mean by that?

Mr. Choate: I mean what I say, that it is denied, that part of it, that Mr. Jerome and Mr. Goff physically interfered.

The Court: Well, I saw them both put their hands upon the shoulders of the man and tell him to stay where he was.

Mr. Choate: Then it becomes a question, of course, between Your Honor's personal observation, and the observation of a cloud of wit-

nesses who testify to the contrary. (Mr. Choate then read the affidavits of S. B. Todd, Christopher C. Boyd, Henry W. Bolles, Russel R. Cornell, Charles H. Hartfield, William Travers Jerome, Frank Moss and Daniel Nason.)

The Court: In relation to the last specification Mr. Goff omitted to read two lines below, which was a portion of the witness' answer in which she had stated that the demand for money had been made.

Mr. Choate: After I finish these affidavits Your Honor will hear me.

On the part of Mr. Goff, we ask that the proceedings against him be discharged.

I don't know that I need apologize for appearing here in his defense. It seemed to me that something very much more was at issue than whether a few dollars of fine should be imposed upon Mr. Goff, which is the form, I suppose, that any punishment or penalty for a contempt, if adjudged, would take. I believe there was once in modern times in the history of England, in one of its remote colonies, a judge who sent a counsel to prison for contemptuous language, but upon appeal to Her Majesty it was reversed and the action of the court censured; and one of the most eminent judges of England has said that the practice of doing anything other than imposing a fine, or ordering imprisonment as an alternative of not paying the fine, has been discontinued in England for more than a century.

The Court: You need not trouble yourself on that point.

Mr. Choate: I proceed to the real matters involved here. It seems to me, and I think to many members of the Bar whom I have heard speak of it, that although the conduct of Mr. Goff, especially in regard to this last specification, may not be justified, that there is a question of the right of counsel to defend to the utmost of their capacity without regard to the consequences to themselves or anybody else, so long as they keep within the legal limits and rights of their client.

When the Constitution of the State of New York provided that prisoners on trial should have counsel to defend them, it meant all that it said; and that counsel should be not only fearless, but aggressive, if necessary, in the defense of their client's right, within the rules of law, not only against the representative of the prosecution but against the learned Court. Otherwise the constitutional provision giving them the benefit of counsel is wholly swept away. If counsel go into the defense of a prisoner upon the expectation or apprehension that if they are fearless, and if they are even aggressive, without being contemptuous, or insolent, they may be locked up themselves at the end of the trial, why

prisoners might as well have no counsel, and they might as well be surrendered, as they were according to the old English practice, to the Court.

Your Honor knows how that constitutional provision arose. It came into being when prisoners had no counsel. The courts not only tried them, but convicted them, and that was found not to be an adequate defense of the rights of the prisoner. That old English practice never has been followed here by anybody.

Shall counsel be protected or punished in the conscientious discharge of duty? What are the rights of counsel in the cross-examination of witnesses? Have they not the right to resist respectfully and properly whatever may seem to them to be an invasion of their rights? They have to perform a conscientious duty of which they are the judges, just as much as the learned Recorder upon the bench is the judge of his duty and conscience.

That leads me to speak of the first specification, which seems to me so really trivial that, unless the more serious matters which subsequently occurred upon the trial were connected with it, I think it never would have occurred to Your Honor to make it the subject of a proceeding for contempt. Recalling it now as it appears from the record and from the affidavits, it was substantially this: Mr. Goff was cross-examining one of the important witnesses for the prosecution. Now, if there is one sacred right of counsel, if there is one sacred right of the party represented by counsel, it is the right of full cross-examination, until the Court, in its judgment (I admit having the discretion) sees fit to stop it. So long as counsel are keeping within that line, so long as in the judgment of the Court they have not exhausted their rights, and the time has not come for the Court to stop them, they cannot be interfered with, without a real invasion of their right, an interference with their duty, and a great prejudice to the client whom they are representing.

The Court: Did you look at the stenographer's notes to see the length of the direct and the cross-examination in that case?

Mr. Choate: I have not.

The Court: Two pages of direct and twenty-six pages of cross-examination. Of course, that does not absolutely debar the counsel from going on twenty-six pages more, but the Court certainly has some power.

Mr. Choate: I admit the power, I don't question the power or the duty, to stop a cross-examination whenever the Court pleases—not

whenever it pleases, but whenever in the judgment of the court, the right has been exhausted, the function has been performed; but, my proposition is that short of that the counsel must be let alone, and the party must be let alone as represented by counsel. That was not done in this case, and it was because Mr. Goff respectfully, properly, and as he would have been negligent for not doing, objected and excepted, that Your Honor has called him here to answer as for a contempt. So I say that, if that had stood alone, this proceeding never would have taken place.

Now, let us see what happened. He had not yet exhausted his right, he had not yet reached the point where Your Honor thought he ought to stop. The District Attorney made some interruption and Your Honor said, "I will let him go on a little longer." Now, what there was of menace, of implied rebuke, or of disapproval in Your Honor's manner, you alone can judge. I don't know whether there was any or not. But on those words alone, or to those words alone, Mr. Goff objected, making no reference to anything but the words themselves. Your Honor said, "You may object and note your objection, and you may except to that." Very proper. Was that contempt? I submit that it was not. I submit that when Your Honor said, "You may object and have your objection noted, and you may except," you recognized that it was a respectful and rightful protest on the part of Mr. Goff, within his power as an advocate, and within his duty as an advocate, and was something which he ought not to have neglected. Then when Mr. Goff objected further, and his exception had been noted under Your Honor's direction, the learned Court said, "I will now go on with business," or "with the business," as Your Honor recollects it, or "with some business," as we find it on the stenographer's minutes. Now, if Mr. Goff had shown any indisposition to going on with business, or with the business, or with some business, the rebuke that was implied in that remark might have been natural, obvious and well deserved; but he had not been. Upon the record of what had immediately preceded, it appears that Your Honor considered that he was still proceeding with the rightful and dutiful business of cross-examination, just as any advocate ought to have done; and yet Your Honor says, "Go on with some business," or, "with the business."

Now, of course, we are not here to question Your Honor's motives. We all believe in Your Honor's absolute fidelity to conscience, not only in this business but in all business. But the question is how

counsel to whom such a remark was made on such a position might naturally view it. Might they not naturally accept it as a rebuke, which, upon what had gone before, was not deserved, and if they could so view it could they not protest? Would they be men if they did not protest, and protesting might they not put it in the legal form of objection and exception?

I submit, if Your Honor please, that upon that part of this case, this first specification, Mr. Goff is not only justified, but that upon the facts, which cannot be brought into question, he did no less than his duty.

Let me call Your Honor's attention to one or two of the precedents in which great lawyers have come into collision with judges, to show that what Mr. Goff did, as charged in these first and second specifications, is far from the protests and aggressive onsets upon courts that fearless advocates have made, and which won for them the approval, not only of the Bar, but of the community. I refer specially to what happened between Mr. Erskine and Lord Mansfield, and what happened between the same great counsel and Mr. Justice Buller. I wish to contrast them with these first two specifications in regard to the conduct of Mr. Goff and his bearing toward this Court. Your Honor will remember that, when the case of the King against Bailey was on trial, Erskine, then taking his first flight at the Bar, was interrupted by Lord Mansfield, who was presiding in the court, when he was beginning to attack the Earl of Sandwich, who was the first Lord of Admiralty. He had not been mentioned in the case and was in no way concerned. Lord Mansfield interrupted Erskine with a remark which was intended as a rebuke and warning. As the words of the report have it, Lord Mansfield, observing that counsel was speaking of the first Lord of Admiralty, said that he was not before the court.

"Erskine: I know he is not formally before the court, but for that very reason I will bring him before the court."

He was not censured for that. On the contrary, he was by that statement and other things in that argument, although a mere youth, placed at the front of the English Bar. It happened later, when he was before Mr. Justice Buller in the case of the Dean of St. Asaph [21 How. St. Tr. 847], that the jury returned a verdict of "publishing only." Observing that, and observing what the effect would be upon the rights of his client, Erskine insisted that the verdict should be so recorded. The jury had returned a verdict of publishing only. Pursuant to the very pernicious sentiment that prevailed at that time, on the part of the Government and on the part of courts which de-

prived the jury of the real voice in the decision of libel cases, the court tried to induce the jury to alter their verdict by striking out the word "only." This occurred:

"Justice Buller: Gentlemen, if you add the word 'only' it will be negating the innuendos.

"Erskine: I desire Your Lordship to record the verdict as given by the jury.

"Justice Buller: You say that he is guilty of publishing the pamphlet, and that the meaning of the innuendos is as stated in the indictment.

"Juror: Certainly.

"Erskine: Is the word 'only' to stand as a part of the verdict?

"Juror: Certainly.

"Erskine: Then I insist that it shall be recorded.

"Justice Buller: Then the verdict must be misunderstood; let me understand the jury.

"Erskine: The jury do understand their verdict.

"Justice Buller: Sir, I will not be interrupted.

"Erskine: I stand here as an advocate for a brother citizen, and I desire that the word 'only' may be recorded.

"Justice Buller: Sit down, sir. Remember your duty or I shall be obliged to proceed in another manner.

"Erskine: Your Lordship may proceed in what manner you think fit. I know my duty as well as Your Lordship knows yours. I shall not alter my conduct."

And Lord Campbell adds that the learned Judge took no notice of this reply, nor did he repeat the menace of commitment, and this noble stand for the independence of the Bar, of itself, would have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall.

Mr. Justice Buller was actually administering the law as recognized by the courts of England. Upon what has already been referred to upon the part of Mr. Goff, he is as far within the position of Mr. Erskine towards Mr. Justice Buller as it is possible for a minor to be within the greater offense—if it were an offense. I submit that instead of being an offense it was a credit and a merit that Mr. Goff took the position he did, and that Your Honor on sober reflection will not discredit him for it.

Now, we come to the second specification. I have only said what I did in regard to the first, because it seemed to me to be comparatively trivial, because of the principle involved in it, and because upon this record it seemed to me, as a lawyer of some experience, that Mr.

Goff's position was absolutely right. Your Honor holds him for his language alone. I was not present to witness his manner. Of course, for our manners we are, under moments of excitement, not always responsible. Your Honor knows very well what a tremendous strain is brought upon counsel, especially in the defense of criminals upon serious charges. I leave that all out, because Your Honor has kindly left that out. If there was anything offensive in his manner Your Honor has not so informed us.

As to the second specification, it involves the same thing, the right of cross-examination. There are two instances referred to in the record and in the charge, and Your Honor puts in "&c.," referring I presume to some other such incidents on the trial. Now, was he right or was he wrong? He was cross-examining a very important witness for the prosecution. The question of the time and place of the alleged incident was of very great importance indeed. He was cross-examining a person who had sworn to having seen the prisoner on the 20th of October. He did not believe him. He was instructed by his client that when she testified to not having seen him again until the 21st of November it was a falsehood. He had a right to probe and to sift the conscience of that witness without interruption. Of course, it is always within the physical power of the learned judge to interfere at any point either of the direct or of the cross-examination, but I submit that it is not within his rightful power to interfere with a cross-examination that is being properly conducted. That is not a novel ground. It is centuries old, as long ago as counsel have appeared in court.

Now, what was the effort on the part of Mr. Jerome and Mr. Goff,—or Mr. Goff, for I have no right to speak for Mr. Jerome. It was to shake the evidence of that woman and to show that some time between the 20th of October and the 21st of November she did see him, or may have seen him. She was a person of abandoned character. She was just the person on whom the right of cross-examination should be permitted to be absolutely exhausted. Now, then, he says: "When did you next see him after that?" She had testified that she saw him on the 21st of November. He went on with the further question, repeating it. Then Your Honor interposed and said, "Why, she has said that it was the 21st of November." Would Your Honor have allowed that interruption by counsel upon the other side? Would any court have allowed it? I think not. If Your Honor please, I think it would have been an invasion of counsel's rights. When counsel has a witness in his hands for cross-examination he should be let alone,

unless he is doing something improper. What was the necessary and natural effect of that? Why, of course, whatever Your Honor's intention may have been, the inevitable effect and result of it was to put the woman on her guard, to remind her, as well as the counsel, that she had said the 21st of November, and there was no question about the date. That was the effect. Your Honor had no such purpose. Your Honor, as you stated upon the record, did it to remind the counsel. Counsel are vigilant, and it is to be presumed that that was within his remembrance; he had recently heard the statement of the witness and did not need to be reminded of it. When I am cross-examining a witness who five minutes ago has said that it was the 21st of November, and I am trying to break that down and show that it was the 20th of October, or that between the 20th of October and the 21st of November there were many times when she saw him, I do not need to be reminded that she said the 21st of November. If she is reminded, the cross-examination is broken down. That is the way to look at it, if Your Honor please, giving the fullest scope to Your Honor's desire to shorten the trial, and not to permit unnecessary or impertinent cross-examination. The lawyer conducting the examination is the judge of the questions he ought to put, and if a question is improper it can be objected to and ruled out, but if it was not, if it was a proper question, as it was in this case, the counsel ought to be let alone or the right of cross-examination is refused.

I come to the other incident, which illustrates this same rule still more forcibly. That was in regard to the witness Moore in the second specification, which is a very interesting incident. That was in respect to the date of a meeting at which these parties were, and where Moore says he saw Gardner in the saloon or upstairs, or something like that. This illustrates in a more emphatic manner what I have to say in behalf of Mr. Goff in regard to this specification. Your Honor will bear with me, because it seems to me to imperil the rights of the profession if counsel are to be punished for such an incident as this. Moore had testified that it was in October that this meeting occurred, and he identified it by the club meeting on a Tuesday in October. Mr. Goff and Mr. Jerome were advised by their client that that was false, and they desired, as it was their duty to do upon that information, to break it down if they could. What happened? Mr. Goff cross-examined him and tried to break down his evidence about this being on the 8th of October, and tried to show that it might be in November. Now then, he had cross-examined him at some length, bringing the incident of the election to bear upon it, and so

that Your Honor will know exactly how it came in, I will read the proceeding. Mr. Goff asked, "Don't you remember, at that meeting, that the political campaign was discussed?" That was as bearing on the question of its being before November 8, when the campaign closed by the election. He said, "I believe we are not allowed to discuss politics in the club."

"The Court: Was there anything discussed with reference to the approaching political campaign? A. No, sir.

"By Mr. Goff: Q. Was not the result of the elections discussed?"

What was the object of that question? If the result of the election was discussed, then the witness' testimony went for nothing, because it must have been after the election. Now, if the District Attorney, at that moment, had interposed with the suggestion to the witness that the elections did not occur in October, he having sworn that it was in October, would Your Honor have permitted it? Would any court have permitted it? Wouldn't it have been a flagrant breach of the rights of the parties and of the counsel in whose hands the witness was, because it directly told that witness, "You are going to be caught on that question?" If the District Attorney had said "Were the elections in October?" the witness would have said at once, "No, it could not have been in November; I stick to October."

Now, fully conceding the position in which the learned court stands, always to be able to interfere, I don't question that at all, the question is as to the rights of this party and of his counsel, and the relative point of view in which he must have looked upon the attitude or the interference of the learned Recorder at that moment. Now, I am appealing to Your Honor, knowing you to be a fair man, and knowing how you sit there always intending to do absolute justice, and I submit to you that if, on that occasion, the District Attorney had interfered, you would have rebuked him if he had made that remark, because it killed the cross-examination at that point, it nullified it. You would have said: "Mr. District Attorney, let that witness alone. Keep your hands off of that matter while this cross-examination is going on. He is within his rights. You have had your turn." Did it make any difference that the remark came from the learned Recorder instead of from the counsel? Its effect was the same, there is no doubt about that; its inevitable result was the same, fatal to that cross-examination on that point. It seems to me that, if Mr. Goff had protested, he would have been justified. But he submitted quietly to that and passed on to another question. I submit to Your Honor's sense of fairness, to your judicial experience, to your knowledge of the practice and

the traditions of the profession, that he was within his duty when he was pressing that question, and it was an invasion of his rights for the suggestion to fall even from the lips of the learned court, that the elections are not held in October.

Now, if Your Honor please, I come to the third specification, in respect to which I offer two more affidavits from two more of the jurors to the same effect. These are from S. B. Todd and Christopher C. Boyd.

Here we come to a question certainly of very considerable interest. I do not speak of the question of law raised, which to my surprise I find on examination is much more serious than I supposed, as to the invasion of the rights of the defendant in his being compelled to stand up against his will and by force. That is only a passing incident in this matter of the third specification; that is all. A witness was put upon the stand who had seen a material occurrence, and he was asked whether he could identify Gardner if he saw him again. Now, if Your Honor please, suppose a criminal was on trial for his life for murder, and a witness of the affray had been called for the prosecution, and being put upon the stand said, "I saw the affray, I saw the murder." Then he is asked, "Should you recognize the murderer again?" and he said, "I don't know; I am in doubt about that." Is it not an invasion of the prisoner's right to have him indicated by the court, so that he can be identified and the doubt be removed? That is a very serious question, not necessary to be passed upon or considered here. But it does seem to me that it seriously affected the right of the party on trial, and if it had been a matter of life or death it might have turned the scale against the right and against the fact. This matter of personal identification is always difficult, always dependent upon so many circumstances, subjective and objective, in the mind of the person who is called to testify, that when it becomes, as in this case it did become, and as in the case supposed it might become, vital to the case, I submit the witness ought not to be allowed to identify the prisoner in that way and the prisoner ought not to be permitted to testify or furnish evidence against himself. Suppose there had been an affray and a murder, and the prisoner had received, or the party who had committed the offense was shown to have received, a stab wound in doing it somewhere on his person, and the court said, "Prisoner, uncover your body and show whether there is a fresh stab wound there or not." It would be the same thing as this. Would it or would it not be an invasion of the rights of the prisoner, as they have always stood at common law?

Now about the protest. The objection was very respectful, and very

proper, and then this subsequent protest was made, and the request to discharge the jury because of the error of law that had been committed. Why, obviously Mr. Goff was acting within his rights. It may have been an extreme position for him to take, I don't care for that,—we are driven to extreme positions very often by the necessities of our case,—we should be false to ourselves if we did not take them. Your Honor very properly and kindly does not complain of that. What you do complain of, and very justly, if it were so, is that when the protest was offered and had been overruled, and when you exercised your official power through your officers to raise Gardner to his feet, that this gentleman interfered by force to prevent him. Now, I agree that, if that be so, there was a clear contempt of Court. Nothing would justify counsel in a physical interference with the orders of the Court. If the Court is wrong, there is a remedy elsewhere. He can take the remedy by objection and exception, and he can take the remedy by appeal to the powers to whom judges are responsible, but he cannot physically interfere to prevent the execution of the order.

Now, then, we come to a question of evidence, and there again I submit to Your Honor, as a judge and as a man, that to my surprise you say that this specification was prepared upon the evidence of your own eyesight. Very well. Now, then, as opposed to that there is the evidence of the eight jurymen, who, I suppose, sat here quite as well situated for observation as Your Honor upon the bench; there is the evidence of Mr. Jerome, of Mr. Moss, of Mr. Goff, of Mr. Nason; that makes twelve witnesses to the contrary. Now, I am not addressing an infallible man, or a man who believes that he is infallible, or a man who believes that he always can succeed in being perfect; he is not that kind of a man. You stand with Judge Story, I suppose, when he said that "perfect justice pertains to one judgment seat only, namely, to that which is affixed to the throne of God." On this question of evidence, is it possible that Your Honor may have been mistaken? Well, I don't know about Your Honor's powers of vision. I know this much, that for myself I would not set my opinion against that of twelve men equally able to see what occurred, and who have no reason to distort the matter or testify to the contrary. Have those eight jurymen who sat here any interest in this controversy? How can they have? Why, they would side with Your Honor, every time, of course; I mean to say that their sympathies are always with the court. How is Mr. Goff or Mr. Jerome to be punished for this, on the evidence as it stands, against this overwhelming weight of evidence. Your Honor knows that practically there is no appeal from any order

you make in this case, no possibility of appeal. But, suppose that a case were brought before you where a man of the highest repute in the community, who commanded your absolute confidence, testified in one way, and twelve men to whom there was no exception, whose credibility, whose competency, was unassailable, testified to the contrary, wouldn't you say that the judgment cannot stand, that the verdict cannot be sustained? Courts are bound to determine cases, and a case of contempt does not differ from any other case, according to the weight of evidence, and not to render judgment against overwhelming evidence. We are all liable to make mistakes. There is no doubt about that, especially in this matter of vision. There were hands laid, as appears by this affidavit, upon the prisoner's shoulders. They were not the hands of either of these advocates; they were the hands of Your Honor's officers, according to the evidence. They both swear they did not touch him subsequent to the order of the court.

The Court: Let us read the specification. It says: "Did then and there contemptuously and insolently and whilst the said attendants were undertaking to lift the said defendant to his feet, resist the said attendants and attempt by force to prevent them, the said attendants, from lifting the said defendant to his feet as they had been so directed to do." Do they both swear they didn't touch him?

Mr. Choate: Subsequent to the order; that is the point.

The Court: Do they both swear that neither of them put their hands on the shoulders of that man?

Mr. Choate: Let me call Your Honor's attention to it. We are not being tried for any speech or conduct before Your Honor gave the order to stand him up. The charge is this: "The said John W. Goff, together with the said William Travers Jerome, did then and there contemptuously and insolently, and whilst the said attendants were undertaking to lift the said defendant to his feet pursuant to the direction of the said Hon. Frederick Smyth, justice as aforesaid, resist the said attendants and attempt by force to prevent them, the said attendants, to lift the said defendant to his feet as they had been directed so to do." Your Honor will now permit me to read what Mr. Goff says in his affidavit on that subject: "While one Smith was under examination, and was about to identify the defendant, and he having refused to stand up to be identified, the court directed the officers to lift the defendant to his feet, and that, while they were doing so, my associate, Mr. Jerome, and myself resisted the said officers and attempted by force to prevent them from lifting the defendant to his feet. The statement of alleged fact contained in

this specification is absolutely erroneous and has no foundation whatever in truth to support it. The record touching that part of the trial shows as follows:

The Court: The record shows nothing except what was said. I presume the stenographer did not take down the fact of this man's being lifted to his feet.

Mr. Choate: Mr. Goff swears that the statement is absolutely erroneous, and absolutely without foundation, and continues: "At no time during this transaction did I touch the person of, or interfere in any manner, shape or form with the court attendants when they forcibly stood up the prisoner." Now, I read Mr. Jerome's affidavit: "At no time after the said Hon. Frederick Smyth directed the attendants of the court to lift the said defendant to his feet did said John W. Goff, either alone or with William Travers Jerome, or with any other person, and neither by word or act, and neither directly or indirectly resist the said attendants or attempt by force or in any other manner to prevent them raising the said defendant to his feet as they had been directed to do." That is a very explicit, absolute denial. Could it not have been that Your Honor, in looking back upon it, has confounded some speech and conduct of these lawyers with the prisoner, before you had issued your mandate to the officers to stand him up, with what occurred afterwards?

The Court: They don't deny in either of their affidavits that they had placed their hands upon this man at some time.

Mr. Choate: That is not the question. Did they at the time specified in this charge? Let us have fair play. Your Honor has brought them to answer a contempt here for laying their hands upon the prisoner at a certain time when it would have been wrong for them to do so, namely, after Your Honor ordered the officers to stand him up. It would not have been any offense to lay their hands upon him and keep their hands upon him before that. Your Honor, recognizing that right and that fact, limits the charge, as it ought properly to be limited, to their putting hands upon him in resistance to Your Honor's order when you directed the officers of the court to stand him up. I really did believe, and I do believe now, and I know Your Honor will stand by me, that when a prisoner is brought up for a criminal offense, he is to be tried according to the indictment, and not according to the Grand Jury's view of what might have occurred or what occurred at some other time and place. When counsel are called upon to answer for a criminal contempt they stand as parties indicted, and they are to be tried upon that indictment and

not otherwise. It is true they do not deny that they placed hands upon him during the trial. They were not called upon to deny any such thing; it would have been impertinent and frivolous for them to have made such a denial, just as much as it would be for a party charged with murder to deny that he committed burglary. If Your Honor please, this prisoner, while free from the custody of the officers of the law, was in the custody of his counsel in court, and it was no offense, would have been no offense, for them to tell him to sit down, or, if you please, to put their hands upon him, until Your Honor should dispose of a mooted question, and that is what they did. I don't know that I can present that matter any more forcibly; it would only be to repeat what I have said.

We trust to Your Honor's absolute sense of justice,—appeal to no mercy,—on that third specification. Your Honor cannot say that their answer is not as wide as the information; all we have to do is to answer this charge, and Your Honor cannot make a new specification and call them to answer for having put their hands on the prisoner at any other time than that charged. Your Honor has no pride of opinion, no self-applause, that will prevent your correcting an error of fact, if, upon the evidence, you have made one. If this specification was made upon the authority of Your Honor's personal eyesight, can that stand against this testimony? Your Honor does not doubt the veracity of these two gentlemen; their character, outside of this proceeding, stands as well as that of any other man at the Bar, and when they say they did not, isn't Your Honor bound to accept it,—wouldn't you accept it always? If you thought that you saw me, or any of us, do something and we testified to the contrary, and if Your Honor put us to the necessity of testifying on oath, would you accept it any the less? I submit I ought not to spend any more time on that specification.

Now I come to the fourth specification. Here is something very different; here is something which forced me to say to Mr. Goff, after he conferred with me, that in the heat of discussion, under extraordinary strain, and pressure and irritation, he had, without realizing what he was doing, used words disrespectful to the Court, for which he comes here to express his regret. Let me recall that matter a little before I sit down. I see I am taking up more time than I ought to. Was Your Honor ever conscious of being absolutely convinced, from the very outset of the trial, that a prisoner was guilty? If not, then you are more than human. Was Your Honor never conscious, as the trial proceeded, that it was impossible to conceal that

conviction? If not, then you are more than human. Well, that has happened, not in this court, but in many courts, time and time again, and of course, when it does, it rouses the resistance, the aggressive resistance, of the advocate who understands his duty, and he would be false to his trust if it did not rouse him. What would Your Honor say if counsel got that impression as the trial proceeded, and did not in their minds, and so far as they properly could, in words, resist it? And even if it were not so, as in this case, counsel may get a misapprehension that the judge is against them. That, of course, does not justify them in contemptuous expressions to the Court. I am not arguing it in that view, but my province now is to show just how Mr. Goff came to make this statement that he did. Here I come to the matter of the right of counsel in summing up. I submit that the right of counsel in summing up, especially in defense of a prisoner on trial for his life or his liberty, is to be let alone until he violates the rules of law.

The Court: Wouldn't it be a violation of the rules of law to misquote evidence?

Mr. Choate: Undoubtedly. I am coming to that. If he misquotes evidence, then you should interfere and interrupt him; there is no question about that.

The Court: If he omitted to read a portion of the testimony of a witness which was directly under his eye, and which bore upon the very question he was addressing the jury about—

Mr. Choate: I submit that in this case the duty of the Court is to see him through on the point, and to see whether he reads it or not.

The Court: There is no doubt about that.

Mr. Choate: We don't differ as to the rule. I must accept Mr. Goff's statement of the record. He was quoting the evidence of this woman Clifton on the question whether the prisoner made a suggestion of money.

The Court: As to whether a demand of money had been made by Gardner.

Mr. Choate: He had a full right to discuss that subject. It was his duty to do it. I don't think it is possible for two intelligent men to misunderstand each other on this point. I am not proceeding to claim that Mr. Goff's words were justified. They were not. But, while he was reading that evidence and commenting upon it, and when, as he said, he had this very passage marked for discussion to the jury, before he got through, Your Honor arose upon the bench and said—

The Court: I did not rise upon the bench,

Mr. Choate: Your Honor needs no elevation; you are there already. Your Honor said, and I know you said it emphatically: "If you look down at the bottom of that page," the very page he was citing from up above, "you will see that he said, 'Do you think you can stand \$50 a month.'" Now certainly he did not suppress any evidence. I agree that if we suppress evidence the court must be quick to jump upon us and say to the jury that it is a misrepresentation.

The Court: How about omitting to cite evidence bearing directly upon the point?

Mr. Choate: Mr. Goff did not have the last word. The District Attorney had the last word, to be followed by Your Honor to correct any errors of either of them. Now, I say, with all deference to Your Honor, that if we are summing up a case for a party charged with a crime, or for a party in a civil case, we are at liberty to make all we can out of the evidence which bears in our favor, and we are not obliged to drag into our discussion evidence which is to the contrary. Mr. Goff was referring to page 119 of the evidence, and was commenting upon the portion of the evidence that he thought bore in his client's favor, and against the integrity of this witness. Now, Your Honor says, "Suppose he omits something that the witness said that tends to qualify it;" if Your Honor please, he has a perfect right to omit it; in many cases that is what he is there for, especially if he doesn't believe the statement.

The Court: If he is quoting the testimony of a witness he should give the qualification.

Mr. Choate: I will tell you how it stands. He hadn't got to it; he hadn't a chance to cite it. Here it is marked with blue marks in pencil, which Mr. Goff made before his summing up for the purpose of discussing it: "He introduced me as Mrs. Smith. We went in and sat down after being introduced. Mrs. Gardner said, 'Charlie, do you wish me to leave the room?' He said, 'If you please.' She went out. I said, 'You have a rather pretty wife, and young.' And he says, 'Yes, that's the style I always get.' He immediately went under the—I don't hesitate only because—the wardrobe, where you hang clothes, and brought out a long-necked bottle with red wine in it. We sat down and drank it. 'Now,' I said to him, 'for fear that I should get into any trouble, I understand all the houses in Fifty-Third street are to be pulled or indicted. If you can assist me in any way—I never was in trouble in my life—I have always done the best I could not to get into trouble—and what would it cost me? Can you do anything for me?'"

The Court: And then he stopped, and stated to the jury that up to that time there was no evidence in that woman's statement of a demand for money having been made.

Mr. Choate: That was exactly true, and exactly as I would have summed up to the jury myself.

The Court: Here is the other part of the answer: "He said, 'Well, I don't know.' I said, 'Yes, you can, now. Please do what you can for me.' He said, 'Can you stand \$50 a month?'" That part he studiously left out.

Mr. Choate: Now, let us see about that. That was the entire answer of the witness, and Mr. Goff was reading the testimony and making running comments on it.

The Court: My dear sir, you were not here.

Mr. Choate: I was not here, but I judge from the record, and Your Honor agrees with me when I state that then he made the remark that up to this time no money had been demanded. Now, counsel must sum up their own cases in their own way, as long as they do it fairly. Was this fair? Mr. Goff says in his affidavit: "I was about midway in the page, and while in the act of addressing the jury, using the words of the woman, Clifton, when the learned Recorder stood up on the bench and addressed me in the hearing of the jury and of the whole court as follows."

The Court: I am sorry to differ with Mr. Goff on a question of veracity, but he read right down to that line.

Mr. Choate: Your Honor agrees with me, that he was just above that passage?

The Court: It is within two or three lines of the bottom.

Mr. Choate: I know it was. I trust Your Honor will hear me on that. I say that, if I am summing up a case to a jury, and read so far, and then say that down to this point no demand for money had been made, I am perfectly within my rights, and if I have it on my notes, as Mr. Goff had it on his, after saying that, to proceed to read this passage, "Can you stand \$50 a month?" I have a right to do so without interference. Different counsel may have different modes; Your Honor, from your unerring sense of justice and fairness, might say, "You should read the whole sentence and then make your comments upon it." But if I am addressing a jury I read what is favorable to me and comment upon it, and then I read the other part of it that qualifies it, just as Mr. Goff was about to do.

The Court: That was not Mr. Goff's plan.

Mr. Choate: Well, he says it was.

The Court: He and I differ.

Mr. Choate: One thing Your Honor won't differ about, and that is the undisclosed operation of the mind of Mr. Goff, which you did not let him go far enough to reveal.

The Court: The only way we can judge of that is by a man's acts and what he says and the circumstances. That is the only way.

Mr. Choate: Your Honor will indulge me for pressing this upon your attention. We agree as to where Mr. Goff stopped; we agree that he stopped before the witness had testified about this demand for the \$50, that the demand was afterwards made. Now Your Honor says that he differs with Mr. Goff in this, that he had it on his notes, and that it was his intention to read the qualification. Your Honor has the right to doubt Mr. Goff, but I should say that was the ordinary course of counsel. If counsel is reputable, and has always in a life of fifteen years before the courts been veracious, Your Honor is bound to accept what he says; otherwise how could we get along. We should have quarrels with the Court constantly. If the Courts won't accept my statement, after I have been practicing 35 years before them, of what I was intending to do, how can I practice before them with self-respect? That is where Mr. Goff stands. It is a question of veracity between him and you as to what he had in his mind as to the design and scope of his summing up yet to be made. Yet that is not very important after all.

Now, then, how did he stand? He turned upon Your Honor and made these improper remarks. What should he have said? It was the tone, it was the form, it was the phraseology, more than the substance. What should he have said, which would have excluded this intimation against the prisoner from Your Honor? If it was anything that he could get on the record, he could be righted on appeal; but he could not get it on the record, no part of it could be righted by a resort to the powers to whom Your Honor is responsible. What happened? Here he was defending a desperate case, as Your Honor viewed it, because you said, after the jury had rendered their verdict, that they could have rendered no other verdict. The more desperate the case, the more the advocate is put upon his mettle, and put to the severest strain; the more desperate the case, the more desperate the duty of the counsel to exhaust all his powers.

The Court: Did you see that on the record, that I said the jury could have rendered no other verdict?

Mr. Choate: Your Honor will excuse me for having read that in the public prints.

The Court: That was not the language.

Mr. Choate: Well, was this the language, that Your Honor thanked the jury?

The Court: For the attention, patience and time that they had given to the trial of the case.

Mr. Choate: I don't know what the language was, but I perfectly understood Your Honor's view of it, that you approved the verdict. How did Mr. Goff stand? Where we all may stand any day and lose our temper. We may say hasty things, and I suppose nobody has sinned more than I have in that regard, but fortunately thus far I have escaped the rigor of the law.

The Court: You have never violated the rules.

Mr. Choate: If I had been before Your Honor, probably I should have. Here he was at the end of an exhausting trial of a week or ten days. On one of those days Your Honor had almost reduced him to inanition by a threatened night session, more than any of us can bear. Your Honor has forgotten, in your fifteen years of repose upon the bench, the straits to which we are put.

The Court: Do you call it repose?

Mr. Choate: Absolute repose. Your Honor has forgotten the straits we are put to here at the Bar—the exhaustion, nervous prostration is no word for it, as the end of a trial approaches. You have seen these very men, not only in this but in other trials, almost ready to sink into their graves as the end of the trial approaches, so severe was the draft upon their vital energies. They get distorted views at that time of everything that has happened; they think Your Honor means something that you do not mean, something that is as far removed from Your Honor's mind as the satellites of Jupiter are from Your Honor's person; and so when he made this retort he had, as I think, the right to believe and feel that the interruption of the Court was a serious invasion of his rights as counsel, a serious prejudice to his client, and he spoke as he did, and he has come here to express his regrets, in a manly way, for it.

Now, if Your Honor please, I believe in cultivating good terms between the Bar and the Bench. There is no man of whom we stand more in awe, and for whom we feel more unbounded and unlimited respect, than for Your Honor, but we make mistakes and we say in the heat of blood what we ought not to say.

The Court: You mean you made a mistake in that last assertion? Go on.

Mr. Choate: I will go on, and I was just going off, too. I say, that it does not tend to promote good feeling between the Bar and the Bench which ought to prevail, or to maintain that respect which we all have entertained so long and hope to the end to entertain for Your Honor, for you to visit this gentleman with punishment. It is a good deal of a punishment to be arraigned in this way and to submit to the mortification of having to answer on oath charges made against him. In my judgment that is enough. I hope Your Honor will take this fact into serious consideration. I think that upon a careful study of the whole matter you will agree with me, that on the first three specifications he was not only not subject to censure, but is entitled to praise, and that on this fourth specification, where he did go beyond the proper attitude of counsel to the Court, though not justified, it was such an error as a court, liberal and generous-minded, as Your Honor is, must necessarily remit.

INCOME TAX CASES

CLOSING ARGUMENT, ON BEHALF OF THE COMPLAINANTS,* IN SUPPORT OF THE CONTENTION THAT THE INCOME TAX LAW OF 1894 WAS UNCONSTITUTIONAL; UNITED STATES SUPREME COURT, MARCH 12 AND 13, 1895.

STATEMENT

The Act of Congress of August 15, 1894 (28 Stat. at Large, c. 349), entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," contained provisions imposing an income tax of two per centum on net profits in excess of \$4,000. Among the classes of income subject to tax were interest on stocks and bonds issued by the States and by municipal corporations, rents on income derived from real estate, and income from personal property. Among the classes of corporations exempt from tax were mutual insurance companies.

Charles Pollock, of Massachusetts, brought a stockholder's suit in equity against the Farmers' Loan & Trust Company of New York, praying that the company be restrained from filing an income tax return and paying an income tax, on the ground that the income tax provisions of the act of 1894 were unconstitutional. In the United States Circuit Court the defendant's demurrer was sustained, whereupon the record recited that the constitutionality of a law of the United States was drawn in question, and an appeal was allowed directly to the United States Supreme Court. The cases of *Hyde v. Continental Trust Company* and of *Moore v. Miller* were argued along with the Pollock Case.

A notable array of counsel appeared for the contestants: for Pollock and Hyde, William D. Guthrie, Clarence A. Seward, and Mr. Choate; for Moore, George F. Edmunds; for the Trust Companies, James C. Carter; and for the United States, by leave of the Court, Attorney General Richard Olney and Assistant Attorney General Whitney. The case was argued on March 7, 8, 11, 12, and 13, 1895, and decided on April 8, 1895. The opinion of the Court was delivered by Chief Justice Melville W. Fuller. Justice Stephen J. Field also filed an opinion in support of the decision; while Justices Edward D. White and John M. Harlan filed a dissenting opinion. The decision held that the act was unconstitutional in so far as it imposed a tax on rents and income from real estate, and on income from municipal bonds. A tax on income from real estate was held to be a direct tax, and therefore not to be levied except in conformity with Article I, Section 2, of the Constitution, which provided that "Representatives and direct taxes shall be apportioned among the several States."

Having been to that extent successful, Mr. Choate and his associates, on April 15, 1895, petitioned the Court for a rehearing on those points on which the Court, in the absence of Mr. Justice Jackson, had been equally divided, viz.: (1) Whether the void provisions invalidate the whole act; (2) whether, as to the income from personal property as such, the act is unconstitutional as laying direct taxes; and (3) whether any part of the tax, if not considered as a direct tax, is invalid from want of uniformity.

* Charles Pollock, Appellant, v. Farmers' Loan and Trust Company; Lewis H. Hyde, Appellant, v. Continental Trust Company, 157 U. S. 429.

The Attorney General then having suggested that the rehearing should embrace the whole case, it was reargued, before a full court, on May 6, 7, and 8, 1895. On May 7 and 8, Mr. Choate made the closing argument for the appellants. The case was decided on May 20, 1895 (158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108), by a five to four vote. Justices Harlan, Brown, Jackson and White filed dissenting opinions. The opinion of the Court, read by Chief Justice Fuller, reaffirmed the decisions of the original hearing, declared a tax on personal property to be a direct tax, and the entire act of 1894, so far as it related to income taxes, to be unconstitutional.

In consequence of this decision, no Federal income tax was possible until the adoption in 1913 of Article 16 of the constitutional amendments, which reads: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Undoubtedly, the Income Tax Cases were the most important, from a legal point of view, of any in which Mr. Choate was engaged, and his success greatly enhanced his reputation. There was much popular discussion about the amount of the fee which he was supposed to have received. Strong, in his *Life of Choate*, p. 232, records a conversation in which this matter is cleared up. "A good many people," said Mr. Choate, "have stated that my fee was as high as \$250,000, but nothing could be further from the truth, although that amount would not have been excessive. The parties directly interested in the case, who could be called on for a certain amount, were a few insurance companies, with the expectation, however, that a number of banks, and other financial interests, would contribute to some extent, but not one of them did so, and all that I received for my services for preparing the case and making the two arguments before the Supreme Court of the United States was \$34,000.

If the Court please: After Jupiter had thundered all around the sky, and had leveled everything and everybody by his prodigious bolts, Mercury came out from his hiding-place and looked around to see how much damage had been done. He was quite familiar with the weapons of his learned Olympian friend; he had often felt their force, but he knew that it was largely stage thunder, manufactured for the particular occasion, and he went his round among the inhabitants of Olympus restoring the consciousness, and dispelling the fears, and raising the spirits both of gods and men who had been prostrated by the crash. It is in that spirit that I follow my distinguished friend; but I shall not undertake to cope with him by means of the same weapons, because I am not master of them.

It never would have occurred to me to present either as an opening or closing argument to this great and learned Court, that if in your wisdom you found it necessary to protect a suitor who sought here to cling to the ark of the covenant and invoke the protection of the Constitution which was created for us all, it was an argument against your furnishing such relief and protection that possibly the popular wrath might sweep the Court away. It is the first time I have ever

heard that argument presented to this or any other court, and I trust that it will be the last.

Now, I have had some surprises this morning. I thought until to-day that there was a Constitution of the United States, and that the business of the executive arm of this Government was to uphold that Constitution. I thought that this Court was created for the purpose of maintaining the Constitution against unlawful conduct on the part of Congress. It is news to me that Congress is the sole judge of the measure of the powers confided to it by the Constitution, and it is also news to me that the great fundamental principle which underlies the Constitution, namely, the equality of all men before the law, has ceased to exist.

If Your Honors please, I look upon this case with very different eyes from those of either of the learned Attorney-General or his distinguished associate who has just closed. I believe there are private rights of property here to be protected; that we have a right to come to this Court and ask for their protection, and that this Court has a right, without asking leave of the Attorney-General or of any counsel, to hear our plea.

No longer ago, if the Court please, than the day of the funeral procession of General Sherman in New York, it was my fortune to spend many hours with one of the ex-Presidents of the United States, who has since followed that great warrior to the bourne to which we were then bearing him. President Hayes expressed great solicitude as to the future fortunes of this people. In his retirement he had been watching the tendency of political and social purposes and events. He had observed how in recent years the possessors of political power had been learning to use it for the first time for the promotion of social and personal ends. He said to me, "You will probably live to see the day when in case of the death of any man of large wealth the State will take for itself all above a certain prescribed limit of his fortune and divide it, or apply it to the equal use of all the people, so as to punish the rich man for his wealth, and to divide it among those who, whatever may have been their sins, at least have not committed that." I looked upon it as the wanderings of a dreaming man; and yet if I had known that within less than five short years afterwards I should be standing before this tribunal to contest the validity of an alleged act of Congress, of a so-called law, which was defended here by the authorized legal representatives of the Federal Government upon the plea that it was a tax levied only upon classes and extremely rich men,

I should have given altogether a different heed and ear to the warnings of that distinguished statesman.

It does seem to me now, if the Court please, that it is time for us to learn a little more about the real nature of this act of Congress which we are impugning before you. It is far more communistic in its purposes and tendencies than anything President Hayes apprehended. It is defended here upon principles as communistic, socialistic—what shall I call them—populistic as ever have been addressed to any political assembly in the world.

Now, what is this law? My learned friend, Mr. Carter, has said that in the convention which created the Constitution there was one ever-present fear. There was; I agree with him as to that. It was that by a combination of States an unjust tax might be put upon a single State or upon a small group of States. Let us see about this act which, exempting all incomes under \$4,000 of individuals, but denying the exemption to corporations and to persons drawing their income from corporations, seeks to raise a sum, as has been stated here, of from \$30,000,000 to \$50,000,000. There are sources of information as to how such a law will strike, to which I wish to direct the attention of the Court.

There was formerly an income tax law, and the last year it was in force was the year 1873. The exemption then was \$2,000. In that year the collections for that tax were such in the States of New York, Pennsylvania, Massachusetts and New Jersey that even then, with that exemption, those four States paid four-fifths of the entire tax. What is their political power? What is their political representation in the lower House of Congress, which only can initiate and secure the passage of revenue bills? Eighty-three out of three hundred and fifty-six, or a little less than one-quarter. Anybody who knows anything about the operation of these income tax laws and as to the effect of changing the exemption from \$2,000 to \$4,000, knows that that inequality of burden will, under the act of 1894, press upon those four States with vastly greater force. So that Massachusetts, New York, New Jersey and Pennsylvania under this enactment, if it is allowed to stand, will pay not less than nine-tenths of the entire tax, a tax imposed upon them by other States, which, as the learned Chief Justice has quickly seen, as shown by his questions in the course of the argument, will hardly bear a dollar of it.

Now, what we come here to say is that this most iniquitous result has been brought about by an express violation of two of the leading

restraints of the Constitution—restraints upon the power of Congress, arranged, and carefully arranged, in the compromise that resulted in the creation of the Constitution itself, and without which this nation never could have been brought into being.

The learned Attorney General says, and his associate re-echoes the proposition, that this is a state of things which cannot be helped—that no matter how far wrong Congress goes, there is no help for it; but we think that there is, if Congress has exercised a power not granted to it by the Constitution, or has exercised it in a manner which the provisions of the Constitution forbid.

Have your Honors observed the argument—the main argument—that has been presented in support of this law by the gentleman who has just closed? It is that the men upon whom this tax is imposed are too rich. The constitutional argument presented to justify it is that they are too rich. In Cromwell's time there was a sect of people that arose in the land from which our fathers came who were called "Levelers," and their platform was to level all existing ranks of society and all estates to an equality. The question is whether Congress can stand upon that platform and exercise that mission under the Constitution of the United States.

But I desire, if the Court please, to ask one or two questions. Did your Honors observe what the learned counsel claimed, namely, that \$20,000 might have been made the minimum of exemption of taxation of this law, and there would have been no help for it? Have you read his brief, in which he says that, although Congress cannot tax John Jones by name, however rich he be, it can make a class which shall consist of him and so tax him?

Now, if you approve this law, with this iniquitous exemption of \$4,000, and this communistic march goes on and five years hence a statute comes to you with an exemption of \$20,000 and a tax of 20 per cent. upon all having incomes in excess of that amount, how can you meet it in view of the decision which my opponents ask you now to render? There is protection now or never. If it goes out as the edict of this judicial tribunal that a combination of States, however numerous, however unanimous, can unite against the safeguards provided by the Constitution in imposing a tax which is to be paid by the people in four States or in three States or in two States, but of which the combination is to pay almost no part, while in the spending of it they are to have the whole control, it will be impossible to take any backward step. You cannot hereafter exercise any check if you

now say that Congress is untrammelled and uncontrollable. My learned friend says you cannot enforce any limit. He says no matter what Congress does, if in its views of so-called—what did he call it?—sociology, political economy, it establishes a limit of a minimum of \$20,000 or a minimum of \$100,000, this Court will have nothing to say about it. I agree that it will have nothing to say about it if it now lets go its hold upon this law—upon a law passed for such a purpose, accomplishing such a result and by such means.

One more preliminary word before I proceed to discuss this act in detail, not as a question of political economy—I do not propose to discuss it as such, or of sociology, whatever that is, or of speculative philosophy—but, as a question of constitutional law, one word more. I have thought that one of the fundamental objects of all civilized government was the preservation of the rights of private property. I have thought that it was the very keystone of the arch upon which all civilized government rests, and that this once abandoned, everything was at stake and in danger. I was brought up at the feet of Gamaliel. That is what Mr. Webster said in 1820, at Plymouth, and I supposed that all educated, civilized men believed in that. According to the doctrines that have been propounded here this morning, even that great fundamental principle has been scattered to the winds.

There was never any set of men more sensitive to the rights of property—more consecrated to the preservation of private right as the essential foundation of all public law—than the framers of this very Constitution which you are here to protect and enforce. Among them all, there were no two men who, though not lawyers, were more alive to that sacred principle than Washington, who presided over its deliberations, and Franklin, who was its oldest and most revered member. Do your Honors remember what took place when the last discussion had ended, the last vote had been taken, and the last name had been signed? Franklin, standing at the table on which this sacred instrument rested, then at last complete, looking over the head of Washington, who was in the chair, at the painted sun that was upon the wall of that immortal chamber in Philadelphia, said: "I have debated many times in my own mind during the discussions of this convention whether that was a rising or setting sun, but now I know for sure that it is a rising sun." Those two men did, as I believe, more to bring about the compromises that resulted in that Constitution than any other men. If either of those great men could have foreseen that in a short time in the life of the Republic (for what are one hundred

and eight years in the life of such a nation as they projected), it would be claimed here, in this Court, that, not in spite of that Constitution, but by means of that Constitution which they had helped to create, a combination of States, seeing that four other States were wealthier, stronger, richer, could combine and pass a law for the purpose of breaking into the strong boxes of the citizens of those States and giving out the wealth of everybody worth more than \$100,000 for general distribution and use throughout the country, would they not both have sprung forward to erase their signatures from an instrument that would result in such consequences?

Now, if the Court please, after what my learned friend has said, I may say, as a part of the preface of my argument, that the eyes of the whole country are fastened on this Court, the eyes especially of those who sympathized with the passage of such a bill and enacted it into law; that spirit which invaded the halls of Congress is now seeking, as we see by its representatives here this morning, to throw up its entrenchments in this Court. They are watching for the result of this case. If they carry this, they will carry their first parallel, and then how easy it will be for the whole fortress upon which the rights of the people depend to be overcome.

It is not any part of our mission here to question the power of Congress to raise money by taxation. We believe that Congress has plenary power in the last exigencies of the Government to reach every man, every dollar, every inch of ground, to secure the common defense and the general welfare; that it was the purpose of the convention that created the Constitution to give Congress that power, and that it is one of the absolute essentials of a great sovereignty which was to cover a continent and to last for untold ages. There is no doubt about that. We are perfectly aware, too, of the difficulties that lie in our way; that it is necessary for us to show, in the first place, either that the power to pass this act was not conferred upon Congress, or that in passing it Congress has exceeded the power entrusted to it by the Constitution.

One thing is certain, absolutely certain, that although the power was given Congress to tax, no power was given it to confiscate; and that the learned Attorney General and his associates all admit. If this is a confiscation under the forms of law, there is no power given to Congress in the Constitution that could by any possibility enable it to enact such a law.

I now desire to call the attention of the Court to the distribution of the taxing power as between the States and the Federal Government

imposed by the Constitution. The particular views that I propose to present differ somewhat from those which have been presented by my distinguished friends, Mr. Edmunds and Mr. Seward, but are exactly as stated in that portion of our brief which was not opened by Mr. Guthrie, who confined his argument to the point of uniformity. The precise grounds are stated in our brief, which has been in the hands of our adversaries for the last fortnight. I can add nothing to the wealth of argument, the force and power of the claim that was presented by my two distinguished associates, namely, that this tax is wholly void because absolutely in all its parts a direct tax not imposed by the rule of apportionment. But, if the Court please, we may distrust, in view of the former decisions of this Court, the willingness of the Court to come to such a conclusion as that an income tax in all its extent, levied upon all callings, levied upon all earnings as well as upon the rents of land and the income of personal property, is in the meaning of the Constitution a direct tax.

I, therefore, present the case as to direct taxes upon somewhat narrower grounds distinctly stated in the brief, grounds consistent with every case that has yet been decided by this Court, grounds maintained by the uniform course of the Federal Government in its legislative capacity for over half a century after the adoption of the Constitution. If your Honors should conclude that it is not possible to condemn this entire tax law as unconstitutional because entirely a direct tax, my purpose is to present, then, the only safe and practicable alternative upon which your Honors can place, as I believe, any decision, and which is based upon the clear distinction, the distinction which we find in the Constitution itself, between direct taxes upon the one hand and duties, imposts and excises upon the other.

Therefore, for the purposes of this argument, I shall assume what my adversaries claim. I shall assume that it may possibly be decided by this Court, as it has so often been decided before, that all duties, all excises, all imposts are shut out from the class of direct taxes by the necessary meaning and effect of the Constitution, and that they are to be administered by the rule of uniformity, as they ought to be in this law and are not. I shall claim, upon the other hand, that at any rate so far as regards the direct, inevitable, necessary income and outgrowth of real estate and of personal estate, the tax is a direct tax levied upon the proper subject of a direct tax within the meaning of the Constitution, and is therefore invalid.

I have said that it is not our desire, nothing could be further from

our wish, than to cramp or belittle or confine the powers of taxation as confided to the Federal Government. Now, what will this leave to the Federal Government, as between the States and the Federal Government, as between the citizens of the States (for whose protection we invoke your judgment) and the Federal Government? It will leave to the Federal Government all customs duties, by which, in the main, since the foundation of the Government its expenses have been defrayed. It will leave all internal taxes upon what may be called, and have already been called this morning, consumable commodities, including manufactures. It will leave not only the manufactured article itself, the consumable commodity itself, but every process, every step, every agent involved in the creation of those consumable commodities or manufactured articles, from the first entering into them of the raw material down to their actual consumption by the consumer. Your Honors know what I mean—the commissions, the labor, the sales, the transmission, the transportation, storage, insurance, everything that has to be done about those consumable articles.

In the next place, it will leave to the Federal Government, to be applied by the rule of uniformity, all taxes on transportation of every kind, from the \$100,000,000 railroad down to the cart of the licensed vendor that crosses our path here upon the Avenue. It will leave for taxation by the rule of uniformity all those great businesses that have furnished such a fruitful field of revenue in all times—I mean distilling, insurance and banking, and every kind of trading. Then, finally, it will leave every possible occupation in which these 70,000,000 people can by any chance engage.

If I am right, if we succeed in the contention that I have presented to you, the hands of the Federal Government will be left open, free to impose all that class of taxes by the rule of uniformity, and they will still have plenary power over lands and the rents of lands, over accumulated personal property, and the income from personal property, but to be measured by the other rule—I mean that of apportionment according to the census.

[The Court then adjourned to Wednesday, March 13, 1895.]

Mr. Choate, resuming his argument, said:

If the Court please, at the adjournment of the Court yesterday, I was pointing out that there are ample sources of revenue from indirect taxes left open for the Federal Government to employ under the principle of uniformity without the need of resort to any direct taxation, and yet that, at the same time, under the right 'to collect direct

taxes upon the principle of apportionment there is available the entire wealth of the country, real and personal, which in the last emergency may be absolutely exhausted for the common defense.

And now, before proceeding particularly with the views which I wish to lay before the Court regarding the question of direct taxes, I desire to call attention to the rules regulating the power and the methods of exercising the power of taxation, laid down in the Constitution, which are absolutely imperative upon Congress and from which by no contrivance, by employing no name, can it possibly escape.

Under the provision of section 2 of article I of the Constitution, it had already been declared that representatives and direct taxes should be apportioned among the several States according to the census, according to numbers to be ascertained by an original census and by a decennial census from time to time, as years rolled on. The framers had not yet, so far as concerns the arrangement of sections in the Constitution as it was finally drawn, given to Congress the general power to tax. That first provision was a restraint upon what was intended to be given by a subsequent clause, all of course finally speaking with one voice. Then the framers came to the first clause of the eighth section, which prescribed the power of Congress, and naturally and necessarily gave to Congress plenary power of taxation, which might meet the exigencies, necessities, and demands of the Government at any period and under any stress. I agree with the learned Attorney-General that nothing could be more comprehensive; that no other language could be used to include the entire power of taxation which it was the evident, the obvious, the necessary purpose of the framers to bestow upon the new government. "Congress shall have power to lay and collect taxes, duties, imposts, and excises." They added, however, to that clause, "but all duties, imposts, and excises shall be uniform throughout the United States," which I understand to mean exactly what it says—that all duties, imposts, and excises shall be uniform duties, uniform imposts, uniform excises throughout the United States.

The first question that suggests itself is why these words were added in that particular form, especially why the word "taxes" was included in the grant of power and excluded from this particular modification of it. I am not one of those who attribute ignorance or heedlessness or acting in the dark or in a maze to the men who, after sitting four months together, evolved this piece of work. I submit to your Honors

that upon every reasonable rule of construction, in view of the nature and character of those men, in view of the light of the history of the Confederation and of English history in which they were acting, they intended by their prescription of methods of exercising the power to cover absolutely the whole subject of taxation, and that the reason why the limitation as to uniformity, the prescription of method as to uniformity, was applied only to duties, imposts and excises was that the framers knew very well that they had already prescribed the measure for all other taxes under the term of direct taxes. Anything less than that would impute to them the ignorance, the heedlessness, the striking in the dark which, I think, one of the briefs on the part of the other side has imputed to them in this regard. They had known all about the struggles of English-speaking people in respect to taxation and resistance to taxation and the necessity of regulating taxation. There was not one of them to whom could be imputed ignorance of all that history had taught in that regard. So I submit to your Honors it is a fair and necessary construction that the reason why the framers of the Constitution limited the provision of the method of uniformity for the measurement of taxes to duties, imposts and excises was that they understood that they had already provided for the method for the measurement of all other taxes.

In respect to this, what the learned Attorney General says regarding the uniform conduct of the Government from the beginning is entitled to our greatest respect, and I draw from it what appears to me to be a very strong argument and one that I do not remember to have heretofore seen suggested. Your Honors will remember that Mr. Justice Chase in the case of *Hylton v. United States* threw out the suggestion that there was some mystery about the word "taxes" in the first clause of the eighth section; that all duties, imposts and excises necessarily were taxes; and he hinted that possibly there might be some kind of a tax of which he could not then think, the nature of which he did not intimate, that might neither upon the one hand be a direct tax, nor upon the other be a duty, an impost or an excise. That suggestion has lingered in the mind of the profession from about a hundred years ago until now, and you find it reproduced in the brief of the learned Attorney General or of his associate. They say that there may be a tax which on one side is neither a direct tax nor on the other side a duty, impost or excise. They do not venture to suggest that the tax under examination is such a tax, and nobody from the beginning under this Constitution has ever imagined what such a tax

could be. In fact, as I understand the brief of the learned Attorney General, he suggests that no such tax has ever been discovered.

Now, for the argument that I draw from it: how about the corpus of personal property? If a tax upon that were such a tax, neither direct upon the one hand nor a duty, impost or excise on the other, then what would follow? What Mr. Justice Chase suggested, that neither rule prescribed would apply; that it would not have to be levied either according to apportionment or according to uniformity. Would it not have suggested itself to some astute mind connected with the executive or legislative departments of the Government at some time since the adoption of the Constitution until now, in all the great exigencies and emergencies of the nation, that there was a tax unlimited in respect to measure, in the meting out of which there was no restraint upon Congress? Under that construction, under that theory or imagination, what has there been from the beginning to prevent Congress from raising all the money required for the purposes of the Government from the corpus of personal property throughout the United States without any rule of apportionment, without any rule of uniformity, laying it exactly as it pleased, and coming to every citizen, saying, "I find you are worth so much personal property; pay me two per cent. of that." No; this has never been dreamed of—it has never been suggested to this hour—and why not? It is because everybody who thought for a moment about this subject knew that the judgment I have ascribed to the framers of the Constitution was sound and right, namely, that in providing for direct taxes, and that direct taxes should be collected according to apportionment, they covered a tax upon personal property.

I might be asked why, if personal property was included in direct taxes, has it never been made the subject of direct tax by this Government, as it never has? Is not the answer obvious, namely, that the inequality of effect produced by a levy, a collection according to apportionment among the different States according to representation, would be, in respect to the bulk of personal property, so great, so oppressive to the smaller and less wealthy States that it was impossible for any man in Congress or out to propose it for a moment? See how that would have operated as between New York, with its vast accumulation of personal property, and Florida, if you please, or any one of the poorer States regarding which the proportion of such a tax to be imposed upon its citizens should be measured by apportionment according to numbers? If the Court please, Mr. Langdon, of New

Hampshire, understood that inequality perfectly well in the convention when this rule of apportioning direct taxes was submitted. Said he: "It will be very hard upon New Hampshire, but we will submit to it for the purpose of carrying this Constitution through." Why hard upon New Hampshire? Her property consisted of her farms and her granite hills, with no accumulation of personal property, but Massachusetts, Rhode Island, New York, and several of the other States had personal property vastly in excess of their proportionate numbers. If the Court please, do not these considerations fully confirm the necessary interpretation imposed upon you by the ordinary rules of construction with which I set out this morning, that you are to ascribe to the original makers of this Constitution exactly what everybody has ascribed to them ever since, namely, that they believed that they had, and by their language they certainly had, covered the restraint of the taxing power as to all manner of property and methods of exercising it?

Now, I come to establish my proposition that the income of all accumulated property, whether it be the rent of lands or the interest of bonds or the immediate outgrowth of any other specific form of personal property, is necessarily, under the Constitution, the subject of a direct tax and of no other. If I accomplish that it will not result in establishing the illegality upon that ground of all the provisions of this law. If those things which I mention can only be made the subject of an apportioned tax, it will make void this tax so far as it rests upon rents and upon the income of personal property. By what method is this to be established? By exploring the misty areas of political economy, about which, however thoroughly informed your Honors may be, I know next to nothing? I think not. I think it is to be established and decided by the ordinary rules for the construction of statutes and constitutions.

One thing is absolutely certain in this Constitution, and that is that the difference between the subjects of taxation by apportionment and taxation by the rule of uniformity was considered one of vast importance by the framers of the Constitution. It was no trifling thing. They did not think either branch of this question of taxation inconsiderable or unimportant. By and by I shall be able to recall to your Honors' attention why they did not think so and that there was a wide gulf between them. The nature of the property and of the tax to which it was on the one hand to be subjected by apportionment, and the nature of the subject of taxation and of the tax to which it was

to be subjected on the other hand by the rule of uniformity were absolutely distinct in their minds, whatever each may have included.

Now, if the Court please, my proposition is that real estate itself and the rent of it, the bulk of personal property and the income from it, were what was in their minds under the subject of direct taxation. How do I ascertain that? I say by comparing and studying these clauses of the Constitution which I have already quoted and the other clauses of the Constitution and the whole scope and purpose of them. The mere talk of this man or that in the convention, mere talk of this man or that upon the bench of any court, unless it was a solemn adjudication upon his oath of office and the decision of a case, is of very little weight. I have found from a careful study of it very little help upon this subject in the debates of the Federal convention, and I think there are two reasons why no conclusive force, as Justice Swayne said in the Springer case, can be drawn from them. In the first place, it was not a legislative body; it was merely a deliberative body, coming voluntarily together at the invitation of Virginia and of Congress, submitting its work to Congress with a suggestion that it finally be submitted for adoption to the conventions of the several States. In the second place, its deliberations were absolutely secret. The seal of secrecy was set upon them and never taken off until after the death of Mr. Madison, in 1826. So absolute was the secrecy that you find in the personal journal of General Washington, who was president of the convention, that while he recorded everything else that happened to him, the dinners he attended, the men who were there, the women who were there, the rides and the drives, and the walks he took, he has this entry: "The convention having voted that its proceedings shall not transpire, no word as to what happens there will be found in this diary." So, while it is true that aid can be derived from the discussions in the State conventions to which this document was submitted, without another word from these framers, with not a word of explanation, you have to look to the document itself as your first and final guide.

The first step which I take as the starting point of my argument in support of the proposition that I am submitting is that, whatever else was or was not included in the term direct tax, real estate was included, real estate in the several States, real estate that was distributed equally everywhere, found everywhere, in every State, although necessarily differing in value and differing in acreage. I take that not as a concession from anybody, not as a concession from Mr. Hamilton

or Mr. Justice Paterson, to be coupled with and limited by anything else they may have said in connection with it, but I take it from the universal assent of mankind, then and now, in Court, in Congress, in the executive department, everywhere.

I observed in the brief filed by my learned friend, Mr. Carter, that he says it was the naked land, and he draws a distinction between improved real estate and uncultivated, unproductive real estate; and he says, "Why, a tax upon rented property is one thing, but a tax upon all land, including unproductive and unoccupied land of which there was so much then and so much now, is quite another thing." If the Court please, appealing to the practical construction by the legislative branch of the Government from the beginning, the power to tax land does not rest upon theories of distinctions between land and the increment of land, the improvement of land, and the growth or value of land; but it applies, according to such practical construction, to improved and unimproved real estate. There have been three cases of a direct tax, which has never been imposed except in cases of great emergency: first, there was the direct tax law of 1798, when trouble with France was apprehended; then the land tax act of 1812, and the direct tax of 1861. All were of one type. They were not taxes on naked land; they were taxes arranged carefully upon improved and upon unimproved property, just as a land tax, if you please to call it so, a direct tax, may now be imposed upon rented property and unrented and unproductive property. What did Congress do? Take the first tax as a specimen of them all. It said, first, we will tax the houses. That is improved real property, is it not? That is rented real property, is it not? It taxed them according to their value, from \$3,000 ranging all the way up to \$30,000, at a differing rate. Then it taxed the slaves so much a head. I think it was fifty cents a head. Then it taxed all the rest of the land a dollar for a hundred acres or whatever the rule was. So I say there is an absolute consensus, confirmed by these hundred years of history, that a direct tax upon land was not a purely naked land tax, but it was a tax, as I have said, upon all possible improvements or outgrowth of the property, as well as upon the land itself.

Now, we come to the second proposition, which it seems to me is equally easy to establish, and that is that the rent of real estate issuing from it is indistinguishable from a tax on the real property itself. I understood my learned friend, the Attorney General, to say yesterday, "No, there is a difference; there is this difference, that rent after it is

in a man's pocket is turned into money, and they are taxing the money." I shall have something to say about that by and by in regard to the decisions of your Honors, decisions of this Court almost from the beginning. Then he said that it depends upon the will of Congress and the form or name of the tax whether they say we mean to tax these rents as personal property and not as real property. Is that possible? He says under some tax laws a tax on rents ought to be regarded as a tax on real estate from which it is indistinguishable in principle, quality, and character. But if Congress says, "We say this is a tax on personal property, although on rents," it ceases to be a tax on real estate and rents as such and becomes a tax on personal property. I thought that this Court in the investigation of constitutional questions always went for the substance and not the name, for the real purpose and not for any fictitious purpose and held that what Congress was forbidden to do directly it could not do indirectly.

If the Court please, as to this matter of rent, is a tax on rent distinguishable from a tax on land? I say that a tax on land yielding income by whatever name, is in reality, in effect and substance, a tax upon the rental. I speak now, of course, of rented property. I am not foolish enough to argue that a tax on rents is the same thing as a tax on land which nobody rents. I am looking, however, at the nature of the tax; not the form, but the substance. Your Honors will observe that the tax laid by this law is a yearly tax upon the yearly rental. Can that be distinguished from a tax on land? How under Heaven is a tax on land to be paid, except out of the income? How is it possible? I mean in the common, ordinary, practical business of life which the Court is bound to look at. We are living under a constitutional government, are we not? We have regulated the measure of our taxation by the Constitution. Was it intended that, although Congress could not put an unapportioned tax upon real estate, it could put an unapportioned tax upon rent of real estate, and so eat all the real estate up? How can a man pay this five years' annual tax on the rent of real estate? Absolutely only out of the rental. Would any free people, if they had prohibited a land tax, submit to a tax on the rentals?

We are lawyers, are we not, all of us? We are deciding this as a question of law, not of political economy. I say that every time the Courts ever passed upon the question of an annual tax on land, by whatever name you call it, whether you call it a real estate tax or a land tax or an income tax or whatever you please, it has been held to be a tax on the immediate ownership, upon the immediate freehold,

and upon the man who is in possession thereof receiving the income. Your Honors are all perfectly familiar with the cases which hold that as between tenant for life and remainderman such a tax as this rests necessarily upon the tenant for life. Now, is not that rule applicable? Is it not perfectly pertinent? Take another instance. We have got a piece of land here, a house, a building that is worth \$100,000, that pays \$10,000 rent, and there comes a five years' annual tax of half of 1 per cent. upon the assessed value, if you please, or the appraised value or the value ascertained in any way. This would clearly be a direct tax. But instead of calling it a half of 1 per cent. upon the value of the property we call it 5 per cent. upon the rents, and so take \$500 per annum for the five years. Can anybody tell me that in substance, in merit, in virtue of the thing done as between the Government and the citizen, there is any difference between those two cases? Every material circumstance is the same—the first payment, the final bearing, the impossibility of escape except by abandoning the property and refusing to rent it. So I say, by whatever name you call it, it is the same thing; there is no difference as to either owner or Government.

If the Court please, I shall put another case. We have been discussing the question upon the principle that an unapportioned tax upon real estate is forbidden absolutely by the Constitution. Suppose the Constitution instead of forbidding an unapportioned direct tax had specifically forbidden any tax by Congress upon the real estate of any inhabitants of a State. Let us see whether there is any difference between a tax upon the rent and a tax upon the body of the property. The Constitution has provided, we will assume, that Congress shall not levy any tax upon the real estate of any citizen of any State. Congress gets into a tight place and it says, "We want more money. We cannot levy a tax upon the real estate of any citizen, but we will put an annual tax for five years or for ten years or for twenty years upon the rental income of the real estate." Would anybody say that that was permissible to Congress under such a constitution? As the Constitution now stands, it is conceded that you cannot put any unapportioned tax upon real estate, and yet my opponents claim, and it is necessary for their argument to claim, that you can nevertheless tax all a man's real estate away by an annual tax upon his rents. It is scarcely necessary for me to follow up the last suggestion by arguing that that proposition, if true as applied to the prohibition to levy any tax upon real estate, is equally true as to my proposition in regard to the prohibition to levy any unapportioned tax upon real property.

Then, if the Court please, there are many other suggestions that crowd upon us. We have all been lawyers all our lives and followed scores, generations, of lawyers dealing with the subject of the difference between real estate and the rent of real estate. Now, what has been the law from the beginning of the common law? What do the old writers say?

"If a man seized of land in fee by his deed granteth to another the profit of those lands to have and to hold to him and his heires and maketh livery secundum formam chartæ, the whole land itselfe doth passe. For what is the land but the profits thereof?" That is from Coke upon Littleton. That has been law ever since in every court in English Christendom. It is applied now just the same as it was in the time of Coke. It was applied in the State of New York to the matter of a devise. "A devise of the interest or of the rents and profits is a devise of the thing itself, out of which that interest or those rents and profits may issue." That is the law as administered by the Supreme Court of the State of New York when your late associate, Mr. Justice Nelson, was a member of it.

If the Court please, let me call your Honors' attention again to what the learned Attorney General says. He says: "Well, when a man has got the money in his pocket it is no longer rent." One thing I would say about that is that if you are going after the rent as money, the tax is on personal property and should be apportioned, as I think I shall demonstrate by and by. But the answer is that the tax does not go after the rent as money in the tax-payer's pocket. The act of 1894 (section 27) specifies the rents as a cardinal part and element of this income return, and every man who goes up to make his return has to state under oath what rent he got last year.

This fiction—this difference between the name and the thing, between the substance and the shadow—urged by the Attorney General is that, though you cannot tax rent, you can tax the money in the owner's pocket received from rent. If there is one factitious argument, one pretense of a reason, one attempt to make a distinction without a difference that this Court has uniformly stamped upon with all its might, it is just that. This Court has repeatedly decided that such an argument is wholly unsound. What did the Court mean in *Brown v. Maryland* when it held that a tax on the occupation of an importer is the same as a tax on imports, and is therefore void? It is the source, the substance that the act strikes at, that the Court always looks to, and always has looked to, in every form and case that has ever come

before it until now. Chief Justice Marshall said—I read from the twenty-eighth page of our principal brief:

“It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself.”

What did the Court mean in *McCulloch v. Maryland* by saying that a State law levying a tax in the shape of a stamp upon bills issued by the Bank of the United States was a tax upon the bank? What did it mean in the case of *Osborn v. Bank of the United States* by declaring that a State law requiring a payment of \$5,000 or \$50,000 before a bank could begin business was a tax upon the actual powers of the Federal Government? The case of *Weston v. Charleston* is very conclusive on this point. There it was held that a tax upon the income of United States bonds was a tax upon the securities themselves and equally inadmissible. Chief Justice Marshall and four of his associates held that, although Mr. Justice Thompson and Mr. Justice Johnson dissented on the ground that it was palpably an income tax, which the learned Chief Justice did not contradict.

The case of *Dobbins v. Commissioners* is one of the most instructive cases on this very point ever decided. What was that? The Commissioners of Erie County, in Pennsylvania, had a revenue cutter captain residing there, the captain of a Federal vessel. They were levying their annual taxes upon their citizens, and they said, “You have got this office from which you have received this salary, and we want \$10.50 from you for that.” What was the plea then in the Court? Exactly the one now made here. It was insisted that it was not a tax upon his salary, that it was not a tax upon his office, but a tax upon the money in his pocket. What did this Court say? Mr. Justice Wayne was not in the habit of using strong language, but your Honors will find how sternly he condemned such a pretense as that.

In *Almy v. California* it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented. In *Railroad Company v. Jackson* it was held that a tax upon the interest payable upon bonds was a tax not upon the debtor, but upon the security, the bonds. Have not your Honors held over and over again that a tax on a broker or an importer—that a license fee before he could handle an imported article in its original package—was a tax on the imports which no State had a right to levy? I need not weary your

Honors further with cases. They are all set forth here on pages 28, 29 and 30 of our brief.

"The value of property results from the use to which it is put, and varies with the profitableness of that use" (*Postal Telegraph Co. v. Adams*, 155 U. S. 688, 697). A tax upon the profitableness of the use is, therefore, a tax falling directly upon the value of the property. So I submit that a tax on rents is in substance a tax on real estate and should be made the subject of apportionment, as required by the Constitution in respect of all direct taxes.

If your Honors please, how in principle does the corpus of personal property differ from a piece of real estate? I own a house to-day and sell it to-morrow, and take as its consideration a mortgage on the same property for \$10,000, the value of the house. Is a tax upon the house one kind of a tax and a tax upon the proceeds of the house another? It cannot be; it is impossible. There is no real or substantial difference between a general tax on personal and on real property. No such thing has ever been decided; no such thing has ever been hinted at. A tax on personalty has all the elements of a direct tax exactly as a tax upon real estate. It is directly imposed; it is presently paid; it is ultimately borne by the party owning it. There is no choice for him to escape from the tax but to abandon the property. There is no volition about it, as there is in the case of any consumable commodities upon which excises are laid.

I recur now to what I said a little while ago as to the effect of the word "taxes" in the first clause of section 8 of article I, and I recall what Mr. Hamilton said and what Mr. Justice Paterson said and what Mr. Chief Justice Chase said when the subject came before them. They included in the subject of a direct tax the bulk of personal property under a general assessment. When they added the words "under a general assessment" there was no warrant for that in the Constitution or anywhere else. What they meant was a tax on personal property as it is levied and collected in the various States where the State comes directly to the owner of the personal property and taxes it as such. Suppose a direct tax be levied upon real and personal property in the States, could a man whose personal property was touched by it appeal to the Court with any hope of success and say, "That tax on my personal property is not a direct tax, but is an excise or a duty or impost. I will pay on my real property, but I will not pay and I shall appeal to the Supreme Court to free me from paying the portion of the tax that rests upon my personal property." The

Court certainly would overrule such a contention. I say there is not the least distinction between such a case and that presented here.

It has been alleged in the brief filed on the part of the Government in response to ours that this is not a general levy upon personal property in the words of Mr. Hamilton and Mr. Justice Paterson and of Chief Justice Chase. Why not? The suggestion is, because we have exempted everybody below \$4,000. It is because we have exempted certain favored companies that own hundreds and thousands of millions of personal and real property.

What does a general assessment mean? It means that the Government goes through the district and hunts up the property and sees how much the citizen has and lays the tax upon him. Section 34 of this act covers the whole subject of general assessment and general levy. That section provides for a general scheme by which it is made the duty of the collectors and deputy collectors in each department to journey through the district and find out what property each person has and make a list and levy the tax on that. If your Honors care to follow me (you will find a copy of the law among the papers submitted), on page 20, lines 19 and 20: "It shall be the duty of the collector or deputy collector to make such list or return, which, being distinctly read, consented to, and signed," etc.

I think your Honors will have no difficulty in coming to the conclusion that the corpus of personal property is included within the subject of a direct tax, and that a tax thereon must be apportioned. How about income derived therefrom? I am not speaking now, your Honors understand, of the earnings and income from labor and from any calling, trade, profession, or business. I am talking about the direct income of personal property, as illustrated by the interest on bonds. Thus the United States issues certain bonds and declares that the bonds shall not be subject to taxation by any State. I am looking at the question whether a tax on the interest of the bonds is the same in nature as a tax on the bond itself. A State levies a tax. The Legislature recognizes that the bond itself is protected and cannot be taxed; but it attempts to circumvent that inhibition by pretending to tax only the income after it has been collected on the plea that it has lost its identity and is part of the personal property of the owner of the bond. Would you say that, although the act of Congress said the bond should not be subject to tax, all the income therefrom and all its value might be eaten out by the State putting a tax upon the income of the bond? Of course, that would be an impossibility, and it is de-

cisive of this question. The substance is what the Constitution provides for. The substance of right is what the Court is bound to protect. What is a bond of the United States or of any corporation, payable thirty years hence to anybody who holds it, but for the provision that in the meantime it shall pay interest every six months at a certain rate? It is that which gives value to the bond. The interest is a part of that bond, is a part of that piece of personal property, just exactly in every sense as the principal that is payable thirty years hence. It seems unnecessary to dwell longer on that subject, for the Government and the appellees have had our brief for two weeks and not a word has been said against this branch of the discussion therein, except the learned Attorney General's suggestion that Congress was not taxing rents, but was only reaching the money collected in the form of rents.

We may proceed now to inquire how the two rules, apportionment and uniformity, were intended by the makers of the Constitution to work in practical application to their respective subjects of taxation. It was then known perfectly well that apportionment was necessarily a rule of inequality. Nobody ever supposed or could contemplate that a tax levied by the rule of apportionment would result in equality of burden as to wealth, or, to state it in other words, that it would be found that the distribution of real and personal property was according to the population of the various States, or that a tax on real and personal property apportioned according to population would not bear more heavily on some than on other States.

You remember that the Confederation had no power to tax; that it had been the subject of an intense struggle since 1781, culminating finally in 1786, and that the Confederation was then on the point of absolute collapse when the constitutional convention came together. The Confederation had demanded the impost, they had demanded the power of taxation in some form or other to save the nation, and the States never would consent. Your Honors all remember the quarrel about the impost, the getting of the impost and the not getting it, and then came the compromise in the Constitution. It is not necessary to relate the history of the compromise; how it was arrived at.

Everybody knows that the quarrel began about how representatives should be apportioned, and one morning Gouverneur Morris, then hailing from Pennsylvania, solved that difficulty by saying, "Let us say representation *and* direct taxes." This solved the difficulty, and no more quarrel was ever heard of, because those States that wanted more

than a due proportion of their representation, as the others thought, must now pay a similar undue proportion of the taxes.

Then, as the essential part of this compromise, came the provisions in regard to the power of taxation to be vested in Congress, which we are here to-day to expound. First, there was a surrender by the States to Congress of the exclusive power to levy taxes on imports. That had been the great source of revenue to all the seaboard States; it was known to be an endless resource for Congress. The States gave it up absolutely, and with it the power to regulate foreign commerce. Then, too, the States surrendered forever afterwards the right that they had had of taxing and regulating commerce between the States. How much of revenue, how much of sources and subjects of taxing power that has amounted to, let your Honors' decisions for the last ten years on interstate commerce questions decide. That was one part of the compromise. Then came the grant to Congress of power to lay indirect taxes, as we now call them—a grant to Congress of the power to levy, by the rule of uniformity, duties, imposts and excises.

I say that the rule of apportionment by numbers was designed to operate exactly as it eventually did. What does it result in? It results, does it not, in a law of protection for the benefit of the holders of such property as was contemplated as the subject of the direct taxes? I own a house in New York. I study the Constitution and I see that it can be made the subject only of an apportioned tax. If that apportioned tax is applied my taxes will be less by half or a quarter or a fifth or a tenth, as the case may be, than if it were a tax applied by the law of uniformity. Is not that an absolute and indefeasible right of the property owner in every State just as much as if the Constitution had provided as a part of this compromise that no taxes should be levied by the Federal Government upon real estate in any State?

Of course there has occurred this accumulation of wealth per capita in certain States to a greater extent than in other States. This disproportion existed then as it exists now, only different in degree. It was just this disproportion that the provision as to apportionment was intended to protect. It was that which it has operated to protect, and ought to operate to protect. It was then understood perfectly well to be a rule of inequality on the strength of which was bought the assent of the States then owning such property. The question to-day is whether that bargain shall be repudiated. Your Honors know what the seaboard States gave up for it. They gave up that inexhaustible source of revenue, customs duties, the whole regulation of com-

merce, and now the question is whether the other States, in whose behalf and for whose benefit that was given up, shall take back the price for which it was given. I cannot believe that your Honors will entertain any real doubt upon such a question as this.

But there is another clause providing that representation and direct taxes shall go hand in hand. What did that mean? Why was it that the framers twice said it in the Constitution? And it is the only thing that they did say twice. They said it in section 2 of article I, when they provided that representatives and direct taxes should be apportioned according to numbers, and they said it in the ninth section of the same article when they prescribed that no capitation or other direct tax should be levied except according to the census. If the Court please, they were fresh from the struggles about representation going hand in hand with taxation, and it was for the protection of this property, this accumulated property in the States, as against the inroad of the vote of mere numbers, that they stipulated and insisted upon the guaranty of apportionment—such was the fundamental condition of the States adopting the Constitution.

The purpose was as clear as if it had been written in so many words that when the representatives of any State voted in the House of Representatives, where only a tax could originate, upon a law to impose a direct tax upon the property or the income of property in any State, they should do it under the restraint that according as they possessed the political power to vote the tax, it should fall upon the citizens of the State that they represented. Is there any doubt that that was the object, that that is how it was made a precaution and a guaranty? That is how it was made a safeguard of the Constitution, so that when a man came from a poor State to put a direct tax upon New York or upon Massachusetts or Pennsylvania, however poor his State might be, however small or great might be its population as compared with that of those richer and greater States, it should bear just that proportion of the tax, and that in voting to tax Massachusetts, New York, Pennsylvania and New Jersey he could not by any device exempt his own State from its proportionate share.

What an object lesson this law is as to these subjects of direct tax that I have now spoken of, namely, the rents of land and the income of personal property. Here are the other forty States, all the States representing that region that has come in under the provision that new States might be carved out of the Territories, which have voted to put this direct tax under the pretense of an income tax upon these

seaboard States, throwing to the winds the restraint that the Constitution placed upon them, and practically exempting their own States. They have provided that New York, Pennsylvania, Massachusetts and New Jersey shall pay, as I told you in the beginning, five times the amount they would pay if the rule of apportionment guaranteed by the Constitution had not been utterly disregarded.

If the Court please, this question as to a direct tax upon the income of real and personal property has never been decided. Not only that; it has never been considered; it has never been presented to this Court. When my learned friends on the other side get up and say there is nothing to debate here, we answer that the question whether a tax on the rents is in real substance and effect different from a tax on the real property itself, and whether a tax on the income of personal property is different from a tax on the corpus of personal property has never been presented here.

My friends say that we are bound to lose our case in toto because the questions have been adjudicated adversely to our contention. There are five cases upon which they rely. If the Court please, let us look at those five cases. First, there is the *Hylton Case*. I feel bound to speak of the *Hylton Case* and of the men who were in it with profound respect, but there are some peculiarities about that case. Your Honors may recall what the Court said in the case of *The Collector v. The Railroad Company*, in 100 U. S., when a tax case involving a very small amount came up for decision under the old income tax law which had been repealed. The Court said, in the language of Mr. Justice Miller:

“As the sum involved in this suit is small and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action.”

Mr. Justice Gray: From what page do you read?

Mr. Choate: I read from our brief, page 26. That case was two volumes, and only one year before the *Springer Case*, which is reported in 102 United States.

The carriage tax which was levied by the law of 1794 was for two years and until the next session of Congress. The Attorney General has erroneously stated in his brief that this contained some exemptions. It was a tax on carriages, but not including carriages kept for agricultural purposes or for the transportation of goods, wares, and merchandise. It was therefore limited to a tax on carriages used for the transportation of passengers. It was levied at arbitrary rates, with-

out regard to the value of the carriages. A man paid the same for the right to use his carriage over the public roads whether it was a \$15 or a \$1,500 carriage. Mr. Hylton said in his declaration that he had 125 chariots, not kept for hire but for use in his own family; 124 of them must have been for use in his castles in Spain. It turns out that the amount necessary, then, to give jurisdiction to this Court was \$2,000, and a stipulation was filed that if the case went against him judgment should be entered for \$16. It appears by comparing the case with the statutes that the annual tax was \$8 and there was a penalty of \$8 more. The case going against him, judgment was entered for \$16 for his one actual carriage and one penalty. Sixteen dollars multiplied by 125, the number of his imputed carriages named in the declaration, amounted to just the sum that was necessary to give the Court jurisdiction, namely \$2,000. Mr. Hamilton addressed the Court in an eloquent oration, his biographer says, for three hours, on the question whether a tax upon the use of a carriage by the year was a direct tax or an excise duty or impost. What he could have talked about, your Honors will wonder just as much as you will next year wonder what I have talked about so long to-day. There never was any doubt nor could be any doubt that this was an excise duty, an excise upon the use, the privilege of using, of having the right to run a carriage over the public road for the year. The same principle was held under closely similar circumstances, too, in *Pickard v. Pullman Co.*, 117 U. S. 34.

My friends are very fond of Adam Smith. I should like to call the attention of my friend Mr. Carter to this quotation from Adam Smith, whose book Justice Paterson had in his hand and referred to in his opinion. Smith wrote:

"A coach may with good management last ten or twelve years. It might be taxed once for all before it comes out of the hands of the coach-maker; but it is certainly more convenient for the buyer to pay four pounds a year for the privilege of keeping a coach than to pay all at once, forty or forty-eight pounds additional price to the coach-maker, or a sum equivalent to what the tax is likely to cost him during the time he uses the same coach."

And he gives it as a typical instance of an excise upon a consumable commodity. Whatever the learned judges said in the *Hylton Case* beyond deciding that the duty imposed was an excise, whoever the judges were, wherever they had been, in whatever conventions they had sat, was mere dictum. Certainly the case does not and ought not

to stand in our way in asserting that we are entitled to the guarantees of the Constitution as to our property, real and personal in the States.

We then have the case of the *Pacific Insurance Company v. Soule*. That case involved nothing, if your Honors please, but a tax upon the *business* and earnings of an insurance company. The learned Attorney General at the time had to say something, and he simply said that the *Hylton Case* disposed of that. The Court said that it was an excise duty or impost on the business. It was not a tax on property any more than the tax on the carriage was. The tax was determined to be on the business of the corporation—for the right to do that business for the current year. We do not dispute the right of Congress to levy such a tax by the rule of uniformity, for it is essentially an excise and always has been known as such.

Then came *Veazie Bank v. Fenno*. The tax there was not upon any property, but upon the right to enjoy the privilege of issuing bank notes. What has that got to do with the levy of an unapportioned tax upon real or personal property within the State and in defiance of the constitutional guaranty of apportionment?

The next case was *Scholey v. Rew*. The question was whether a succession tax upon the devolution of title to real estate was a direct tax. The Court held that the tax was not upon the land, but upon the right to become the successor upon the death of the predecessor. A tax upon this right or privilege was held not to be a direct tax.

Then came *Springer v. United States*. What was Mr. Springer's case? It was a suit brought by him long after the repeal of the act. He was a lawyer, and he had earned \$50,000. The Court draws attention in its opinion to the fact that there is no suggestion of any income from property. Mr. Springer did not put the point, if the point existed in his case, that we have presented to you to-day. If he had any rents, he did not say so; if he had any income from personal property, he did not say so, but he said his income, gains and profits. Now, I defy any lawyer to take up the Springer Case and say that there is anything decided in that case which stands in the way of the propositions which we have presented to you. On the contrary, your Honors could decide the Springer Case exactly as it was decided if it was heard before you yesterday, and decide this case as I now claim, giving us the protection of the constitutional guaranty to the owners of property in the States. If what Mr. Justice Swayne said on that subject (limited, as all decisions must be, to the facts and issues presented for decision) were incorporated in the form of a statute, it would not cut us off.

Have your Honors ever decided that a tax on rents and on the income derived directly from personal property was not a direct tax? I believe two of your Honors yet remain on the bench who were here then? Was this question that we now present to you decided? Was it argued? Was it considered? It is utterly impossible that it should have been, for it was not involved in the case.

If the Court please, I am admonished by the flight of time that I must proceed to other inquiries. I say that as to the rest of this law and the provisions which operate as an excise or duty upon income derived from business or work of any kind there is a gross violation of uniformity, and therefore that the whole law is void. What is meant in the clause "uniform throughout the United States"? If the Court please, it would seem that that is capable of solution without imputing heedlessness to Washington, Hamilton, Madison, Franklin, and the other men who sat with them in the convention. Clearly the word "uniform" means something and was inserted for some definite purpose. But the learned Attorney General says that the word "uniform" is surplusage. Surplusage! Those men whose names I have mentioned and their illustrious peers throwing in a word for mere surplusage! His associate, Mr. Carter, says that it only means that it shall be a tax which extends throughout the United States; in other words, strike out "uniform" and insert in its place "extend." Both say in effect that a constitutional requirement that a certain kind of tax shall be a uniform tax throughout the United States may be without the first element of uniformity as between the Government and the citizen, or between the citizens whom it affects. No matter how far it departs from uniformity in the treatment of the citizens who are entitled to equal treatment at the hands of the Government, if that inequality prevails alike in Alaska, in Florida, and in New York, our opponents contend that it complies with this constitutional provision. They claim that this provision deals not with the people throughout the United States, but with the mere geographical divisions of the United States as so much territory. Is not that a fair version of their argument? Is not that what they have said here? It is almost their very words—that "uniform" means nothing—and then they assert that if you say it means uniformity in the tax itself, you get rid of the words "throughout the United States" altogether.

The appellees and the Government claim that the provision means only geographical uniformity; so Mr. Carter explains at page 12 of his brief. I have quoted it here, and if it is incorrect my friend will

correct me. Mr. Carter says that it means that "there shall be no difference of *plan or method in different States.*" Why limit the *uniformity* required to uniformity of plan or method, when a tax lacking every requisite of uniformity *in its essence and substance* may yet as to the plan or method of laying and collecting it be uniform? And why limit the prescribed uniformity to uniformity "*in different States,*" when the provision ignores State lines and States altogether and deals directly with the people of the whole United States without regard to the States? Our adversaries are bound to concede some uniformity, but, under cover of conceding uniformity "*in plan or method*" of laying and collecting, they ignore and refuse *all substantial uniformity*. Thus, while imputing to our construction a total ignoring of the words "*throughout the United States,*" they ignore the whole substance of "*uniformity,*" and so practically nullify the entire restriction.

The whole drift of their argument is that Congress, dealing with the individual citizen in laying and collecting these taxes, need observe no rule of uniformity except as to the plan or method of laying. They strike out the word "*uniform*" and insert in its place "*extend.*" We claim that this clause means exactly what it says, and that each part of it is of equal force and effect and must receive full force and effect. That every duty and every impost and every excise must be *in its nature and quality* a *uniform* duty, a *uniform* impost, a *uniform* excise, and that this rule of uniformity shall be applied in every instance "*throughout the United States.*" Thus we give full play both to the words "*throughout the United States,*" and to the word "*uniform.*"

There is no mistake as to what the meaning of the word "*uniform*" is as an essential quality of a duty, impost, or excise. It must operate alike upon the class of things or of persons subject to it. The class may be fixed and bounded by Congress in its discretion. It is for the courts to say whether this rule of uniformity has been applied within and throughout the class.

The contrast or antithesis between the rule of apportionment prescribed for direct taxes and the rule of uniformity prescribed for "duties, imposts, and excises" was designed. The contrast was intended to be complete and perfect between each element of the two rules.

The rule of apportionment was known and intended to be a rule of *inequality*. This inequality was inevitable and existed in the very nature of the compromise out of which it resulted. This inequality was recognized as certain to increase as one State grew in population faster

than another; hence the requirement of a decennial census to correct this inequality, so far as that might do it. But there were features of inequality as between different States which were radical and incurable by any census. There was and there could be no such coincidence between population and wealth as the rule assumed, and the divergence from any approximate coincidence would grow, as it has grown with every census.

The rule of uniformity, on the other hand, as applied to "duties, imposts and excises," was known and intended to be a rule of approximate and reasonable equality among those embraced in the class affected by it—everywhere and at all times—and no changes of population or of wealth anywhere would or could affect its force and effect.

The constitutions of nearly all the States have adopted from the United States Constitution this rule of uniformity, and in its practical application the courts of all speak with one voice as to its meaning, that it is exactly that for which we contend.

But there is another cardinal difference between the two rules which is even more radical and far-reaching and compels the construction of the rule of uniformity for which we contend. It must be observed that the first clause of section 8, article I, taken by itself, gave to Congress the complete and unqualified power of taxation, only limited to national purposes, but wholly unlimited as to place. As it stood alone the power extended to every inch of the territory and to every person and every thing within the dominion of the Government created by the Constitution. As it stood alone Congress could have laid and collected taxes of every kind, direct and indirect, for national purposes, without regard to population or wealth or to State boundaries, restrained only by those fundamental limitations inherent in the very power of taxation and indispensable in the government of a free people.

At last, what Washington and Hamilton and Madison and all the other great national leaders had so long been contending for as the only possible basis of "a more perfect Union" was achieved, viz., power in the National Government to reach directly and not by requisition on the States, which had proved to be of no use, every man, every dollar, every thing, and every inch of land within the States or the United States; but it was no part of the plan of any of them that this power in the new Government should be absolute or unqualified, except as to place and persons. As to place and persons it should forever remain unqualified and reach as far and as wide as the territory of

the United States and touch every person and every thing therein. And so they proceeded to modify and to qualify this power, except as to its extent in place or space through the whole territory of the nation, and except as to its hold upon every person and thing, by prescribing the different measures by which the burden of the different kinds of taxes, direct and indirect, should be meted out. As to indirect taxes, the modification or qualification was applied by section 8. As to direct taxes, the measure was prescribed by section 2.

And just here differences of geographical relation and of the political relation of the Government to the different divisions of the entire people confronted them, and these differences entered into and in fact formed the basis of the different measures prescribed for the laying of the two different kinds of taxes. This directs our attention to the different geographical expressions used in the two rules by which the taxes were to be measured out: "*among the States*" and "*throughout the United States*," wholly different measures.

There were the thirteen States, all seaboard, and behind them a vast stretch of territory, occupied or unoccupied, explored or unexplored, which in due time, but not yet, would form new States of the Union. This vast territory was beginning to fill. Burke in one of his great speeches for America ten years before had remarked as unparalleled "the vast force with which population shoots in that quarter of the world." The political relations of the new Government to the people in the old States and to those in the new Territories were to be wholly different. On the one hand the State governments intervened between the United States and their people, the States retaining all their powers not granted to the United States. On the other hand the relation of the Government to the growing people of the Territories was direct and immediate. What constitutions, what laws would prevail in the future new States was wholly unknown, except that each was to have a republican form of government.

As to representation in Congress and direct taxes—taxes on property—the people in the Territories had little concern and would not have until from time to time new States were created. But the thirteen old States were in a hopeless conflict with each other—conflict as to both representation and taxation—which was only solved by the happy compromise resulting in section 2, that representation and direct taxes should be apportioned among the several States according to their respective numbers; new States as admitted were to come under that rule.

Thus the Constitution, in prescribing the rule of measuring direct taxes, deals with the States and with the people therein. It allots to each State its aliquot part of the total amount to be collected according to numbers, and the quota of each is levied and collected from the property of the States, in substance though not in form, as other State taxes are collected.

But as to taxes not direct—"duties, imposts and excises"—the situation was wholly different. These, which had belonged absolutely to the States and which they had persistently refused to part with, were now surrendered to Congress—the imposts absolutely; the excises and duties on consumable commodities to a great extent—because of the impracticability of any State maintaining them against competition with other and adjoining States, and because of the "commerce" clause and the "immunities" clause in the Federal Constitution which cut them off from all manner of excises upon interstate commerce and upon incomers from other States who could no longer be treated as foreigners.

In dealing with these the Constitution no longer dealt with the States or with the citizens through the States, but directly with the individual citizen—the individual thing to be subjected to the tax. It wiped out all State lines, ignored the States entirely, and went directly for the man or the thing, and whether he or it was found in a State or in the Territories or in the District of Columbia was all one. On all these alike the purpose was to provide for the exercise of the taxing power "*throughout the United States*" whenever it should be exercised at all. In each and every part of the territory of the United States the excise or duty laid or imposed must rest and operate.

This direct relation between the nation and the individual citizen, by means of which the nation was to lay its hand upon the citizen without any regard to his State, was now and here for the first time attained. It had failed to be attained under the Confederation because the States had stubbornly refused to grant it any power of taxation. It had failed under this very Constitution, as to direct taxes, because of the equally stubborn refusal of the States to permit them at all unless apportioned according to numbers.

By what rule or measure, then, was this new power in the new Government to be wielded or exercised *throughout the United States*? That was the question. The equality of all men before the law was the fundamental principle of the new Government. It was this that dictated the rule of uniformity—not a nominal or formal uniformity, not a uniformity of plan or method in the different States, but an actual and

substantial uniformity in the nature and quality of the taxes so to be levied. There had been an effort at such uniformity in respect to direct taxes, but the quarrels and rivalries between the States, driving them into the compromise of apportionment by numbers, had defeated and produced as to those an utter lack of uniformity. But here there were no States in the way. Provision could be made and was made in respect to these kinds of taxes for substantial equality in the treatment by the Government of all the people—in other words, for uniformity.

Of course it was necessary for the Constitution not to attempt to legislate, but only to prescribe the rule. It was necessarily to be left to Congress to select the subject of taxation, the class of things or persons or occupations on which the excise or duty should fall. It might make that class as narrow or as broad as it chose in its discretion, subject only to the limits inherent in the nature of taxation itself, but every man within the class must fare alike. There had been an infinite variety of excises as to the subject of taxation, infinite variety as to rates, and even distinction as to persons. It was well known that even as to persons there had been variety as to the same tax. In England during the commonwealth foreigners were always charged a double tax on the same imports, and this had been possible among the States in dealing with incomers from other States. It was to put an end to this pre-existing rule of variety which led to marked inequality and frequent oppression that the rule of uniformity was introduced; not as between the States or the citizens of States, for the States had and were to have absolutely nothing to do with it, but as between all citizens standing alike before the Government and entitled to just and equal treatment at its hands.

It is impossible to impute to the framers of this rule of uniformity the intention that, on the same identical article subjected to duty or excise, any one citizen, simply because of his age or size or sex or condition or any other personal difference, should pay a higher or a lower rate of tax than any other citizen, or that, as an impost on the same article imported, the rich man should pay a larger or a smaller rate of duty than a poor man. In this respect all were to be treated alike in the laying of the new duties. In this sense every such duty or excise or impost was to be a uniform duty, excise, or impost, and this rule of uniformity securing just and equal treatment by the Government was to prevail *throughout the United States*, wherever the authority of the Government extended, and so, to make this absolutely certain against all possible doubts and contingencies, the clause was

formulated as a limit or modification of the power to lay these duties, etc., "*but all duties, imposts and excises shall be uniform throughout the United States,*" and every word of it is full of meaning.

Our construction of this clause has been acted on by the Government from the beginning until now. In no tariff act—and I call your Honors' special attention to this—with all the infinite variety of classification of goods which those acts contain, never once has there been a clause in a tariff act which made the rate of duty to be paid dependent upon the person who imported the goods, whether it was a person or a corporation, whether it was a white man or a black man, whether it was a rich man or a poor man.

Mr. Justice White: Would not that construction destroy all specific duties in every tariff act from the foundation of the Government?

Mr. Choate: Not in the least. We advance no such theory of uniformity. All the uniformity we claim is that on the same thing persons shall not be taxed at different rates. We do not pretend or claim that all articles must be taxed at the same rate. Such a position would be preposterous. We simply claim uniformity as to persons paying the duty; that the duty on the same article shall not be at one rate for A and double that rate for B; at one rate for individuals and partnerships and at double that rate for corporations. We do not claim that all articles should bear the same rate, or that all grades of every article should bear the same rate.

Mr. Justice White: Is it not the uniform construction of the word "uniform" in State courts that if a man has property worth ten dollars you cannot tax him at the same rate that you would tax a man if his property was worth one dollar? Is not that the uniform construction given to the word "uniform" by the State courts?

Mr. Choate: I think not, if Your Honor please, where the Constitution requires uniformity in the rate of the tax.

Now I call attention to the particular point that was raised by Your Honor the other day in the question to Senator Edmunds. It appears that the State of Louisiana in its constitution had adopted the words "equal and uniform throughout the State." A specific duty by the pound was laid by the State of Louisiana upon all cotton of whatever quality, grade, or value. It was suggested by Mr. Justice White yesterday that equal and uniform, as used in the constitution of Louisiana, forbade such a specific duty because it taxed different property at the same rate without regard to value, and that the same construction would operate to deprive Congress of the right to impose specific du-

ties. But on examining the constitution of that State, it appears that there was another clause. The provision was that taxation shall be equal and uniform throughout the State, but it also added "all property shall be taxed in proportion to its value." If I correctly understand it, that specific duty per pound on cotton, whether it was worth four cents or twelve cents, was held to be a violation of the provision that all property should be taxed in proportion to its value (*Sims v. Jackson*, 22 La. Ann. 440). I do not see how anything else could possibly have been held.

I have searched in vain and my associates have searched in vain for any case in any State or Federal reports where the phrase "uniform" or "uniform and equal," or "uniform throughout the State" or "uniform throughout the United States" has ever been held to sanction or permit one man or one corporation, or a corporation as compared with an individual, or a rich man as compared with a poor man to be taxed at a different rate by the same impost, the same duty. The word "uniform," which has now become a cardinal part of the constitution of most of the States, never permitted that, and that is all we ask. That is all the extent of uniformity which we claim here.

I repeat that in no tariff act, with all the infinite variety and discrimination in the classification of goods which those acts contain, has there ever been a different rate of duty charged to different persons on the same article imported.

The learned Attorney General says that there is an exception to that. He says that passengers arriving on vessels from abroad are permitted to bring in their personal baggage and effects free of charge. I think that is the exception that proves the rule. If he wanted to make the presentation of his claim as to uniformity grotesque and ridiculous, it seems to me he could not more successfully present it. Of course there is a reason for that. All people, foreign and native, are treated alike under that rule. However much the rule may be abused, it rests upon a principle, which is that nobody shall be required to come in without clothes. That was the original intent; but it has been stretched in a variety of ways, and those clothes have been multiplied hundreds of times over; but is it not a pitiful result of a search through all the books, Federal and State, when no departure from the rule of uniformity for which we contend can be found anywhere except this provision?

Rich and poor, old and young, capitalist and laborer, citizen and foreigner, corporation and individual, have been accorded the same

right to import the same goods at the same rate, and we do not believe that any departure from this rule of uniformity has ever been suggested in either house of Congress on the discussion of any tariff bill, and this is the rule of uniformity throughout the United States for which we contend as to all duties, excises and imposts.

The learned Attorney General has appended to his brief a list of all Federal excises imposed during the first generation after the adoption of the Constitution: first, during Washington's administration by eight different acts of Congress, and, second, during the war of 1812 by thirteen other different acts, and we challenge the closest scrutiny into the provisions of those twenty-one different acts of Congress for any departure from this rule of uniformity as construed by us.

And turning to the decisions of the courts and the utterances of text-writers we find full support for it and nothing decided and almost nothing said to the contrary.

Chief Justice Marshall certainly knew what this clause meant if anybody ever did, and in *Loughborough v. Blake*, 5 Wheaton, he analyzes and resolves it exactly according to our construction, and he would manifestly have scouted the idea that "a mere territorial uniformity in plan and method in the different States" would satisfy its requirements. He shows that the grant of power contained in the first clause of section 8 is general, *without limitation as to place*; that it (*i. e.*, the grant of power to tax) "*consequently extends to all places over which the Government extends*;" that the object of the second clause is to "*modify the grant*" and that "the modification of the power does not extend to places to which the power itself does not extend;" that the power, then, to lay duties, imposts and excises when exercised "*must be exercised throughout the United States*;" that any place in this District or in any Territory is not less within the United States than any place in any State, and that "*it is not less necessary on the principles of our Constitution that uniformity in the imposition of duties, excises, and imposts should be observed IN THE ONE THAN IN THE OTHER*," and he says that "*the principle of uniformity established in the Constitution secures the District*" (which must be the people of the District) "*from OPPRESSION in the imposition of indirect taxes*." If the object of the principle was to secure the people in one part of the United States from such oppression, it was equally to secure all the people throughout the United States from the same thing.

Mr. Justice Field gave the same construction to the same clause in *U. S. v. Singer*, 15 Wallace. "The tax here is uniform in its opera-

tion—that is, it is assessed equally upon all manufacturers of spirits, wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike.” I ask nothing but that. It is said that the *Head Money Cases* stand in our way. If the Court please, there is not a word in the *Head Money Cases* that stands in the way of the construction which I have claimed and which Mr. Justice Field has given to this clause. The *Head Money Cases* decided nothing to the contrary, but merely that an act imposing the same rate of head money per passenger on sail and steam vessels complied with the rule of uniformity. Of course it did. And Mr. Justice Blatchford in the same case in the circuit court explained just how this was, viz., because “the rule of uniformity is sufficiently observed if the tax extends to all persons of the class selected by Congress—that is, to all owners of such vessels” bringing alien passengers to all ports of the United States.

The observations cited from Mr. Justice Miller and Mr. Justice Story, on page 33 of the learned Attorney General’s brief, do not even imply that on the same article or on the same class of articles fixed by Congress one man in any part of the United States can be made to pay a higher rate than any other man in that place or in any other place in the United States. On the contrary, they imply that he cannot, and that is the very rule of uniformity in all places and for all people for which we contend.

In insisting, then, upon our construction that the clause means that all duties, imposts and excises shall be uniform duties, imposts and excises throughout the United States, we give full force and effect to every word, and claim to be supported in it by the highest authorities.

It is our adversaries who, to limit its meaning to “geographical uniformity” (if that means anything), have to distort it and pervert it by inserting other words which alter its meaning, as Mr. Carter does on page 12 of his brief, when he says:

“It means *just what it says*, namely, that ‘duties, imposts, and excises’ must be of *uniform operation* throughout the United States—that is, that there should be no difference of *plan* or *methods in different States*.”

The framers of the Constitution certainly never would have recognized this paraphrase of their rule.

What we claim and what we think they meant is that each duty, each impost, each excise, must be uniform in itself, must bear at the same rate upon the subject of the tax, however owned, without regard to

any other duty, impost, or excise, and the idea suggested by the learned Attorney General that a plain and intended departure from uniformity in any one duty, impost, or excise, or in any set of duties, imposts, or excises can validly be resorted to to compensate for any real or imaginary inequality produced by the operation of any other set of duties or branch of taxation is utterly repugnant to the rule and to the Constitution.

If the Court please, this brings me to say a few words upon a new doctrine which has been presented here by the representatives of the Government and strongly urged by my learned friend, Mr. Carter. The learned Attorney General says in his brief, at page 83, that the rule of uniformity has been practically violated in the act of 1894, but that the law must be regarded not as standing alone, but as a part of our general system of taxation, and that so regarded, its effect is to bring about an approximation of equality of taxation. This is, as I understand it, an unequivocal admission that the law in itself is not equal or uniform in its operation, but that we may speculate that perhaps it works out uniformity of tax burden upon some theory or notion of compensation or equivalents. Has such a doctrine ever before been advanced in this Court? It amounts to the claim on the part of the Government that an act of Congress violating the Constitution and utterly lacking in uniformity may be upheld because some other act or the general tariff laws operate unequally. Is it true that under the Constitution you can compensate for intentional inequality of burden in one set of excises, duties, or imposts by imposing others which are inherently lacking in every essential element of uniformity? Is this Court prepared to go that length and to enunciate any such construction of the Constitution?

This is a doctrine worthy of a Jacobin Club that proposed to govern France; it is worthy of a Czar of Russia proposing to reign with undisputed and absolute power; but it cannot be done under this Constitution.

Your Honors cannot mistake our proposition or misunderstand our position. It is that each duty, each impost, each excise must be tested by itself under the Constitution. We must ascertain whether it is inherently uniform throughout the United States. If uniform in itself it is valid; if it is not uniform inherently, bearing equally upon the subject of the tax wherever found, it is void. This theory that you can force a set of ununiform excises and internal taxes into the body of a tariff act to compensate for supposed or speculative inequalities

worked by a protective or free-trade tariff on the body of the people is certainly an outrage upon the Constitution, and it ought not to be sanctioned or tolerated by this Court. The same rule should apply as to every internal duty and to every external duty. All and each must be inherently uniform, and unless uniform this Court can and must pronounce them void.

We cannot be put in the position of claiming that different articles should be taxed at the same rate. We have never made any such claim. Mr. Guthrie in his opening distinctly repudiated it. No foundation exists for any suggestion that you are going to upset the whole tariff scheme; that you are asked to declare specific duties unconstitutional. We do not claim that goods imported must be taxed according to their value. We only insist that the same tax, whether specific or ad valorem, shall be the same as to all PERSONS—as to all OWNERS of the subject of the tax. There is not a single article, there is not a single clause in any tariff scheme since the first one was devised by Hamilton, that we interfere with in the least by the assertion of our doctrine in this case and by a decision on the part of this Court sustaining the propositions for which we contend.

It is not necessary for me to say anything more, I think, about the fifth amendment or about the inherent restrictions contained in the nature of a tax. My learned friend, the Attorney General, thought he could be excused for condemning the members of the convention for inserting the word “uniform” in the Constitution as surplusage, because he imputed the same effect to the fifth amendment; because he imputed the same effect to the inherent limits upon the power of taxation indispensable to the government of any free people within the cases cited in our brief, and from the convincing force of which his argument recognized there was no escape. But the makers of the Constitution were not willing to leave this to implication. They did not mean to have any doubts as to what limits were inherent in a tax itself. They meant to make assurance doubly sure and take a bond for themselves and their posterity to the end of time that Congress never should put an impost, duty or excise upon the people that should not be uniform upon all the people of the United States.

The position of our adversaries is that Congress can dispense with this rule of uniformity under some pretense of public policy; that their power is absolute and beyond the control of this Court; that no abuse can be checked; that there is no help for it, in the language of my learned friend, Mr. Carter. That contention presents the funda-

mental principle of constitutional law that you are to apply in this case, which I think has been laid down a hundred times from the cases of *Calder v. Bull* and *Marbury v. Madison* until now; that this Court was created to enforce the provisions of the Constitution, and that because it was so created this Constitution has been declared to be a document surpassing in wisdom all prior written forms of government ever dreamed of. To argue further is to dignify a suggestion which I never thought possible would ever be flung at this tribunal—a doctrine so revolutionary that I am amazed at hearing it advanced by Mr. Carter.

Now, what are the breaches of uniformity here? I shall treat them briefly in view of the clear and remarkably forcible presentation of them in the opening by Mr. Guthrie. In the first place, there is this exemption of everybody with an income less than \$4,000. I might, by the way, find it wholly unnecessary to argue that this was class legislation, because my learned friend who last spoke said this is only a tax upon a few selected rich men, or, as the Government's representative puts it, on the upper class. I thought that every Federal statute must be one law for the poor and rich alike throughout the United States. Mr. Carter went further and said that it was a law for a few extremely rich men. We are at the parting of the ways, if your Honors please. On one side there are all these constitutional guaranties, these fundamental principles which this people believed were wrapped up in the Constitution from the beginning, and on the other, there is this new doctrine of Mr. Carter's army of 60,000,000—his triumphant and tyrannical majority—who want to punish men who are rich and confiscate their property. What does this exemption really amount to? A man living with investments of \$133,000 in bonds at 3 per cent. is a subject of exemption. I hope that we shall all be able to leave our children each in as good condition as that, and not have Congress claim that he or she should be classed among the lower middle classes because his or her income does not exceed \$4,000. My friend on the other side has made our argument easier because he has said this exemption might just as well have been \$20,000, and he said it in earnest. Thus he has conceded that if this classification can stand, a man with \$666,000 at 3 per cent. or \$500,000 at 4 per cent. was a fit subject for exemption. It is, therefore, for you to decide whether that is a reasonable exemption.

If you now decline to adjudicate upon the question of reasonableness, and hold that it is outside your province, no abuse hereafter, when

the limit is fixed at \$20,000 or more, can be checked. The reasonableness of the exemption is essentially a question of law (*Reagan v. Trust Co.*, 154 U. S. 362, 397-399). The discretion is in Congress, but the abuse of that discretion is not remediless. Some exemptions are always defended as established in order to prevent grinding the faces of the poor; to prevent taking the ordinary comforts, if you please, out of the mouths and off the tables of the mechanic and the laborer; in a word, to admit of perfect comfort in every household in the land. Does that principle of public policy sanction an exemption which enables a man to live in idleness and in clover, drawing \$4,000 a year net from invested securities, without labor?

There are other grounds which are considered in determining the amount of exemption. The very poor should not be deprived by taxation of the means to provide the necessities of life. So also the expense of collection warrants an exemption of a trifling amount. Such considerations do not enter into the question of exempting incomes of \$4,000. You are to decide whether the exemption is or is not reasonable, just as you have considered and passed upon the rate imposed upon public carriers by State legislatures. In determining the reasonableness of the exemption, you can look at its obvious purpose. It was the same purpose that led the majority to trample on and to disregard the constitutional safeguard requiring apportionment of a direct tax. It was a combination of the many against the few States. It was in the same direction and with the same purpose. It was a deliberate strike on the part of the people who voted for it at the people of those States where wealth had accumulated. As I have said, it was with exactly the same purpose as the other violation of the Constitution as to apportionment of direct taxes, which is wrapped up in the same act. It is conceded by all the counsel that the taxation is limited to a selected few—an upper class. Is it competent for Congress to accomplish such a purpose as that by such means? Is not that the very breach of uniformity which the framers of the Constitution intended to provide against? No wonder that the President after ten days of study refused to put his name to that act. No wonder that neither the President nor the Secretary of the Treasury recommended its passage.

Mr. Justice Harlan: Would you dispute the validity of any exemption as to amount?

Mr. Choate: Certainly not. A reasonable exemption, say, of \$1,000 may be defensible. It would probably not be grossly unfair and sec-

tional in its operation. No wonder that the President of the United States wrote to Chairman Wilson, "You know how much I deprecated the incorporation in the proposed bill of the income tax feature." Nobody knew better than he that the Constitution ought not to be violated and its guaranties disregarded upon the pretense that in some such way the supposed inequalities of burden of the tariff might be compensated. No one recognized more clearly than he did that this was sectional legislation. No one would have condemned more sternly than he these income tax provisions if his hands had not been deliberately tied, if his broad statesmanship had not been circumvented by cunningly inserting these populist dogmas into the tariff bill. Who for a moment, friend or adversary, can doubt that President Cleveland would have vetoed any bill containing these provisions if the condition of the country last August had not made it imperative, in order to avert panic and ruin to thousands, that the tariff modifications should go into effect?

One word as to the power of the Court to adjudicate upon the reasonableness of an exemption. In 134 United States, the case of the Chicago Railway Company v. Minnesota, the Court said that unquestionably the rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. I need not refer to the cases there cited or those like the Reagan Case, which have followed and applied that doctrine. We claim that this Court is competent and that it is its duty to judge as to whether this is a reasonable exercise of the power of exemption or whether it is arbitrary and capricious.

If the Court please, the next ground of exemption of which we complain is the denial of the \$4,000 exemption to corporations simply because they are corporations.

Could your Honors justify the incorporation of a clause in a tariff act that a given brand of tea, if imported by an individual, should pay a duty of ten cents, but if imported by a corporation, twenty cents, and nothing if imported by a mutual association? I have never heard any suggestion from any living man that you could. I believe it must be absolutely conceded by everybody that you cannot. If you cannot do it as to a tariff duty, how can you do it as to an income excise? Various reasons have been alleged by my friend, the Attorney General. Do they go to the very meat of the thing? He says that the

shareholders are exempt from personal liability. Suppose they are, did Congress exempt them? He says the corporations are enabled to do a larger business. I doubt that. I deny it. Many partnerships are wealthier and carry on more extensive businesses. He says they have to do their work by the hands of other people, and not by their own hands. If your Honors please, we are not construing this act in any application to excepted cases. We are looking at it in its application throughout the country to the ordinary business corporations of the people. They say that it is a very small tax. Well, it has never been alleged in this Court as a reason for denying a constitutional guaranty that it was a small amount that was involved. Your Honors recall the ringing tones in which such a suggestion was disposed of by Mr. Justice Bradley in the *Boyd Case*, 116 U. S. 635.

Mr. Justice Brown: May there not be a proper distinction in this, that the \$4,000 is reserved as a reasonable sum for each individual's domestic household expenses, whereas the corporation has nothing of the kind? The expenses of carrying on its business are deducted before ascertaining its net profits.

Mr. Choate: The law is made alike in that regard as to both. The individual is entitled to deduct not merely the \$4,000, but in addition thereto the necessary expenses of carrying on any business. I refer you to section 28. If your Honors will look on page 3 of the income tax law of 1894, beginning at line 21, you will see the provision supplementing the \$4,000 as to individuals—in addition to that exemption. It reads: "In computing incomes the necessary expenses actually incurred in carrying on any business, occupation, or profession shall be deducted, and also all interest due or paid within the year by such person on existing indebtedness." So that all the expenses of the individual, by way of wages, salaries, etc., in addition to the \$4,000 are deducted.

Mr. Justice Brown: But in case of an individual, his domestic expenses are not deducted, I understand, but the allowance of \$4,000 is made to cover all those.

Mr. Choate: I have already pointed out the unreasonable extent of that exemption. It has never been held that difference in manner of expense was a sound ground for discrimination between owners of the same subject of taxation. Still less can it be so in view of the constitutional and fundamental guaranties of equality of burden. But, still further, the shareholders of corporations certainly have their domestic expenses as well as the individuals who draw their incomes

from other sources. Why deny to the shareholders an exemption to cover their household expenses?

Take the form in which it usually occurs and this question of household expenses, if your Honors please, will be seen to entitle the shareholder to an exemption equal to that granted to his neighbor. I put the case which Senator Platt insisted on as a reason why this exemption should not be allowed. He said that in his State of Connecticut (and everybody knows that it is so throughout all the States) encouragement has been given by State policy to the transaction of business under corporate organization. You have five men, if you please, who are carrying on the milling business. They carry it on upon a piece of water power, on a river in the State of Connecticut, and they carry it on as a partnership. The net result of their business is that at the end of the year they have \$20,000 to divide among them. They take that \$4,000 apiece and pay no income tax under this rule. On the next piece of water power on the river below, in the same State, there are five other men who carry on the same business exactly, with the same capacity, the same intelligence, and the same result, only they have availed themselves of the privilege given and filed a certificate of incorporation. The business is precisely the same; the manner of carrying it on is identical, but the *form* of ownership is different. Now, simply because they have a corporate form, you propose to sanction a tax upon the one set of five men at a different rate from the other five men. The first get their \$4,000 apiece clear, and the others have to deduct a tax of 2 per cent. on \$20,000, or \$400, before the profits are divided. There is no exemption, in other words, given to a corporation or to its shareholders.

Each of these five men, carrying on the same business under a corporate name, has his household expenses. We will suppose that they each occupy the same kind of a house, the same number in the family, and live in adjoining houses, as very likely they do in the two cases. What justice is there in the discrimination? What is it but arbitrary caprice to discriminate against them for following the policy held out to them as desirable by their State and beneficial to its people, to punish them for taking a corporate organization, to place them at a disadvantage when compared with their neighbors in the same line of business?

Then, if the Court please, they talk about superintendent's salary, and that the business carried on by a corporation, the expense of which may be deducted, requires superintendence. The individual has the same advantage.

Mr. Justice Brown: It is suggested that the superintendent's expenses or office expenses of corporations stand in lieu of the household expenses of individuals. In other words, Congress says to individuals, "The expenses of one man are \$40,000 a year and of another man \$1,000 a year. We will not allow those household expenses, and we will fix an arbitrary sum, which shall be exempt, to stand in lieu of the expenses of corporations, and we will fix that sum at \$4,000." That is the suggestion, as I understand it.

Mr. Choate: As I have already suggested, the mere manner of expenditure is no ground for discrimination among owners of the same class of property or subject of taxation and has never been so regarded. Moreover, if the principle which your Honor suggests is to be regarded, the act works gross injustice to those whose incomes are derived from stocks of corporations, for they do not get the benefit of the exemption. As regards the expenses of carrying on business, individuals are protected equally with corporations, for the act provides that in computing the incomes of individuals the necessary expenses actually incurred in carrying on any business, occupation or profession shall be deducted—that is, deducted *in addition* to the \$4,000. But take the very case suggested. I am not looking out for exceptional cases, and I am now speaking of the question of superintendence. I say that the same amount of business that calls for and justifies the employment of superintendents by a corporation will justify and necessitate the employment of superintendents by an individual, and the same rule applies and ought to apply to both. They are both entitled to a deduction; but the individual is allowed the deduction in addition to the \$4,000. The corporation and those who carry on business in that form are denied the \$4,000 exemption, although such shareholders necessarily have household expenses as well as those who conduct business individually or as partners or as joint owners. It is impossible for me to conceive how the question of the expense of superintendence comes in if five men, dispensing with a superintendent, carry on their business and earn their own income in a mill under a corporate organization, and five men do the same thing in a mill that is not owned in corporate form.

Of course, there are grounds of special taxation of corporations that do not enter in here at all. There are grounds for a special mode of taxation of railroad corporations because of the peculiarity of their business. There are grounds for the special taxation of express companies because of the peculiarity of their business. There is a dif-

ference between excises upon the different businesses carried on by different corporations, which may be as various as the occupations themselves; but what I am complaining of is imposing a penalty upon men simply so that, under the same circumstances and producing the same results by the same means, one set of men is discriminated against and made to pay a higher tax simply and solely because they hold their property or carry on their business in corporate form. It is not necessary for me to repeat what Mr. Guthrie put to you so strongly in the opening, that there is a policy of the States in these matters that Congress has no power and ought to have no desire to interfere with. Congress cannot create private trading corporations in the States. Congress may tax the business of corporations, the property of corporations, at the same rate as individuals, but can it touch that intangible thing, the simple privilege to be a corporation? As Judge Garrison says in a late case cited on page 79 of our brief, a franchise tax is properly described as a poll tax upon a corporation for a right to be. Mr. Guthrie has certainly shown that Congress cannot impose such a tax.

Now, I come to another ground. It is not necessary for me to dwell very elaborately upon this, because of the very clear and forcible manner in which it was presented to you in the opening by Mr. Guthrie and appears upon our brief. I say here was a deliberate, arbitrary, capricious (it is entitled to infinitely worse names and epithets than capricious or arbitrary) exclusion of certain great and wealthy corporations from the operation of this law, without justification, without warrant, without any principle of public policy whatever. If the Court please, the Attorney General says in respect of the exemption of these favored companies that there is a humane policy always acted on by civilized States. It is very curious that these civilized States, the United States of America, did not discover it until now. None of these institutions were exempted under the previous income tax laws. Take Trinity Church, for example, in New York, with its hundreds of parcels of real property and stores and houses and millions of property, from which it receives a fabulous income. Is there any public policy in exempting that income at the expense of the poorer sections of the country?

Mr. Justice Harlan: Do you mean to say that all this property is exempted?

Mr. Choate: It is, but it never was before. My learned friends will correct me if I am wrong. Take Columbia College, with acre

upon acre of property yielding ground rent, and Harvard and Yale Colleges, with their enormous revenues. We do not dispute, in this bill, this branch of the exemption. It is not necessary for our purposes to attack the exemption of the wealthy educational institutions of the East, but we very greatly doubt the power or the propriety of Congress taxing the people of Nebraska, Montana and Dakota for the support of those institutions of New York, Connecticut and Massachusetts. That is what this act does. Are we not entering upon most dangerous ground? But let that go. Be generous before you are just.

Let us take the exemption of mutual savings banks. I ask your Honors' particular attention to the act on pages 14 and 15. The learned Attorney General says that we should encourage the savings of the poor, encourage them to be prudent and frugal, and so exempt the deposits of the small depositors in savings banks. We have no objection to that. This act not only exempts the deposits and the savings of the poor: it also exempts the deposits of the millionaire. If your Honors please, a clause was slipped into this bill which exempted uncounted and incalculable millions, if they are only put into the hands of a mutual savings bank.

On page 14 of our printed copy of the act, you will find the provision that the act shall not apply "to such savings banks, savings institutions or societies as shall, first, have no stockholders or members except depositors and no capital except deposits; secondly, shall not receive deposits to an aggregate amount, in any one year, of more than \$1,000 from the same depositor; thirdly, shall not allow an accumulation or total of deposits, by any one depositor, exceeding \$10,000; fourthly, shall actually divide and distribute to its depositors, ratably to deposits, all the earnings over the necessary and proper expenses of such bank, institution or society, except such as shall be applied to surplus; fifthly, shall not possess, in any form, a surplus fund exceeding 10 per centum of its aggregate deposits."

There, that covers all the functions of charity and all the functions of paternal government. Then somebody got this slipped in after the bill was drafted by its projectors, a clause which engulfs all that preceded it, and fixed it so that Mr. Astor or Mr. Vanderbilt may put all of his property, \$10,000,000, \$50,000,000, \$100,000,000, into savings banks and have it exempt from taxation, namely:

"Nor to such savings banks, savings institutions, or societies com-

posed of members who do not participate in the profits thereof and which pay interest or dividends only to their depositors."

You will notice the play upon the word "depositor." Every mutual savings institution in the country is conducted on precisely that basis—the depositors take the profits by way of interest or dividends. We can go back to New York to-morrow and advise our clients how they may get protection from this tax, and say, "If you have \$10,000,000 organize a building association, a savings bank, and have it cover the general description of the act, and you can exempt all your property."

What do you say, then, of this being justified by a pretense of public policy on the ground of caring for the poor, of encouraging industry and thrift? Why, it looks as if there were a job in it; it looks as though somebody got it in. It is there anyway. Is it an unlawful exemption? Is it reasonable? Is it within any range of reasonableness, or is it capricious, is it arbitrary, is it wicked?

I need not repeat to your Honors the figures stated by Mr. Guthrie as to the accumulated funds of some of these exempted building and loan associations, savings institutions, and mutual insurance companies.

Mr. Justice Harlan: Where do you get these figures?

Mr. Choate: All from the census reports; many from the report sent by the President to Congress December 3, 1894, called "the Report of the Comptroller of the Currency."

Permit me to repeat a few of the figures: total number of mutual savings banks exempted, 646; total stock savings banks, 378. They do the same business; they take in the money of depositors for the purpose of investing it and making it bear interest with a profit upon it in the same way, and the 646 are exempted and the 378 are taxed. Total deposits in State banks and trust companies, \$1,225,000,000; total deposits of savings banks, \$1,748,000,000. That will give you some idea of what this exemption covers? How are those deposits used? Are they kept in the vaults of the banks? No, they are invested like anybody else's earnings, to make interest and to make profit on the money.

Now I come to the question of mutual insurance companies. My learned friend, Mr. Carter, got up a new idea. He said mutual companies were organized not to save the poor, but for the sole purpose of saving expenses and dividing losses. That is his argument, and those, I think, were his very words. We had them taken down, at any rate. Here are his very words: "An organization," he said, "to divide the losses." So, I suppose, he thinks they are benevolent and

charitable organizations. I should like to have him go to his friend, the president of the Mutual Life Insurance Company in New York, whose company has accumulations of property, real and personal, amounting to \$204,000,000, and tell him that this was an exemption secured for the purpose of enabling them to divide the losses that came upon them in the transaction of their business. To divide the losses! Where is that phrase he uses? Mr. Carter said: "They carry on the business simply to divide the losses among themselves."

Why, if the Court please, the total property exempted of these mutual companies that merely carry on their business to divide the losses among themselves appears by the census reports to be over \$2,000,000,000!

Now, is that within the exercise of a reasonable discretion on grounds of public policy, or is it caprice—is it arbitrariness? Did somebody come down and get them to do it? Did some crafty representative of the mutual insurance companies—for instance, the Mutual Life with its accumulation of \$204,000,000, the Equitable with its \$185,000,000—succeed in pulling the wool over the eyes of Congress and prevail upon it to believe that these were charitable organizations? Were they fooled by the benevolent-sounding name "mutual"? The annual saving to this favored class by being exempt from income tax is over \$2,000,000—that is, mutual life, fire, marine and inland insurance companies. My friend, Mr. Carter, has been associated with and has been the adviser of the Atlantic Mutual Insurance Company in New York for forty years. He has seen their accumulated profits growing to \$12,000,000. He has seen them divide up profits among themselves of 40 per cent. every year, calling them return premiums. He has seen them display their advertisements of their great accumulated revenues invested and earning interest as an invitation to insure with them. I fancy the president of that company would laugh if it were said to him, "You are a philanthropist; Congress now puts you at the head of a benevolent and charitable organization; you have been carrying on the business all this time simply to divide your losses among yourselves."

You heard the high-sounding phrases in which Congress was to be screened from criticism and sustained in its action by this Court if they acted within legislative discretion in making exemptions—if they acted upon some principle of public policy. Has counsel stated any principle of public policy to justify this gross favoritism? Has he stated any reasonable range of legislative discretion that would permit or sanction it? It cannot be.

The annual total property exempted of the mutual life companies alone is in excess of a thousand million dollars, and the annual savings to these favored companies by exemption are at least \$1,000,000. The Mutual saves \$200,000 a year; the Equitable \$180,000.

Mr. Justice Harlan: Is the Equitable a mutual company?

Mr. Choate: The Equitable Company has \$100,000 of stock, but now does its business on the so-called mutual plan, and that is exempted—all its business, all its profits, all its investments—freed from the burden of Federal taxation at the expense of the balance of the country.

It does not really seem that I ought to dwell longer on this subject. I have heard no argument in defense of these exemptions. I believe there is none. I stand here for the whole people. Here are thousands of millions of dollars of property exempted from which income is derived and out of which earnings are made. There are no institutions in the land that are such noted grubbers for money and hoarders of money and such successful accumulators of money as these very exempted companies. I say again, how under the heavens did they get it? It was not proposed by the author of the bill. Shall this stand as a reasonable exercise of legislative discretion? Of course, we are not allowed to penetrate into the mysteries of the Senate or House of Representatives. I give you the history of those exemptions of the mutual insurance companies, with their hoarded thousands of millions. They were not thought of by the author of the bill, nor noticed or discussed or called to the attention of the members of either House or pointed out to the public until we prepared for this suit. The exemption got in somehow or other.

All the great corporations keep their register of stockholders. I will venture to say that half of the stock in all the corporate organizations of the United States together yielding revenue are owned by people who receive revenues from them, their total revenue from all sources being each less than \$4,000. They are not to have an exemption. Who are they? In at least a majority of the cases they are the widows and the orphans and the helpless ones of the land for whom some fund has been provided by the prudent father or ancestor. We speak for them. In striking at the corporations, in attempting to confiscate their property, you injure not the wealthy—they can now stand it—but the widow and the orphan, whose limited means are and always will be found invested in corporations, the only permanent form of investment.

The man who goes into trade and earns his \$4,000 gets an exemption. The man who has been provided for in that way, if you please, or has laid up the earnings of twenty, thirty or forty years of industry in corporate stocks that yield him the same amount pays \$80 a year. They talk about the aggregate being a small affair. Instead of \$80 a year, multiply all the holdings of those stockholders together and it will amount to millions of discrimination thus imposed, millions of exemptions thus denied by reason of this discrimination. I have not heard of any justification of that.

If your Honors please, I have trespassed altogether too long upon the attention of the Court. There is nothing that stands in the way of the decision of this Court which we urge. I do not mean to say there are not individual dicta. If you try to drive a case through dicta it is like trying to get yourself through a barbed-wire fence without injury to your garments; but I say there has been no case decided in this Court that will in the least interfere. These questions have never been weighed, have never been considered; certainly they have never been decided.

I will say just one word before I conclude about these municipal bonds, briefly to state the grounds on which we say they ought to be exempted, and that is exactly the ground on which United States bonds are exempted from a State tax. It is because it interferes with the sovereign power and the exercise of sovereign power by the States themselves. What is the answer to this? My learned friends on the other side say, why if you put it in a general income tax it does not matter; it will not be felt. So they said about the rents, if you put them into a general income tax it is not a tax on rents, it is not an unapportioned tax. If the Court please, what possible difference in principle is there between a tax on the bond and a tax on its income?

But my learned friend, Mr. Carter, gives us a reason, the only answer he could make to our brief. He says that the power to borrow money is an inseparable incident of the sovereignty of the United States, but that States and municipalities could get along very well without borrowing money, and many people think they ought to be prohibited from borrowing money. Let us use his exact language on that point. You will find it on page 46 of his amended brief: "But the power of borrowing money is not necessary to the existence of the States, and if it were, it cannot be destroyed or its efficiency impaired or endangered by taking from the lenders the same part of the interest received by them which is taken from the interest received by them on their loans to all other persons."

Mr. Justice Shiras: Is there not this difference between those two classes, however: The Federal tax, when it comes to be expended, is expended for the purposes of the whole people, for all the States?

Mr. Choate: Unquestionably it is.

Mr. Justice Shiras: And the local tax, the State tax, is expended in its limits, in which other States do not participate?

Mr. Choate: Unquestionably that is so, but the ground on which the power has been heretofore denied to interfere with all bonds of the Federal Government by State taxation was no such ground as your Honor has suggested, but the reason that it interfered with and therefore might cripple the power of the United States to borrow money, and that was an essential element of sovereignty. The very existence of the States may depend upon the capacity to borrow. I have thought that within their sphere the sovereignty of the States was quite as independent and complete, and that the same things are essential to it as to the Government of the United States within its limits. Take our own State of New York, for instance, from which my learned friend and myself come. He says we do not need to borrow money; it is not an essential ingredient of our sovereignty.

The City of New York now has plans on foot for borrowing \$50,000,000 for public improvements. The State of New York has just made provision for the enlargement of the canals, which, if carried out, will extend to \$25,000,000 at least. The power has been given by changes in the new constitution of that State.

Now, will my friend tell me, will your Honors say, that it is not an essential ingredient of the sovereignty of the State of New York as represented in its legislature, as represented in its municipal governments, which are a part of the State government, that it should have the power to borrow money? All that subject is so fully examined in the cases and authorities cited upon our briefs that I do not feel justified in taking any more of your Honors' time in referring to it.

Let me say one word about the case of Bonaparte, in 104 United States, in respect to which a very singular argument is made. It is that if the State of Maryland can put a tax upon the bonds of the State of New York in the hands of its citizens, why should not the United States Government have power to do so? If your Honors please, the States have entered into no covenant with each other as each State has with the Federal Government. The State of New York or the State of Maryland can tax the bonds of any other State in the Union in the hands of its citizens just as it could tax the interest on

British consols or French government stocks or Russian or Brazilian securities, the same as any other property. They have entered into no compact on that subject. But according to the doctrines laid down by Chief Justice Marshall, each individual State has entered into a compact with the Federal Government on that subject. They have entered into a compact that the sovereignty of the United States shall be absolutely maintained, and that no State shall approach to put its finger upon that sovereignty to mar or bar its way; that is an unexpressed compact. Is not that compact mutual, and has not the United States Government by the same act of union entered into a mutual compact with each State that it will not lay its hand upon that State in any way tending to interfere with the essential inherent powers of sovereignty within its limits? Manifestly the right to borrow money within its own limits is one of those inherent powers.

After the Bonaparte Case was decided, with full knowledge and appreciation of the doctrine there laid down, this Court, in the Mercantile Bank Case, 121 U. S. 138, 162, said:

"Bonds issued by the State of New York or under its authority by its public municipal bodies are means for carrying on the work of the government and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes."

May it please the Court, the language of Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 635, is singularly applicable to the present case. He said:

"It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

But I have more than trespassed upon your Honors' kind indulgence. I have felt the responsibility of this case as I have never felt one before and never expect to again. I do not believe that any member of the Court ever has sat or ever will sit to hear and decide

a case the consequences of which will be so far-reaching as this—not even your venerable associate who survives from the early days of the civil war, and has sat upon every question of reconstruction, of national destiny, of State destiny that has come up in the Court during the last thirty years. No member of the Court will live long enough to hear a case which will involve a question more vital than this, which affects so seriously the people of the United States, who rely upon the guaranties of the Constitution which our fathers made and under which our people have lived until this time. If it be true, as my learned friend said in closing, that the passions of the people are aroused on this subject, if it be true that sixty million citizens may be incensed by this decision, it is the more vital to the future welfare of this country that this Court again, here and now, resolutely and courageously declare, as Marshall did, that it *has* the power to set aside an act of Congress in violation of the Constitution, and that it will not hesitate to exercise that power, no matter what the threatened consequences may be.

INCOME TAX CASES

CLOSING ARGUMENT ON REHEARING, UNITED STATES SUPREME COURT,
MAY 7 AND 8, 1895 *

If the Court please, we are here in a court of law and in the court of the Constitution, and are not masquerading before a quizzical historical society, or before a political assembly in whose presence the learned Attorney General might be pleading for an amendment of the Constitution, in order to get rid of what he calls "this effete doctrine of apportionment."

Why is it, if Your Honors please, that the whole country is now holding its breath to hear this Court speak again in this case? Why is it that the people of the few States upon whom this extraordinary tax is almost exclusively thrown, as well as the vast majority of the nation, the people of the other States, who have thrust this tax upon the few, although themselves exempt, are so eager to hear the final decision of the Court in this case? Certainly, it is not the question of the payment of a paltry two per cent. upon the income of the country for the brief space of five years that interests them so deeply. That two per cent. is what Mr. Whitney, in familiar phrase, called a mere drop in the bucket of the national resources. Those five years are but a flash in the existence of this republic. This paltry sum is nothing to what the people of these few States and their fathers paid in the times of the country's peril, to save its existence. They paid ten per cent. cheerfully, without a murmur, and would gladly have thrown the other ninety per cent. after it, to accomplish that great result.

No, it is not the petty pecuniary consideration of this day or this year or these five years. It is because all the people of this country are anxious to know whether what was believed to be a constitutional safeguard, purchased by their fathers on good consideration paid, is now to be trampled under foot, and all benefit of it for all future time denied to those who parted with so much of value to secure it—whether the protection guaranteed by the Constitution to property against the onslaught of mere numbers, is to be now enforced or forever abandoned and annulled.

No wonder, then, that neither side in this controversy, nor the Court itself, is able to exaggerate the importance of the case. Your Honors have heard it once, and we are here for the purpose of re-argument. I

* For statement, see preceding Argument.

propose, for my part, to treat it strictly as a *re*-argument—to take it up where, as I understand, the Court by its announced decision has left it, and to render what aid I can, as counsel, in the further consideration of the unsettled questions upon which, as previously constituted, the Court was equally divided. But I do not propose to give up any advantage which we have gained by the decision already rendered. I assume, because the Government acquiesces, that, as to one important subject which we argued here six weeks ago—one important question, very vital in its results—the decision of this Court now stands as the settled law of the land, never hereafter to be questioned. I assume that Mr. Justice Jackson, happily coming to complete your ranks, will not draw in question a proposition upon which his eight associates are united, and in respect to which the official representatives of the Government have rendered their adhesion.

The true method of construction, the fundamental canon in the interpretation of statutes and constitutions, as I have always understood, is to proceed, step by step, from the known to the unknown, from the certain to the uncertain, so that we may advance surely and safely from positions established to those which remain to be established.

Out of all the doubt and disputation which covered every question involved in these issues on our last argument, one thing has been settled. One lonely peak has risen out of the deluge that overwhelmed the whole, as to which we may rest assured that our feet are on dry ground, and, as the waters still further subside, as they seem to me to be now rapidly doing, perhaps we can proceed safely to other positions, feeling that we are always still upon solid ground, and in no danger of being submerged or washed away.

Your Honors have decided that the income arising from municipal bonds (which, I suppose, includes State and County bonds also) cannot be taxed by Congress, although embraced in a general income tax; and that decision, as has been suggested already by one of Your Honors answers to the legal argument presented by the Attorney General, must for the same reason condemn this attempt to tax, without apportionment, the income of real and personal property by making it a part of a general income tax—such an income tax as is attempted to be laid by the Act now in dispute. Let us see if that is not so. I noticed the distinction, drawn by the learned dissenting judges on that question, between the situation arising from an utter lack of power to tax at all, and that arising from a constitutional provision forbidding Congress to tax except by a prescribed and particular method. But,

surely, it needs no argument to demonstrate that the lack of power in Congress is just as absolute when it is prohibited from putting anything but an apportioned tax upon a particular subject as is its general lack of power when forbidden to put any tax at all upon a given subject. That, certainly, cannot be lost sight of or denied.

What is the fact as to the income from municipal bonds? It has ceased to be a part of the bond, has it not? And it has come into the hands of the owner, or into the pocket of the owner (which is the Attorney General's favorite place for seeking it), has been mixed up with his other money, and has lost its ear-mark. And his argument is, that you no longer tax it as the income of municipal bonds; you tax it as money that you find in the pocket, to wit, as personal property. I shall have to inquire by and by, as I have done before, what power the Government has to tax the bulk of this personal property, of which such money is a part, and how such power is to be exercised; for we insist that Congress can only reach the bulk of personal property, as distinguished from consumable commodities, the subjects of excise, by a direct tax apportioned among the States according to numbers. But Your Honors have all—the entire eight—made a grave mistake, if the learned Attorney General's legal proposition, in this respect, is right. You should have said, "True, Congress cannot tax the income of municipal bonds, but, as soon as the owner has separated it from the bond and got it in his pocket, the bond and the income are divorced forevermore, and, finding it as money in the hands of the owner, Congress can tax it, provided only it be included in a general income tax."

Another thing—the learned Attorney General complains of the "substance and form argument," as he is pleased to call it. But upon what does this tax fall? Why is it that this Court has held that Congress cannot tax the income of municipal bonds? Is the lack of power limited to the income, to the coupon, to the bond, to the contract? No. It is, as Your Honors have all agreed, because the power to borrow money is one of the inherent attributes of the sovereignty of a State, of every State, and because Congress cannot tax the inherent power of the State to borrow money, which is a part of its sovereignty as represented in its municipalities, it cannot touch the bond or the coupon, or the interest which comes from either. The prohibition to tax strikes at the source, at the fountain, from which the income is derived.

A favorite argument, which has been used here over and over again on the part of the Government, is that this act does not tax rents at

all. See how exactly the decision already unanimously rendered meets this argument. The tax falls upon a residuum—that is what they say—which is made up of the mass of a man's entire income, including all these prohibited objects, including rents, including income from municipal bonds, including everything from every source, and deducting from it repairs, losses in business, insurance, expenses and four thousand dollars; and there you have a result turned out of the pot, which is neither one thing nor the other, and in which you cannot recognize any of the original component elements. Your Honors have certainly knocked that argument in the head.

So, the learned Attorney General has said, and said over and over again, that, though the Government may not make this income, derived from prohibited objects, the subject of a particular tax, yet when it is wrapped up in this general tax it is so hidden as to escape the power of the Court, the law, and the Constitution, to follow and separate it. It is like the old story of Achan, if Your Honors please, who had obtained what he coveted, the two hundred shekels of silver from the spoils of Jericho, and hidden them in his tent. He thought he would escape responsibility, but Joshua sent and tore open the tent and found the accursed thing, and brought the criminal to justice. So Your Honors have unanimously decided that no manner of hiding or concealing the object forbidden to be taxed in a general mass, or in a residuum, will help the matter at all. The law will search it out, separate it, and declare the invalidity of the tax.

Another argument which my learned friend made before, and repeated here to-day, is that it is not a tax upon any particular thing, that it is not a tax in rem at all; that the Government does not reach out its hands and seize upon the rents of land, the dividends of companies, the income of bonds, the earnings of the husbandman or of any other laborer; but that it looks at the man and reaches after him, and says: "We tax you as a man and a citizen, bound to contribute your proportionate part, measuring your ability to contribute by what you have had and probably have spent; and yet whatever rents you have had, and whatever income from municipal bonds you have had, are not taxed. You are taxed by measuring the amount of the tax imposed upon you by your ability, ascertained by these things." If that is a sound doctrine, Your Honors have certainly made a great mistake as to the income of municipal bonds, with respect to which the opinion is unanimous and has received universal assent.

Another argument has been presented to-day by the learned At-

torney General, which, I confess, I never heard before. I think it was uttered in a humorous spirit, although he looked very serious at the time. It was, that Congress by this Act is only treating landlords as pursuing a peculiar occupation, collecting their rents, and that therefore they may be taxed just as distillers are when they make whiskey, or sugar manufacturers, when they refine sugar. They are merely working out from the still of their real estate the rent as a product of the soil; they are working the soil in that way. Now, really, he could not have intended that as a serious argument to this learned Court.

If the Court please, I, for one, rejoice that the representatives of the Government, upon our request for a reargument as to the points undecided, have been accorded the privilege which they asked, of being heard upon the points which have already been decided and which stand as the recorded law of this Court, affected only, as it may be, by the consent to hear what the Government has further to say. I say I rejoice, because, I now submit, their arguments have gone much further than anything I can say to corroborate the position of the Court, and to reaffirm all that was presented in the argument on which we claimed the relief that so far has been granted.

I cannot learn one hundred pages of history in five minutes, and it is only five minutes ago that I received the new chapter of American history, prepared by the Assistant Attorney General. Time probably will be required for its digestion. But I listened, as I am sure all Your Honors did, very attentively to what he had to say on the novel facts, unheard of, unsuspected before, that he was going to bring to light for the purpose of illuminating Your Honors' path backward, on your retreat from the decision already made. For one, I did not hear anything new from the beginning to the end. The representatives of the Government have said that they did not have a chance to be heard before. I differ with them as to the fact in that respect. Not only did they have a chance to be heard, but they were heard on the very question which Your Honors have decided, namely, on the question whether rentals of real property are the subject only of a tax by apportionment. We filed a most carefully digested brief covering the whole subject, claiming that, as to real and personal property and the income of both, they could only be taxed by a direct tax apportioned among the States; and they not only had it under consideration for nearly a fortnight before the former argument, but they prepared, or their associate who then represented the defendants prepared, a printed reply to it which was in the hands of Your Honors and in their hands,

making all the answer to it he could think of—and it was not much. It was full; it was complete; it covered the whole ground; and it was the work of a most astute and able mind. More than that, I find that the brief of the learned Attorney General, filed in his own name on the former argument, from page 18 to page 31, and again from page 61 to page 67, is wholly devoted to that matter, and there is not, with one exception, to which I shall by and by refer, a single authority cited in his new brief which was not fully set forth and made the basis of his claims in opposition to our contention on the former argument, even down to and including the latest decision of Your Honors in the latest volume of your reports.

Assuming, however, that he was not heard before, you have heard him now; you have heard them both now; and what have you got? What has come of the two hours and a half devoted to this historical investigation? What does it all amount to? What is Mr. Whitney's idea of a direct tax? Obviously, he has none. There is no meaning, in law, he says, in the words "direct tax." That was what he set out to prove, and that was about all that he seemed to think was brought to light by his elaborate historical researches. He found that "*duties*" meant everything, and had always been used as a synonym for "*taxes*" for all time, apparently, in English statutes and in English books. But what was there new that he brought to bear? It all came down to a passage in Blackstone's Commentaries. I thought it rather a reflection, not only upon the framers of the Constitution, but upon the learned members of this Court, to bring forward what he found in Blackstone as a new discovery not known on the former argument. That is what he did. That and the Pitt income tax laws of 1758, 1787, and 1799 were absolutely the only new things, unless he claims a patent for the debates of Congress and for the reports of the successive Secretaries of the Treasury on file, which Your Honors' opinion showed were in your hands, and seriously considered as a part of the basis of your judgment already pronounced. Certainly, nothing has now been discovered by him to qualify or impair the decision of the Court, that the Constitution covers the whole subject of taxation, and divides all taxes into two great and distinct classes—"direct taxes" upon the one hand, and "*duties, excises and imposts*" on the other—and that no tax can be both, but must be one or the other.

If the Court please, his historical argument was illusory. He was following a will-o'-the-wisp all the time. He thought he could see it, but nobody else could; and positively when you come to read the 100

pages which have just been distributed, you will find that from beginning to end there is nothing in them that was not open to the full consideration of the Court, and substantially in its hands for consideration, when the case was presented before.

There has been one new authority cited by the learned Attorney General in his brief on the question of the relation of a tax on the rent of land to the real estate itself, as between landlord and tenant, under a covenant that the tenant should pay all taxes laid upon the property, or in respect of the property. For that he refers to a unique statute enacted to put an end to the famous anti-rent controversy in New York. There were those old leases which from the beginning of the Colony, by carefully framed provisions, had imposed all taxes upon the tenant, and the legislature of New York, in obedience to a very powerful popular impulse, which demanded relief for the tenants, stepped in and laid a new kind of tax, to wit, a tax upon rentals, *as a personal tax*, for the very purpose, as I understand, of relieving the tenant from taxes imposed which would otherwise be, and had been before, charged to him under those ancient iron-bound covenants. The result was that the tenants were relieved under the peculiar phraseology of that statute and of that covenant. That was the act of 1846, to which he referred. It was entitled "An Act to equalize taxation," and, as appears in the Government's new brief, at page 55, the rents were especially enacted to be "*personal estate which it is hereby declared to be for the purpose of taxation under this act.*" It was an act passed in the exercise of that plenary power of taxation which is a part of the legislative power in New York, unrestrained by any constitutional provisions, and the Courts of New York were doubtless bound to obey it. When the matter came before the Court of Appeals, seven years later, in the case of *Buffalo v. Le Couteulx*, 15 N. Y. 451, that Court said:

"Until the year 1846 there was no authority for taxing the rents reserved on leases, as personal estate. Land, of course, was taxed as land; but the rents reserved on leases and not past due were not personal estate, and therefore were not taxed at all. This was changed by a general act in the year 1846."

So the English decisions upon covenants, cited by Mr. Whitney in connection with this case, turn upon the poor rates, created by English Statutes as personal taxes.

My learned friend, the Attorney General, has said that Congress has power to say whether a tax on rentals shall or shall not be a tax

on real estate, and that, if Congress, in passing a law, says as the New York legislature, in the exercise of its plenary power, said, that this tax on rentals is not a tax on real property but is a tax on personal estate, it has the power to do so. That is exactly what Your Honors have denied. That is exactly where the prohibition has been placed upon By no form of enactment or of words, by no device, can Congress Congress, the benefit of which we have so far successfully invoked. convert what is in its nature and essence a direct tax, under the Constitution, into an indirect tax, and so lay it by the rule of uniformity instead of by the rule of apportionment.

Now, what is my further duty? Is it not to render such aid as I can to the Court in the division which has arisen among its members on the remaining questions? Great light appears to me to have been shed upon them by what has already been decided, if we may accept the decision of the large majority, three-quarters of the Court as then constituted, two-thirds of all the members of the Court—great light, I say, is shed upon the other questions by what has already been decided, if I rightly construe it; and with that view I shall proceed with my argument.

I submit that this case is not to be argued as a petty case, upon nice and subtle considerations, but upon broad constitutional principles, such as are embodied in the opinion of this learned Court, and such as every intelligent man, whether layman or lawyer, can understand. It has been the fortune of this Court—it has been the fortune of its successive Chief Justices—to announce repeated decisions on great constitutional questions arising upon very brief clauses in the Constitution. As Chief Justice Marshall said, it is a Constitution of enumerations and not of definitions. The framers did not undertake to specify and define what taxes they meant when they said “direct taxes,” any more than they undertook to specify and to define what they meant when they said “regulate commerce”—those two most potent words, the construction of which has filled volumes in your published reports. They did not undertake to specify and define what they meant by “admiralty and maritime jurisdiction.”

Now, what has happened? This has happened, as I think, in all three cases alike, that what came up before the Court as a question of vast mystery, of extreme difficulty, only to be solved by the most profound investigation, after examination by the Court, was set forth in a few, clear, simple, limpid sentences, announcing the conclusion of the Court as to the definition of the subjects within the class declared and prescribed by the Constitution, which were in each case so con-

vincing that all the people wondered from the time of the decision how the question could ever have been in doubt.

Take the case of *Gibbons v. Ogden*, where the question came up whether navigation, and especially steam navigation, newly introduced upon the Hudson River and the waters of New York and New Jersey, was "*commerce*," the right to regulate which was in Congress, or whether it was subject to the reserved powers remaining in the States. All the jurists of New York, among them being the men most learned in American law, whose names stand today as types of wisdom and power, denied that navigation came under the head of commerce. Yet so convincing, so lucid, so clear was Marshall's setting forth of that simple question that now the law student reads his opinion, and wonders what could have got into the heads of the great lawyers and judges of New York, that they not only hesitated, but absolutely denied that commerce embraced navigation.

So as to "admiralty and maritime jurisdiction." When the case of *The Genesee Chief* came up, what happened? There stood in the way the unanimous decision of this Court, in a former generation, that admiralty and maritime jurisdiction was confined to waters which showed the ebb and flow of the tide. In the meantime the navigation of the great lakes had sprung up, the States surrounding those inland waters had become densely peopled, and the question came again before this Court. Chief Justice Taney, in a similar opinion, setting forth what ought to be the true principles governing the Court on a question already decided wrongly by it, on a question that did not affect, as this question now before Your Honors does not affect, any vested property interest or any conduct or action of any man in the country, pronounced the judgment absolutely reversing the decision of the Court in the case of *The Thomas Jefferson*, and holding that all navigable waters are within the admiralty and maritime jurisdiction. And since that day it seems to all of this generation incredible that any other construction could ever have been given to that clause.

So, in my belief, the opinion which has been rendered setting forth the grounds for the decision that a tax on rents is a "*direct tax*" which Congress can only levy by apportioning it among the States, will stand out in the same bright light to those who come after us, so that they will wonder how anything to the contrary could ever have been claimed.

I do not consider that it is necessary for me to repeat anything already presented by us, because I assume that all the arguments and all the briefs which have been printed have already been placed in the

hands of Mr. Justice Jackson for his perusal. What was it we claimed in respect to the tax on rentals?

[At this point the Court adjourned until Wednesday, May 8, 1895.]

Mr. Choate: If the Court please, at the time of the adjournment yesterday I was proposing to re-state the claims which we made upon the former argument in respect to the rentals of real estate being necessarily the subject, only and exclusively, of a direct tax. But time forbids that they should be more explicitly stated than they have been in our printed brief and in the oral arguments presented on the former hearing, which have likewise been printed. I shall therefore rely wholly upon those.

I shall proceed (after one or two observations in answer to suggestions which the Attorney General has let fall), to consider the three questions referred to in the opinion of the Court as questions still to be decided, and in doing so I shall assume, for the practical purposes of my argument, that it is already the law, as announced by this Court, that the rentals of real estate can only be reached by Congress for the purposes of taxation by means of a direct tax apportioned among the States.

There was one question which my learned friend, the Attorney General, asked yesterday which I think is entitled to consideration and answer. He says, "How long does this exemption which you claim for rentals last? Does it last for a year or for five years or for ten years? Does it last and go with the proceeds that have come from rents into any new investments of property?" It is sufficient, if the Court please, for the purposes of this case, to say that this law in its terms leaves no such question open. It taxes the rent specifically at the moment of its receipt, and I should not claim that if, after the year for which it had been subjected to levy by a direct tax, the rent in the hands of the receiver had been saved and accumulated, and was found incorporated into his personal estate, either in the form of money, or in any form in which it might be reinvested in any subsequent year, it could not be made the subject of taxation under general taxation of personal property by the State, or under general taxation of personal property in the form of a direct tax by the United States.

Then there was another point made by the Assistant Attorney General which was almost the reverse of this. He says, "Why, it is a tax upon rentals received in a former year." Well, the prohibition of the Constitution is in general terms, that you shall not levy a direct tax except by apportionment, and a direct tax, we now assume it to be the settled law, includes a tax upon the enjoyment of real estate,

whether levied upon the body of the real estate or upon the income of the real estate. You cannot by indirection, by going back into a former year and taxing rent because it was received in a former year, reach it any more than you can rent received at the very moment of the levy of the tax. If you could, that would only be doing what the Court has called "frittering away" the provision of the Constitution altogether, for you say at p. 55 of the opinion:

"If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the Nation and the States of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property."

If Congress is prohibited from imposing a tax on property, it cannot evade the prohibition by throwing the tax backward or forward, or by any other subtlety of form. If prohibitions could be dealt with in that way, they would be of little or no use. Moreover, it is to be remembered that the prohibition is not of a tax on property, but of all direct taxes. Taxes on property are prohibited because they are direct. To tax a man this year on the property or the income which he had last year is equally direct with such a tax on the property or income of this year, and therefore equally prohibited. This principle is adopted in the opinion of the Court.

So, too, it is said by our opponents that my Lord Coke's observation, in respect to the identity of the rent of real estate with real estate itself, and the similar adjudications which since Lord Coke's time are found in books almost without number, relate, as stated by my Lord Coke, to a deed or a will of real estate, which of course refers to the future income to be derived from real estate, and that therefore they have no application to a statute like this. But, if the Court please, we use the rule merely for the purposes of illustration, as pointing out the nature of the rent as related to the real estate, the land out of which it does arise, and as demonstrating that the enjoyment of real estate is in the use and rentals thereof, and that title and protection guaranteed to the one necessarily extend to the other.

Another argument of my learned friend, the Attorney General, or an assertion of his, I can meet only by an assertion. He says that an income tax, a tax upon rents and income of personal property, cannot be apportioned without great difficulty and inequality. Well, as to the inequality—if it be such—that very inequality, as Your Honors have decided, was agreed upon as a part of the compact upon which the Constitution rests. But to my mind there is no difficulty in the ap-

portionment of a tax, either upon real or personal property, whether it be levied upon the capital or the income. What the Constitution requires is that it shall be apportioned, and there the Constitution stops. The direct tax shall be apportioned among the different States. The whole amount to be raised, the \$30,000,000, or the \$60,000,000, is divided into aliquot parts according to the proportion which each State's population bears to the total population, and then it may be left as it has been left under former direct tax laws. If the State of New York, with its six millions of people out of a total population of sixty millions, bears one-tenth of it, it may be left either for the State of New York to have it assessed as its usual taxes for its own support are assessed, or, under the Constitution, Congress may proceed through its own agents and instruments to assess it in the same way. There is no practical difficulty in the apportionment of a tax upon real or personal estate, or upon the income of either or both, in the mind of any one who gets a clear understanding of the matter. It is apportionable without the slightest difficulty, just as the old direct taxes were, and by a similar process. It is true that a direct tax which is to be apportioned among the States, whether it is laid on capital or income, must at the outset be arranged upon the plan of fixing a gross sum to be raised and then apportioning it mathematically among the States according to population. That being done, each State's quota is collectible in like manner, whether the tax be on capital or income.

Suppose that Congress determined to lay a direct tax of thirty millions on the income of property, real and personal, and that the census showed the population of the United States to be sixty millions, and that of the State of New York to be six millions. New York would then pay three millions, one-tenth of the whole. In order to collect it, the process would naturally be to require all persons subject to the tax to hand in sworn returns, say by the first Monday of March, as by the present income tax law. Then there might be allowed, say March, April and May, to adjust all disputed questions of amounts. Then provision could be made for the assessment on those who failed to make returns, so that by the end of May there might be made out a complete assessment list, showing the number and names of the taxpayers and the amount of income for which each was taxable. Then, by calculation, the three millions tax would be assessed upon the whole amount of taxable income as ascertained, and the percentage of the tax upon the amounts of the income ascertained and declared. The month of June might, as now, be fixed for payment, and by the begin-

ning of that month everything would be ready for delivering the tax bills and receiving the money.

This course is substantially similar to that pursued in assessing and collecting our New York City Tax, there being, of course, some difference of detail not essential in respect of principle or general method.

Another argument addressed by the Attorney General to the Court was, as he said, of a practical nature—that the decision already made (and it will do so to a still greater degree, if it be extended, as we now demand, to the income from personal property) will seriously impair and cripple the arm of the Federal Government in its search for resources in cases of great emergencies. Figures, they say, will not lie—although I think that they are made the means of other people's committing that sin very often—and we have official figures here. Your Honors will find some of them in our brief. When the war ended four thousand million dollars had already been expended in the prosecution of that great struggle. I think it is safe to say that since the war ended at least four thousand or six thousand millions more have been expended, including the pensions. Up to 1866, when this estimate of four thousand millions was made, how much had been raised by income taxes? One hundred and sixty-one millions. How much of that was from the income of real and personal property, the direct income of real and personal property taxed upon its owners? Who knows? We can only form estimates. Your Honors, from the official organs of the Government, can ascertain. In my judgment it approximated to a half, to something like eighty or ninety or one hundred millions. And the same may be said of this eight or ten thousand million dollars that have been raised in all. Only three hundred and sixty millions, the Attorney General says, have been raised by means of income taxes, and out of that there have come from the owners of real and personal property whose incomes have been unlawfully invaded certainly not two hundred millions in all.

There has never been any indisposition on the part of property owners to respond. The direct tax on land owners, or owners of real estate improved in all sorts of ways—how much has that amounted to? In all, the Government has received and kept nine million dollars. An additional twenty million dollars, raised in 1861, have been repaid by the United States to the several States, on account of the obvious inequality of direct taxation under any circumstances. So this is a mere chimera, raised by the Attorney General to alarm us, that the practical power of the Government to provide for its necessities in

emergencies will be seriously impaired or crippled by anything which we propose to have done.

Again, he says that the landholders and the bondholders are shirking their share of responsibility for the expenses of the Government. I do not appear here as their advocate, but I deny the assertion that they have ever shirked. In the bloody struggle through which we went, while the young men gave their blood and their lives, the property owners and the bondholders threw in their resources without stint and without question. No such argument ought to be raised, or if raised, ought to make the least impression upon the mind of the Court.

The learned Attorney General's brief argument on the questions of law involved, eliminating the pessimistic views of a political character in which they are embedded by him, may be thus summarized and disposed of:

He fairly states the question to be whether the tax on rents, imposed by this particular income tax law as framed, must necessarily be regarded as a tax upon real estate. And, criticising the form and language of the Statute itself, he observes that it does not in precise terms impose a tax on real estate itself. We never claimed that it did, but that, as the Constitution prohibits any direct tax except by apportionment among the States, and as a tax upon real estate is agreed by everybody to be a direct tax, a tax upon rents, which constitute the practical value of real property, is indistinguishable from a tax upon the property itself, and is therefore direct, and, as a consequence, prohibited to the same extent as a tax upon the real estate itself.

He next claims that the language used by Congress in the act, in enumerating rents among other items which are obviously personal property, indicates its intent that they shall be taxed by this act as personal property. To this we answer, as the Court has already answered, that if, as has been determined, a tax on rents is a direct tax, no language or effort or intent of Congress to convert it into an indirect tax can by any possibility avail, because it would entirely destroy the force and effect of the constitutional protection guaranteed to real estate.

The Court will observe that the learned Attorney General carefully avoids the discussion of the whole question whether the tax on rents is or is not a direct tax. He seems practically to give up that point.

He next claims that the Court has made a mistake in dealing with the case as if rents were the only subject of the income tax law, all other subjects of taxation being omitted, and that if it could be so regarded, it should be treated as an act taxing landlords because of their

vocation as landlords, measuring the tax by rents actually received, and likening it to a tax upon an inn-keeper or a distiller. I have already referred to this as a proposition which could not have been seriously presented by so learned a lawyer—that capitalists who live in idleness, if you please, upon the income of property which earns itself, are engaged in the vocation of working the rent out of their real estate or the income out of their personal estate. But seeing how impossible that suggestion is, the learned Attorney General proceeds to abandon it altogether.

He proceeds to say that the Statute cannot properly be looked at in that way—that it not a Statute imposing a tax upon a particular class of persons, namely, landlords, in respect to a particular source of income, namely, rents, and he next proceeds to the proposition, already a stale one, because already condemned by the unanimous voice of this Court in its decision with regard to the income from municipal bonds, that the tax imposed, being a general income tax, is not a tax upon any of the particular things or sources of income enumerated in it, but is an assessment upon the taxpayer on account of his money-spending power, as shown by his revenue for the year preceding the assessment. He says that it is not a tax on property had, or supposed to have been had, by the taxpayer at the time of any assessment, but probably already spent, and possibly the property producing it already sold or wiped out of existence; that the taxpayer pays this year the tax according to his money-spending ability of last year; and that the items of last year's rents form part of the "yard stick," as he calls it, by which this year's capacity is measured.

In view of the emphatic decision of the Court already pronounced, I do not see how I can possibly be called upon to make any answer to this "effete" proposition.

He then recognizes that one of the foundations of the learned Court's decision, in regard to rents, is in the proposition that the value of the land is in its use, that rents are the pecuniary equivalents of the use, and that therefore to tax rents is, in substance and effect, to tax the land itself. He apparently is obliged to concede this proposition in all its force, but claims that in its application to this case it should carry the limited meaning that a tax upon rents *to become due*, to accrue in the future, should be deemed a tax upon the estate itself, likening accruing rents to growing crops, inseparably part of the land. The distinction he seeks to draw is, that the tax which the present law imposes is a tax in respect of rents already had and collected, and in all probability either spent or transformed into other tangible property, and he

asks how a tax in respect of such rents can be said to be a tax upon real estate producing it, because, after they have been produced and received, the landlord has his real estate as before, and his money, too, as so much personal property.

This, we submit, is only an ingenious paraphrase of the old argument already condemned, by which it has been so often claimed and so often denied by this Court that what the Congress is prohibited from doing directly it cannot do indirectly, and that, when prohibited from taxing the source from which any given money or interest is derived, it can not evade the prohibition by striking at interest or incident.

I have already answered his next question as to how far into the future the exemption from taxation except by a direct tax can follow the money. It is sufficient for the purposes of this case that the rents are taxed as and because they are received *as such*.

The learned Attorney General next plants himself upon a distinction, which is purely one of his own imagination, already condemned repeatedly in the opinion of the Court in this case, as will appear, namely, that the distinction established by the Constitution in respect to taxation, is a distinction between personalty and realty, and that the Constitution is to be construed as declaring a tax upon realty to be the thing which is to be apportioned among the States, and a tax upon personalty, which, he says, would include money in any form, to be a tax which is to be imposed only under the rule of uniformity; but surely this is not true. The Constitution does not provide one rule of taxation for realty, and another rule for personalty.

As we have said so many times, and as the Court has said, the Constitution does not distinguish, in respect to taxation, between real property and personal property, nor does it distinguish between direct and indirect taxes upon land, or say anything about taxes upon land. The prohibition is that direct taxes shall be apportioned among the States according to numbers and not otherwise. It is because the tax upon real estate and upon personal estate, levied on the owners on the mere ground of ownership, is held to be a direct tax, that Congress is held to be prohibited from levying it otherwise than by the rule of apportionment.

The "form and substance argument," as the learned Attorney General derisively calls it, is evidently too much for him—it lays the axe at the root of every one of his arguments and propositions.

If it is true, as the Court has so often said, that what Congress is

prohibited from doing directly it cannot do indirectly, that what it is forbidden to do in substance it cannot do in any form or by any device, then there is no substantial foundation for the very ingenious argument presented by the learned Attorney General. We submit, therefore, with great confidence, that the Court, when it comes to the final consideration of his argument, giving it all the weight to which his great official and professional standing entitles it, will find that it has not in any respect impaired or weakened, much less carried away any one of the foundations upon which the decision of the Court, in respect to rentals, rests; and I therefore deem it my duty to consume no more time upon that subject, but to assume, as I do, that the Court will, notwithstanding all he has said, abide by its decision already announced, as concurred in by so large a majority of its members, and I ask only that our original briefs and arguments upon the subject may not be overlooked.

And what is the effect of the decision as to rentals, already announced? The framers of the Constitution knew perfectly well, nobody better than they, that they represented a people and a race who inherited from many ages past a great controversy about taxation and resistance to taxation. The English people, from whose blood they sprang, had maintained a running fight for many centuries, with Plantagenets and Tudors and Stuarts alike, for the right of themselves voting the taxes which they should be compelled to pay. Our immediate progenitors, who escaped from English soil, and founded and colonized these seaboard States, for the first century and a half after the landings at Jamestown and Plymouth, were happily left to themselves in perfect liberty to vote and levy by their own representatives all the taxes which they were to pay to provide for all purposes of government. Then came the attempt of the British Parliament to force taxation upon them as to which they should not be heard. That attempt provoked—it caused, it maintained from beginning to end—the war of the revolution.

Then what experiment was tried? To have a National Government that was not a national government at all; to have a confederation which should administer the affairs of the thirteen States in common, but without any power of restraint or compulsion or taxation over the States themselves. Washington said, speaking of the year 1786, which immediately ushered in the formation of the Federal Convention, that the condition of affairs was little better than anarchy. Under those circumstances the Federal Convention met. The delegates met, they

sat together representing all those thirteen States, for four months, conferring, debating, struggling, and finally compromising, and the great fight—the great struggle from beginning to end—was over the question of representation and taxation. But for the compact, but for the mutual concessions and the compromise, no man can claim that the Constitution could have been framed or the nation formed. The subject of taxation was ever present to their minds and the most important in their consideration.

Now, what did they do? What is it that this Court has decided that they did? In the first place, they gave to the Government which was to be, the power of taxation over every man, over everything, over every foot of soil that ever should be within the domains of the republic. That they did. Then they divided taxes into two absolutely distinct classes, with a great gulf fixed between them, so that whatever tax belonged to one of the classes could by no possibility be included in the other. They did not divide them into “direct taxes” and “indirect taxes.” They did not say anything about “indirect taxes.” They said “*direct taxes*” upon the one side and “*duties, excises and imposts*” upon the other, so that they might not leave it in the power of Congress, by any phrase, or device, or method of enactment, to convert a tax, which was in its nature and essence a direct tax, into a duty, an excise, or an impost by calling it so, whether for the purpose of applying to it a different and prohibited measure, or for any other purpose. And upon one of these, the “*direct taxes*,” they imposed the measure of apportionment among the States according to number; and upon the other, the measure of uniformity. And this was for a reason. It was a reason that represented in that body this old quarrel, this old strife that ran in the blood of every man there, about the right not to be taxed without representation. They knew; they had been in the habit, for many generations unmolested, of taxing themselves, their real estate, their personal estate, their accumulations of property in each State, by their own chosen representatives in that State. They were afraid and jealous of this new power which they were creating, lest it should attempt to tax those portions of taxable subjects without their being thus fully represented, as they had always been. Therefore they enacted that representation and direct taxes should be apportioned among the different States according to numbers. They not only enacted it once, but they enacted it twice, when they said that “no capitation or other direct tax shall ever be laid except according to the census,” and this is believed to be the only provision in the Constitution which was

thus twice repeated, showing how intensely important they considered it. And they did so for the very best of reasons. This rule of apportionment (which the learned Attorney General has seen fit to condemn as the "*effete doctrine of apportionment*") guaranteed to them that for every dollar that was laid as a tax upon their property, every representative who voted for it, from whatever State, should do it upon the moral consciousness and responsibility that he was imposing upon the citizens of his own State their fair and equal proportion, according to population, of the whole sum that was so to be raised by tax. It had a double object—not only the object of securing the right of representation in the enactment of the tax, but an ultimate object of vast importance which has not been sufficiently recognized, of saving property from being overwhelmed by numbers, and saving the exercise of the power of taxation from that abuse which is thus threatening us now. If the tax could be voted by people who were not to bear it, but who might spend it, it would be subject always to gross extravagance, to plunder, to every kind of paternalism and misuse in its expenditure. To secure this right of perpetual constitutional protection to their property, which was the source upon which they had relied and expected always to rely for the support by taxation of their own State and municipal governments, they surrendered forever to the new Government that exhaustless source of revenue, the imposts, for which the feeble Confederation had so long struggled in vain with the States, and the power to regulate commerce, and the concurrent exercise of the power to lay duties and excises, which, as I showed on my former argument, was practically an exclusive grant also.

I am proceeding now to build up my argument on what your Honors, at least by the vote of six to two, have already decided. As I understand it, you have decided that a tax upon real estate, at any rate, is a direct tax, to be levied only by apportionment, and that there is in principle and in reason no difference whatever between a tax laid upon the body of real estate and a tax laid upon the rental of real estate. For what was it that was secured and guaranteed to the people? It was the right of enjoying their real estate free from anything but an apportioned tax, and the only way they can so enjoy it is by receiving the rents free from such a tax.

That being so settled, what more do I insist upon on the part of this plaintiff? I insist that, for the same reason, upon the same constitutional principle, your Honors must decide, and that there is no escape from the decision, *first*, that the corpus of personal property

is entitled to the same protection, *that a tax upon it is necessarily a direct tax*, and was intended so to be. and, *second*, that a *tax upon the income* directly received from personal property, levied upon its owners as such, is indistinguishable, upon the same principles, from a tax imposed upon the income of real estate, *and so is a direct tax*.

Now, if the Court please, let us see whether I am wrong in saying that, except for the question of *stare decisis*, it has already been announced by the Court that the corpus of personal property is entitled to the same protection, to be taxed only by apportionment, as the body of real estate. In this I am aided at the outset by the very frank and candid admission of the Attorney General, who says that he thinks that it necessarily and logically must be so. Let us see, for we proceed now from the known to the unknown, from the certain to the uncertain. Let us see what your Honors have said on the subject of the protection to property intended to be guaranteed by this constitutional provision, without regard to whether it be real or personal.

I read from page 20 of the printed opinion:

"The States were about, for all national purposes embraced in the Constitution, to become one, united under the same sovereign authority, and governed by the same laws. But as they still retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the general government or restrained by the Constitution, *they were careful to see to it that taxation and representation should go together, so that the sovereignty reserved should not be impaired*, and that when Congress, and especially the House of Representatives, where it was specifically provided that all revenue bills must originate, *voted a tax upon property*, it should be with the consciousness, and under the responsibility, *that in so doing the tax so voted would proportionately fall upon the immediate constituents of those who imposed it*."

And again, and more explicitly still:

"*So when the wealthier States as between themselves and their less-favored associates, and all as between themselves and those who were to come, gave up for the common good the great sources of revenue derived through commerce, they did so in reliance on the protection afforded by restrictions on the grant of power. Thus, in the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed.*"

And once more, at page 22:

"Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

Nevertheless, it may be admitted that, although this definition of direct taxes is *prima facie* correct, and to be applied in the consideration of the question before us, yet that the Constitution *may bear* a different meaning, and that such different meaning must be recognized."

"But in arriving at any conclusion upon this point, we are at liberty to refer to the historical circumstances attending the framing and adoption of the Constitution as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other."

"We inquire, therefore, what, at the time the Constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include?"

Having set out with the proposition that, according to the natural meaning, the *prima facie* meaning of the words, "direct taxes," as used in the Constitution, were taxes upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, the payment of which cannot be avoided, the Court went on afterwards to inquire whether there was a different meaning intended by the framers, and, looking into all historical sources of information within its reach, it arrived at the deliberate conclusion that no other meaning could be imputed to them. And now, again, as to the result of the deliberations of the Court on that very subject, as stated at page 43 of the opinion:

"From the foregoing it is apparent: 1. That the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it. 2. *That, under the State systems of taxation, all taxes on real estate or personal property, or the rents or income thereof, were regarded as direct taxes.* 3. That the rules of apportionment and of uniformity were adopted in view of that distinction and those systems."

There is no doubt about these expressions. Nothing could be more explicit. They seem to cover not only real property and the income

thereof, but also—and quite as explicitly, but for the vexed question of *stare decisis*, of which I shall say by-and-by as much as time permits—the whole of personal property, and in like manner the income of personal property.

However the vote of individual judges may be affected by what is supposed to have been decided by the Court in former cases, these extracts from the opinion leave no room for doubt that this Court, by the concurring voice of two-thirds of the whole number of judges, has pronounced its opinion that a tax upon the capital of personal estate, held for the purposes of income, or ordinarily yielding income, is a direct tax, in the nature of things, according to the *prima facie* meaning of the language used in the Constitution, and within the understanding and the true intent and meaning of those who framed and of those who adopted the Constitution.

Nor do I see any reason to doubt that the opinion, but for the question of *stare decisis*, goes to this same length in respect to the income from personal property. If the object now were, apart from the authority of this decision, so recently rendered, to find out as *res integra*, on principle and reason, what taxes, by their nature, character and essence, are direct, and that were the sole question, we should have to argue all over again the identity in their nature and essence, *as to directness*, of taxes on personalty with those on realty. But to begin with, duties, excises and imposts are all shut out. Nothing that is an excise, nothing that is an impost, nothing that is a duty, properly so-called, can be a direct tax. I submit that those terms as applied to such things as consumable commodities are easily understood, and were easily understood before the very learned references to historical sources contained in the collections that have been offered here in such volume. What we should have to do would be to find something that all could agree on as a typical example of a direct tax. Having that, we should have something known, something certain, from which we could with safety and certainty proceed by comparison and classification to measure everything else that was offered or suggested as a direct tax. This has been found, by the unanimous consent of all men, in the tax upon the body of real estate. No thanks are due to anybody for making the concession, whether it was Paterson or Hamilton or anybody else, because it was inevitable, because if they did not say *that* there was nothing that they could say. If they did not admit that a tax on real estate was a direct tax, they would be left in the position of claiming that the words

"direct taxes" and the words "other direct tax," after the words "no capitation," had no meaning whatever. Nothing short of that concession could satisfy the words "no capitation or other direct tax." The uniform course of the Government, from the first direct tax law of 1798 until now, has joined in that concession and followed upon that understanding. All the Direct Tax acts have taxed, not naked land, but all improved land, of whatever nature, beginning, as your Honors observed yesterday, with that which was recommended by Oliver Wolcott, the second Secretary of the Treasury. After going through the range of subjects upon which the direct tax might freely operate, he advised that it should be made to operate upon lands and houses and slaves. And Congress adopted his suggestion, but inverted the order, and put it first upon houses, next upon slaves, and last of all, and only if there was not enough so raised, on land.

Now, this typical example is forever settled. There can be no question about it. It indicates the kind of tax which in its nature and essence is intended and understood by the Constitution as a direct tax. We have had discussions here, there have been discussions elsewhere, on the question of the tax on personal property, and nobody in this argument has suggested that there is or can be any possible difference between a tax upon real estate and a tax upon the corpus of personal estate, in its nature and essence, as regards the question of directness. I believe that the books and the debates and the reports will be searched in vain for any suggestion of any possible difference, because no difference in the matter of directness can possibly be pointed out. I speak in reference to a general tax on the body of real estate and a general tax on the body of personalty, levied upon the owners solely by virtue of their ownership, which tax is by no possibility an excise or a duty or an impost. Whoever heard of such a tax being called an excise, duty or impost, like a tax upon the distiller for his earnings, or a tax on salt, or on carriages, or on gold watches, imposed for the right or privilege of using them?

The State of New York gives us a good illustration of a tax upon real estate and personal estate, whether it is a direct tax or not, whether by any possibility it can be called an excise, duty or impost. What do they do with us there? Every year they send to each one of us and say, "You own so much real estate of so much value; we want two per cent. of that in money." By the same breath they come with another notice, and they say, "You owned on a certain day in January last so much personal property, and we tax you two per cent. upon that."

Mr. Justice Harlan: Mr. Choate, do you mean by a general tax on the body of personal property to include all personal property of every kind?

Mr. Choate: Not all; because I admit the right of exemption. I admit the right of selection.

Mr. Justice Harlan: Apart from exemption?

Mr. Choate: But I do not admit, and nobody can ever bring me to concede or believe that a specific duty, as a duty on a carriage or a duty on a still, for the use of the carriage or for the use of the still, can be confounded with an *assessment* of any kind, of whatever dimensions, upon that carriage or still included with other objects of personal property, on the mere ground of ownership.

Now, in one respect, if your Honors please—

Mr. Justice Harlan: I do not think I conveyed my idea exactly. You speak of a general tax on the personal property of the country or a general assessment on the personal property of the country?

Mr. Choate: Yes.

Mr. Justice Harlan: Now, does a tax law which reaches only a part of the personalty of the country come under that description?

Mr. Choate: I think it does. I am very glad your Honor suggested that question to me, because the same thing was suggested in one of the briefs filed, and I might have overlooked it. We have in the City of New York an immense population, and the Government, State and City, exercises a reasonable power of exemption. Now, suppose they should make a levy generally upon the personal property of the citizens except the inhabitants of tenement houses, a million, if you please, in number, almost half of the whole population. I should call that a tax by general assessment, notwithstanding that exception or exemption.

I was proceeding to say that as to personal property the distinction, if there is a distinction between that and real property, is rather in favor, and strongly in favor, of regarding personal property as the subject of a direct tax, because the two cardinal tests suggested by the Court for determining whether a tax is direct or not, according to the natural use and meaning of language, or the *prima facie* meaning of the words of the Constitution, or the meaning now finally imputed to those words by the decision already made, do more exactly and with perfect precision apply to such a tax on personal property. What are those two tests? Your Honors say, either a tax that cannot be shifted, or a tax that cannot be avoided. How do we stand as to personal property on that? When the City of New York sends to

me for my tax, for so many hundred dollars for my personal property, and I pay it, how in Heaven's name can I shift that upon anybody? How can any tax imposed generally by assessment upon personal property be shifted upon anybody? There is an equally absolute impossibility of avoiding the payment. That is the other test laid down by your Honors. How can I avoid it? I can burn up my bonds; I can throw away my furniture and horses and carriages; I can, if you please, refuse to receive any income from anything, but can I avoid the tax by anything short of death or bankruptcy? It is not possible. There may, according to some ways of thinking or imagining, be some mode of shifting taxes levied on real estate. That is a subject for political economists, with whom I have no relations, and may never have. But that the tax on personal property, whether it be upon the principal or upon the income, cannot be avoided, I submit to your Honors is an absolute proposition which nobody can deny or question.

Mr. Chief Justice: Legal compulsion.

Mr. Choate: Legal compulsion. I proceed and take that hint from the learned Chief Justice. There is a legal compulsion about any general tax upon personal property. Thousands of millions of dollars of personal property in this country are owned by whom? By trustees. For whom? For women and for children. Other great quantities are owned by infants in their own right and by other classes not acting *sui juris*, such as for instance lunatics. Can they avoid it? Can the infant avoid receiving his income? Can the lunatic avoid receiving his income? Can the trustee avoid receiving his income? If the trustee does, he commits an offence which, in some States, is a State's prison offence. No, if your Honors go upon the cardinal principles on which you have held that a direct tax must be tested and determined, you will not find any possible loophole for escape from payment, from legal compulsion to pay the tax so levied upon personal property. I say it is not possible to imagine any clearer case of a direct tax measured by any known rule, by any test of directness that has ever been asserted either by this Court or by any court or by any writer, than this immediate tax upon personal property under a general assessment—by which I mean, as I think everybody means, a tax imposed upon the owners of personal property generally, with whatever exceptions or exemptions, by virtue of mere ownership, and, of course, excluding excises, duties and imposts imposed for the use of consumable commodities.

But, if the Court please, there is to my mind a still more conclusive argument in support of this proposition, and that is, that every reason, every occasion, every necessity for the protection secured by the Constitution, as now construed by your Honors, in respect to real property, to save it from being taxed except by an apportioned tax, applies with equal force and in every possible respect to personal property. Now, see if that is not so. These reasons are not accidental; they are not arbitrary; they are not purposeless. What are the reasons on which the direct tax by apportionment was constitutionally enacted? We tried before in our argument to show exactly what the reasons were, but now your Honors have saved us all further room for doubt, all need of forensic discussion. I do not understand that there is any dissension or question on the part of any Judge upon this bench as to the reasons and necessity for this protection. I have already read what the Court said from pages 20 and 21 of the printed opinion. Now let me read very brief extracts from pages 54 and 55, and see if every thought and word there stated is not exactly as applicable, exactly as relevant, exactly as necessary, in respect to personal property as to real:

"Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the General Government of the power of directly taxing persons and property within any State through a majority made up from the other States. It is true that the effect of requiring direct taxes to be apportioned among the States in proportion to their population is necessarily that the amount of taxes on the individual taxpayer in a State having the taxable subject matter to a larger extent in proportion to its population than another State has, would be less than in such other State, but"—

The Court goes on to say, and there is always tremendous force in a "but"—

"But this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, AND TO PREVENT AN ATTACK UPON ACCUMULATED PROPERTY BY MERE FORCE OF NUMBERS."

And, again (from page 55):

"But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax indirect when it is essentially direct, the rule of protection

could be frittered away, one of the great landmarks defining the boundary between the Nation and the States of which it is composed, would have disappeared, and with it one of the bulwarks"—

That word so much derided by the learned Attorney General—

"one of the bulwarks of private rights and private property."

Now, what is there in this? What word, what thought, what suggestion in those passages that I have read from the opinion of the Court, which does not apply with equal force or equal necessity to personal property and to real? It is too plain for dispute, if your Honors please, that these propositions apply equally and necessarily to owners of personalty taxed merely because of their ownership. There is the same need of protection as to both, there is the same motive to secure protection as to both, and the same realized protection to both in the provision of the Constitution as now construed. There is no suggestion of exclusion of personalty from protection anywhere in any line of your Honors' opinion. There is no room for doubt, then, I say, as to the corpus of personal property, that a tax upon it can be no other than a direct tax, and I do not believe that any human being has ever really doubted it, and so my learned friend the Attorney General was only indulging in his usual candor and usual frankness when he admitted, as he certainly did in his memorandum filed, and as he certainly did in his oral argument, that your decision as to the tax on real estate necessarily must be extended to the tax on personal estate.

Now, as to the income of personalty, apart from the question of *stare decisis*, which must be studied by itself, let me say briefly that exactly the same arguments control as in the case of rentals, the subject of which has already been exhausted, and it is disposed of by the Court in one or two other passages which I beg leave also to read. I do not, for the moment, speak of the question of former decisions of the Court. I read from pages 51 and 52:

"But is there any distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their ownership? If the Constitution had provided that Congress should not levy any tax upon the real estate of any citizen of any State, could it be contended that Congress could put an annual tax for five or any other number of years upon the rent or income of the real estate? And if, as the Constitution now reads, no unapportioned tax can be imposed upon real estate, can Congress without apportionment nevertheless impose taxes upon such real estate under the guise of an annual tax upon its rents or income?"

"The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment. The prohibition is NOT *against direct taxes on land*, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is *against all direct taxes*—and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. *The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other. We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.*"

Now, I say, *mutatis mutandis*, if this Constitution had said that the Congress should not levy any tax upon a bond in the hands of its owner, and Congress should undertake to levy, under the guise of a tax, on the income of the bond, a part of the annual enjoyment of that bond, would any court hesitate to condemn that? So, taking now the bulk of personal property as the subject of a tax by apportionment only, if Congress, being prohibited from levying anything but an apportioned tax upon that, proceeds to levy an unapportioned tax upon its income, it strikes directly at the property itself.

Mr. Justice Harlan: In a law making a general assessment upon all bonds—leaving out of calculation United States bonds, State bonds, and all other municipal bonds, would you think that to be direct?

Mr. Choate: Unquestionably.

Mr. Justice Harlan: That tax would have to be apportioned?

Mr. Choate: Unquestionably.

Mr. Justice Harlan: Would you make the same statement as to a general law taxing all the banking institutions of the country?

Mr. Choate: No; I think that would be a tax on business, as the Court has over and over again decided it is business. Congress can tax business without apportionment if it pleases. That is simply an excise. It can tax one business, it can tax twenty businesses, it can tax a thousand businesses, it can tax one or all, or all but one kind of business,

Let me give your Honors my favorite illustration of the United States bonds. Take a United States bond, running for thirty years, which Congress has issued and declared shall not be taxed. Congress levies a tax on the income of that bond. It is wearying your Honors' patience, it is trifling with your Honors' time, to argue that no such law as that could be supported.

Mr. Justice Harlan: Would the determination of that question depend upon that clause of the Constitution about direct taxes?

Mr. Choate: No, I am using that for an illustration. I wish I could press home upon the mind of every one of your Honors this proposition which seems to me to be a sound one, namely, that where Congress is prohibited from taxing at all, and proceeds to do so, its action must be restrained. And for the same reason, where it is permitted to tax, but prohibited from taxing except in a particular manner, namely, by an apportioned tax, a deviation from that manner must be restrained.

Now, taxing the income without apportionment would be merely annulling the prohibition as to personal property, if you hold, as I think you must hold, that the protection guaranteed by the Constitution applies to the body of personal property. If your Honors please, what can at present be a more urgent case for the enforcement of the recognized constitutional rule than this compact between States, between the existing States, the seaboard States at the time of the adoption of the Constitution, and all the vast army of new States that were to come in, thirty-one already, sixty-one by and by perhaps? They all came in under the Constitution containing this guaranty securing, as your Honors have held, property against the attack of numbers. They adopted it with their eyes open. They secured upon their admission all the great advantages which the Constitution secures. Shall the repudiation of this fundamental article of the Constitution be now permitted?

Now, suppose you had such a compact as that between individuals and it came before your Honors, and they had agreed that nothing should be taken out of the portion of the property of one of them by the other, that no charge be laid upon it, and an attempt was made to evade the agreement (for it is nothing but an evasion) by putting a charge upon the income upon that property instead of upon the principal, how long would such a private suitor stand unabashed before your Honors? Our proposition is that what cannot be done directly cannot be done indirectly. We cited on the former argument

(and your Honors have embodied them in the opinion of the Court) a long array of cases upon that subject.

The "substance and form argument" my learned friend calls it, and he says it is a "*fetching*" argument. I do not know whether that word has got into the dictionaries outside of Boston, but, whether so or not, it is an argument that has "fetched" this Court every time—every time from *McCulloch v. Maryland* down to this time and to this case. An argument cannot be derided that has stood the test of that ordeal. It is, that what you cannot do directly you cannot do indirectly, that what you cannot do in essence and substance you cannot do by any form or under any name or by any evasion. I will stand by that argument, whatever belittling epithet my learned friend may seek to apply to it. He aimed the adjective at me, but it recoiled and hit the Court.

Now, if the Court please, this being my state of mind on this subject, this argument seeming to me to be absolutely clear, seeming to me also to be approved as a matter of substance and principle by six of the learned Judges of this Court, I proceed to inquire, to look within the veil, which perhaps I have no right to do, and to wonder how two of those who could have united on this question as a matter of principle, to make up the six uniting with regard to the necessary meaning and construction of the Constitution, could still hesitate to enforce it by a decree of the Court; and I am constrained to believe it is only in deference to some former decisions of this Court. So I proceed very briefly to refer to those decisions.

This rule of *stare decisis*—standing by what you have said before, right or wrong—when invoked, as here and now invoked, against the proposition—I speak with due deference to the learned Judges who dissent—so clear to the major part of Judges and of men, necessarily assumes that the former decision was wrong. If the conclusion at which we have now arrived is correct on principle, any decision that may have heretofore been made to the contrary is of course necessarily wrong. The Government then comes in and says, "Oh, well, it is wrong; we are forced to admit that it is wrong, but stand by it, right or wrong."

The case is clear. I assume now that the conclusion at which we have arrived is, without any particle of doubt about it, right and sound, and that it is a conclusion commanded by the Constitution, which is the fundamental law. That Constitution your Honors have sworn to obey as the primal rule upon your consciences. It overrules everything.

Any decision of Congress that comes in conflict with it falls to the ground. Ought not any and every decision of the Court, that is now ascertained, by the best light this Court can bring to bear upon it, to be in conflict with this instrument, also to fall? If not, then you set the judiciary above its concurrent branch of the Government, Congress; you refuse to apply to yourselves the rule which you are bound to apply to the legislative department of the Government.

The reason of the rule is, that it is often better on public grounds, where a question of law has been decided, where it has been repeatedly decided, that the Court should let it remain rather than, by the declaration of another though a better rule, dispense with it. Where is that chiefly applied? Where ought it chiefly to be applied? Where has it always been applied? When the former decision has grown into a rule of property, and vested rights, in a trusting community relying upon the past decision, have become fixed, where rules of conduct have come to be governed by it, as in the making of contracts and other arrangements between man and man and between citizens and corporations, I acknowledge that there may often be cases where less damage to the public, less injury upon the whole, results from letting the bad rule stand. Everybody has acquiesced in the rule, everybody knows it to be the rule, everybody has acquired his property under the rule, and made his contracts under the rule. But what right or reason is there for its application to a constitutional provision respecting the power of government in the matter of taxation? Let the learned Attorney General point to one man in the United States, to one woman, to one child, who will be affected detrimentally, whose rights will be in the least impaired, by a correction of that former error here, if such error has ever been committed, and I do not believe it has been.

The distinction I have adverted to as to the kind of case in which the rule of *stare decisis* must be applied is well stated by Chief Justice Taney in the case of *The Genesee Chief*, 12 Howard, page 458. He there said:

"The case of *The Thomas Jefferson* did not decide any question of property or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it, notwithstanding the opinions we have expressed, for every one would suppose that after the decision of this Court in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case, *stare*

decisis is the safe and established rule of judicial policy and should always be adhered to. For if the law as pronounced by the Court ought not to stand, it is in the power of the Legislature to amend it without impairing rights acquired under it. But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we now give can disturb no rights of property nor interfere with any contracts heretofore made. The rights of property and of parties will be the same by whatever Court the law is administered. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it."

Of course the further consideration, that an error of such a nature in the construction of the Constitution, if perpetuated by further judicial decision, can only be cured by the impracticable resort to an amendment of the Constitution, is another obvious reason for not applying the rule.

There is room for a little confusion, which I think has crept into the briefs of my learned adversaries, between the doctrine of *stare decisis*, stand by your decision, and the doctrine of *res adjudicata*, which expresses the binding force between the parties of a matter already adjudged; and, with all deference, I may suggest that possibly the blending of views in respect to those two entirely distinct subjects may have inadvertently affected the views expressed in the pages of the dissenting opinion, which has been filed in this case. What is the distinction between the two rules? It is wide as the poles. Where two parties contest over a subject-matter, and frame their pleadings, and join their issues before the Court, and the case is tried and judgment is entered one way or the other, what is the rule as between those parties? It is that everything decided and everything that might have been decided—everything that ought or could have been decided—whether the parties thought of it or not, whether the judges thought of it or not, is conclusively fixed as between those parties, and they cannot reopen the question.

Under *res adjudicata*, whatever question was raised by the record, and was so submitted that it ought to have been decided, may be held to have been adjudged as between the parties to that suit so as to conclude them. However the Court may have treated, or omitted to treat it, their remedy, in case of improper omission or decision by the Court, is by appeal; and if they be in a court of last resort, they can only submit to it.

In the application of the rule of *stare decisis*, however, there is no such principle or effect. To give ground for the application of that rule so as to bind other people or the Court in a subsequent action, the prior case to which such effect is ascribed must have been not merely a dictum, but an actual decision upon a point distinctly presented and decided, a decision of which was needful to the determination of the controversy between the parties to that suit.

The question is, whether this exact question has been decided before—consciously, intentionally decided before; and nobody better than Mr. Justice Curtis has expressed that rule. His statement of it is cited and relied upon in your Honors' opinion, and so, I take it, it receives the approval of the Court down to this day. It is at page 44 of the printed opinion:

"Mr. Justice Curtis said: 'If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs.'"

To apply the maxim *stare decisis* to something the Court *did not* decide, nor conceive to be involved would be not merely wrong, but utterly unreasonable.

Mr. Justice Brown: But suppose, Mr. Choate, that Congress has acted for a hundred years upon the faith of decisions rendered by this Court, is not that a proper case for the application of the rule of *stare decisis*?

Mr. Choate: I think not, sir, but I shall show that Congress has not so acted. I am going to take that subject up by and by, if time permits, and show that there is no foundation for any proposition about the action of Congress for a hundred years. Now, let us see. Under Mr. Justice Curtis's rule this Court says that none of the previous decisions "discussed the question whether a tax on the income from personalty is equivalent to a tax on that personalty," but that they were all cases of excise. Now, if Mr. Justice Curtis's rule is right, that ought to be enough; that ought to end this question. I do not propose to discuss all the previous cases—only two of them. I see that time is flying, and I wish to make a very brief suggestion about the *Hylton Case*, and to say a little more about the *Springer Case*, about which your Honors already, I fear, have heard *ad nauseam*.

There is a little room for confusion about the Hylton Case. There was talk there about a tax, whether a tax on a carriage was a tax on the owner, as the owner of the carriage, or a tax on the use of the carriage; and it was determined by the Court to be a tax for the use of the carriage and nothing else; and that is all that was ever decided in that case. But what is the room for confusion? One of the learned judges said that a tax might be both direct and indirect. If he had not been a judge, I should say that was absurd, after the exposition your Honors have given of this constitutional provision. No, we say that a tax cannot be both direct and indirect, but the same thing may be the object of a direct tax, and also the object of an indirect tax.

Let me unfold that a little in regard to that carriage of Hylton's or those 125 carriages of Hylton's. A tax may be laid upon them by way of excise, and it was laid there for the right to use them—that is an excise, an indirect tax. Another tax may be laid upon them as a direct tax. How is that? The man's personal property is taxed with other people's personal property, and those carriages are found among his personal property. Now, if you read what the judges say, the opinion of this, that, and the other judge, and this, that, and the other critic since that time, you will find that confusion creeps in between those two things.

Let me illustrate, if your Honors please, by the familiar illustration of the dog tax. A great many of us for our children pay dog taxes—\$2 a year for the right to keep a dog, for the privilege of permitting him to annoy our neighbors. Well, there are dogs and dogs. Some dogs come to be of immense money value—I had a friend who had a \$10,000 dog. He pays his excise tax, \$2 on the dog, whether it is worth \$10,000 or 10 cents, and the range is wide in the value of dogs. But the assessors come along and they find he has got \$10,000 of railroad bonds and \$10,000 worth of dog, and they lay a direct tax on the dog and the bonds, rightly taxing him for \$20,000 on his personal estate. So, in addition to what I said before about the Hylton Case and all your Honors have said, I say *that* by way of illustration, and it sheds a flood of light upon the discussion and consideration of that case. It shows what Mr. Hamilton meant; it shows what Chief Justice Chase meant afterwards; it shows what Mr. Justice Paterson meant sitting here as he had sat in the convention, when he spoke of personal property being subject to a direct tax by general assessment; and that is all he meant, as distinguishing the

taxation by the direct method, which I have suggested, as a part of the man's valued personal property, and the tax on the use of the particular thing, a specific duty, as an excise. All that they meant by general assessment was simply to distinguish between the tax on the use of the particular thing and the general tax on personalty, including that particular thing.

Our contention is—and the Court has sustained it—that taxes upon real estate and taxes upon personal estate, or taxes upon the holders of such real or personal property, in respect of such property held by them, are direct taxes within the Constitution. So, under the language, so, by the true intent and meaning.

Against this it is alleged that this Court nearly one hundred years ago decided in the *Hylton* Case that a tax on personal property is not a direct tax within the meaning of the Constitution.

And it is said on the other side, in substance, that a carriage is personal property, and that it was decided in that case that a tax could lawfully be imposed upon *Hylton* for his carriage or carriages as an indirect tax without apportionment. Therefore, they say, the law was settled about one hundred years ago that a tax on personal estate is not a direct tax within the Constitution, and that the present case is an attempt to reverse a decision made one hundred years ago, which has been regarded as law ever since. And we find Mr. Whitney speaking or writing of it as the case of a property tax—a tax on *Hylton's* carriage.

When we come to see what the *Hylton* Case actually is, we find that the Court then regarded the tax, as unquestionably this Court would now regard it, and as the theory upon which we present our case treats it—not at all as a tax upon *Hylton* as a property holder or a tax upon his carriage as property, but a special excise tax upon the use of the carriage or the privilege of keeping a carriage. Reference is made in one of the opinions to Adam Smith's statement in relation to the varying practice of imposing the whole intended tax in such cases, either wholly upon the manufacturer at the outset or upon the user *pro rata* year by year. An extract from this opinion is quoted in our brief.

Each one of the judges who assigns reasons for his judgment puts his decision or vote in that case expressly upon this ground of excise tax upon the use, and the further ground that the case does not involve the question whether a general tax upon personal property or upon holders of personal property would be a direct tax.

Chase, J., says he is inclined to think it would not, but does not give a judicial opinion on that point. Paterson, J., apparently thinks it would, or at least might be, but does not decide. Iredell, J., says that, as that question is not involved, it would be improper for the Court to express an opinion upon it. Each one of the three puts his decision expressly upon the ground of its being an excise tax upon the user.

In that case the Court, and Hamilton representing the Government, clearly draw the distinction, which in this case appears to be rather lost sight of by the counsel opposed to us, between a tax imposed in respect of the user of a particular article of property selected as the subject of a special excise tax, and the imposition of a tax upon property holders as such in respect of their property in general.

If there had been a general assessment upon Hylton as a property holder, and in it had been included his carriage assessed at its value as an item of property, together with other items composing his personal property assessed at their respective values, such a tax upon his carriage in common with his other personal estate would have been within the class of direct taxes; and the remarks of Hamilton in his brief and argument, and of the judges in this case and in subsequent cases, including Chief Justice Chase, refer to this distinction between an excise tax upon the use of some particular article selected by the Government for that kind of taxation, and a general tax imposed upon the personal property of an owner, which doubtless might include at its money value the article thus subjected to an excise tax.

There would be no illegality in subjecting the article to the special excise tax upon its user and at the same time allowing it to be embraced with the other items of the owner's property in any general assessment upon him as a property holder.

No one tax can possibly be both direct and indirect within the meaning of the Constitution, as one of the Judges in the Hylton Case very strangely assumes, as that would require the impossibility of an assessment by two measures which are absolutely inconsistent with each other, but there is nothing to prevent the imposition upon a particular item of property of two taxes, one direct and the other indirect.

I had thought of something to say upon the Pacific Insurance Company Case, but let me say only this. Your Honors have said enough in your opinion at page 46 about that case:

"The arguments for the insurance company were elaborate and took a wide range, but the decision rested on narrow ground, and turned

on the distinction between an excise duty and a tax strictly so termed, regarding the former a charge for a privilege, or on the transaction of business, without any necessary reference to the amount of property belonging to those on whom the charge might fall."

It is said now that Mr. Bartlett's brief maintaining very strongly, very ably, very learnedly that a tax upon rentals was a tax upon real estate and therefore a direct tax, was before the Court. It is now suggested that a part of the Pacific Insurance Company's income may have been from real or personal property; but, if your Honors please, no such point was made upon the record, and, if the counsel argued it and the Court took no notice of it in their opinion, it was because they considered it was not in the record and could not be raised by counsel. But what is the proposition that they make in regard to this Pacific Insurance Company Case? That something that the Court did not decide, something that the Court did not consider, something that the Court did not pass on is *stare decisis*—a former decision, a decision that was not made at all.

So I come to the Springer Case, and I come first, as most important, because it has been suggested by one of the learned members of the Court, to the reasoning of the learned Judge who delivered the opinion in that case, Mr. Justice Swayne, to whom we all look back with infinite respect. He argues thus: that the series of direct tax laws from 1798 to 1861, coinciding, if you please, with the suggestions in the opinions of the Court from time to time, became a practical construction of these provisions of the Constitution, measuring the taxing power between direct upon the one side and excises, duties and imposts upon the other. What is the claim? That because Congress in all the acts from 1798 to the act of 1861 has limited the application of the direct tax to real estate, counting slaves as real estate and not including any personal property, it has by some legerdemain enacted to the substantial effect that Congress has no power to embrace personalty in a direct tax.

Now, that is the hundred years' argument founded upon the conduct of the Government. I say, with great respect for the Judge who uttered it and for any one who may seek to stand upon it, that there is not a particle of foundation for the proposition. If Congress had the choice between the two, real and personal estate, it is to be supposed that for reasons of convenience, for reasons of economy, for reasons of greater approximation to equality, it saw fit to levy the tax upon real estate only; and is it to be said that that amounts to

the relinquishment, the renunciation of a right vested in them by the Constitution to lay such a tax upon personal property also? You see, it did not make a particle of difference to the United States, raising the tax, after they had fixed the total sum and apportioned it, how it was raised. It did not make a particle of difference to the individual States themselves. It might make a difference as between landholders and personal property holders among the citizens of the States, upon whom it was being levied. But the only restriction of the Constitution was to apportion it, and they chose, after apportioning it, to levy it upon the real estate. I say that is no renunciation, no disclaimer. If it were a renunciation or a disclaimer, then I say that Congress could not annul or abandon a provision of the Constitution which was provided, not for its benefit, but for the people's benefit. It is impossible, if the Court please, to torture the mere selection of real estate in one direct tax and the omission of personalty therefrom into an abridgment of the right, conferred by the Constitution, to include personalty. If your Honors please, suppose the same argument should be addressed to you—that a capitation tax had become an effete power of government, because Congress has passed four direct tax laws and never once in a hundred years embraced in it a capitation tax—that could not alter the effect of the Constitutional provision. Neither can this failure to resort to personal property in these four direct tax laws amount to a renunciation or a qualification or an annulment of that provision of the Constitution, as it has now been held that it ought to be construed and made applicable to personal property as well as to real.

Take the first direct tax. The fact that Congress had laid a direct tax in 1798, when we thought the French were coming, and had levied it only upon real property, did not estop them in 1812, when we thought the British were coming, from laying a tax upon real and personal property too. Oh, if your Honors please, that argument will not hold water, and no foundation can be laid for a refusal to join in the decree enforcing the principles which have been laid down by this Court based upon any such ground. Suppose that the owners of personal property come forward and say, "We cannot be subject to a direct tax. Congress for a hundred years has given a practical construction to that clause by not taxing personal property." How would you listen to a personal property owner claiming exemption from a direct tax on any such theory as that, and how will you listen to the Government, as between whom and the meanest citizen there is no distinction before this Bench?

Congress, in the successive direct tax acts, having complete discretionary power as to the method and the selection of subjects for taxation, whether real or personal, and having nothing to gain by including personalty, it was quite natural that it should confine the taxation to real-estate, because that is a simpler form of tax, involves less expense and difficulty in its collection, and avoids the exercise of inquisitorial powers necessary for the enforcement of a tax on personalty, which is always distasteful to the people. It is fair to presume that such were the motives which induced the choice, but at any rate it is clear that Congress made the choice, and of free will, and did not forbear to include personalty upon any theory that it had not the constitutional power to include it.

I submit that the whole idea that there has been, because of these direct tax laws of 1798, 1813 and 1815, any practical construction of the Constitutional provisions in question adverse to the power to impose a direct tax upon personalty, is utterly baseless.

Certainly the opinion in the Springer Case makes no allusion to distinctions under the Constitution between income from property, real or personal, and income from business.

The opinion of the Court shows that Mr. Springer made return of some income from bonds of the United States. I have been curious to look into the record to see how much he had. Sometimes counsel waive a point by not taking it. Sometimes it is not big enough for them to take and they throw it away. So I looked to see how much income from personal property he had and how much his total income was, in order to see if the point as to personal property was really in the case. He had \$54,000 from his professional earnings as a lawyer, and I am sorry to say (as is the case with too many of us lawyers) only \$161 from interest upon Government bonds or any other source. That is less than one-third of one per cent. of his whole income. Do your Honors wonder that even Mr. Springer, arguing his own case, did not think it was a point worth making, but did see fit to waive it by omitting it? That is the way you waive a point. The question is whether it was necessary, on the record, for the Court to decide whether the tax on the interest from those bonds (\$3,000 of bonds he had, I believe) was a direct tax and required to be apportioned, and was void because not apportioned. We must therefore search the record to see what exceptions he took.

The Chief Justice: That is an action of ejectment.

Mr. Choate: An action of ejectment.

The Chief Justice: The Court could not set the deed aside in an action of ejectment.

Mr. Choate: I accept that suggestion. I was going to enforce that proposition. Now that your Honor has spoken, it does not need enforcement. Then he took his exceptions, so as to bring the case properly before the Court above for decision; and to those we must look to see whether he raised this particular question. Your Honors have laid down some rules about that, to which I wish particularly to call attention. In the case of *Catts v. Phalen*, in 2 Howard, the Court say:

"A party cannot assign for error the refusal of an instruction to which he has not a right to the full extent as stated, and in its precise terms; the Court is not bound to give a modified instruction varying from the one prayed."

And, again—and this is an important opinion from a very recent case, in which all of your Honors united—in the case of *Hickory v. U. S.*, 151 U. S. 316, the Court say:

"The rule in relation to exceptions to instructions is that the matter excepted to shall be so brought to the attention of the Court before the retirement of the jury as to enable the judge to correct error, if there be any, in his instructions to them, and this is also requisite in order that the appellate tribunal may pass upon the precise question raised without being compelled to search the record to ascertain it."

I have examined the exceptions in the case of *Springer*, as they appear upon the bound records, and I will show to your Honors that within that rule, the established, the universal, the binding rule upon the subject, there was no possibility of the Court's deciding in that case the question to which I refer. Here we have the bill of exceptions, and here we have his return, and it is a very interesting return—\$54,504 as a lawyer, \$161 as a holder of bonds. Then there are various sums levied upon him, from \$1 to \$100, *as the owner of boats and watches and carriages and gigs and buggies and so on.*

Let us see what the exception was. I pass by the exception about the admission of the deed, from which your Honor, the Chief Justice, has so generously relieved me, and I come to his prayers for instructions, and there is only one pertinent to this particular point.

"The defendant, by his counsel, then and there prayed the Court to give to the jury the following instructions, to wit:"

The first one is the only one which relates to the subject.

"1. That the tax on the income, gains and profits of the defendant, assessed upon him, as appears by the evidence in this case, was a di-



*Mr. Choate in 1894
At the age of 62*

rect tax within the meaning of the Constitution of the United States, and that, in order to constitute such tax a valid claim upon the defendant, it should be apportioned among the several States the same as representatives in Congress are."

Now, I say that that exception, within that rule, was too broad, that he could not and did not, even before the Judge at Circuit, by that exception, raise the question whether, *as to his \$161 of income from bonds*, the tax was a direct tax, much less did it point to any such question before the appellate tribunal, so as to either enable or require this Court to pass on that question. This Court had no right to decide such a question upon the exception taken, and he had no right to ask them to decide it. He waived his point, if he had one, but Mr. Springer in waiving the point he had or might have had, cannot give away all the rights of all the people of America in other hearings before this Court.

I submit that a careful examination of the case will show your Honors that under no recognized rule of construction of *stare decisis* can that decision be invoked to stand in the way of what your Honors have already, by a large majority, concluded to be the right judgment, the right principle to declare and decree in this case, namely, that a tax upon personal property, or upon the income thereof, is just as clearly and for the same reasons a direct tax as a tax upon real estate or upon rents.

It is indisputable that the opinion in the Springer Case, although it announces the conclusion, that the only direct taxes within the meaning of the Constitution are capitation taxes and taxes on real estate, and that the tax of which Springer complains was within the category of an excise or duty, does not contain any discussion of the inherent distinction under the constitutional provision in question between taxes on property or the income of property, and taxes on the earnings or profits of business or other sources of income, which are ranked as excise taxes or duties. And the brief and argument on file in that case in this Court discusses no such distinction—the very distinction which has formed the basis of our successful contention here as to the true construction of these clauses of the Constitution, if treated as an original question upon its merits. We cannot express the point more clearly than in the language in which we find it stated in the opinion of the Court at page 49:

"The defendant [Springer] contended that the deed was void because the tax was a direct tax not levied in accordance with the Constitu-

tion. Unless the tax were wholly invalid the defence failed. The statement of the case in the report shows that Springer returned a certain amount as his net income for the particular year, but does not give the details of what his income gains and profits consisted in. The original record discloses that the income was not derived in any degree from real estate, but was in part professional as attorney at law and the rest interest on United States bonds. It would seem probable that the Court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action."

But in addition to this it appears, as we have shown by the record, that the point as to any distinction between income from property and income from business, was not raised in the Court below in such manner as to attract the attention of that Court, nor brought up here by any exception which would have justified or enabled this Court to pass upon the point.

Springer's request to charge was, that the whole tax was a direct tax necessary to be apportioned. As to a large part of it, namely 99 $\frac{2}{3}$ per cent. of it—the tax on professional income—this was not at all so. It was an excise tax not apportionable. To have given the charge as requested, the Court would have had to charge a proposition which was not law, but the contrary. And this Court, as appears by the record, could not reverse the judgment, on Springer's exception actually taken, without laying down a proposition that was not law.

Thus it appears that the point involved in the conclusion to which six Justices of this Court have come, after full consideration of this case upon its merits, namely, as to the nature of a tax upon personal estate or the income thereof as distinguished from an excise tax on earnings, was not raised, argued, considered or decided in the Springer Case. No doctrine of *stare decisis* requires this Court to decline or forbear to give effect by decree to the opinion which it has so carefully and decisively formed upon this highly important constitutional question on consideration of its intrinsic merits, and to leave that to stand as the true construction of the Constitution, which it perceives and declares to be really a false construction, especially when it is clear that there was no conscious exercise of the judicial mind upon the point here involved.

I shall not dwell further upon the point of *stare decisis*, but, if the Court please, if any such point could by any ingenuity be tortured out of the record, in the Springer Case, to stand in the way of giving effect by decree to the conclusion at which the Court has arrived on this

great constitutional question considered on its merits, it should be squarely overruled rather than let the erroneous construction or the provision in question work the injustice and wrong which it would work. The considerations for this claim on our part may be briefly stated: First, the tremendous importance of the case, involving not merely two per cent. on incomes over four thousand dollars for five years, but the utter destruction of the barriers which, as the Court has found, the Constitution has provided for the protection of property against the assault of numbers. The Government's claim involves a breach of the contract by which the Constitution was formed, and into which the new States have come who now propose to hold on to all the consideration which these seaboard States gave up, and yet to repudiate the protective provision, the solemn and important character of which is so ably set forth in the opinion of the Court. The stand of the Court for the preservation of these great constitutional rights must be made now or never; no false step now taken can ever be retraced. The present demand for the annihilation of the constitutional guaranty, once yielded to, can never be recalled, and this Court will be utterly powerless hereafter to throw the shelter of the Constitution around property rights.

Then the object of the provision, which is of such vast importance—not only the reason of the provision, but the object of the provision—to save the Government of the United States, and the people of the United States, from falling into those countless and incalculable evils that will ensue from letting three-quarters of the people vote the taxes for one-quarter to pay, the three-quarters then to have the spending of them for the whole—must be constantly borne in mind. If it was important to guard against this evil at the foundation of the Government, it is infinitely more important now. With every decade these inequalities increase. If ever there was a reason, if ever an object, for the enforcement of that constitutional provision, the progress of history and events has shown that to-day it is infinitely more important to enforce it than it was in 1787.

Not one man or woman will be injured by overruling this supposed decision in the Springer Case. But your Honors do not need to overrule it. I challenge anybody to find in either of the adjudged cases in this Court any reason, within the meaning of the rule upon which I have stood, for regarding it as a decision in any respect upon the question now raised, namely, as to the right of the owners of personal property to insist that they shall be taxed by Congress upon that property or its income only by an apportioned tax.

I had a note of observations to make upon the subject that is incorporated in the memorandum of the Attorney General—the consideration that the money would have to be paid back which represented the income on real and personal estate paid under former income tax laws. I submit that with such consequences your Honors have nothing to do. It is not an argument to be addressed to the Court on a question of law, or of the construction of a law or the construction of the Constitution. It does not pretend to be a legal argument. A moral argument he calls it. I call it an immoral argument. The idea of the Attorney General standing here and trying to save the conscience of a Nation for having illegally exacted in the past certain sums of money, by urging your Honors to go on and let the Government collect a lot more money illegally on the same ground. What kind of ethics, what kind of political conscience is embodied in such a claim or such an argument?

But I would say to your Honors that you need not fear that it will be demanded back. The men who paid it, paid it not under compulsion of law. They paid it with a will, because they had a great, eternal duty and object to accomplish by it; and if any men who paid it, or the descendants of any men who paid it, ever come forward to reclaim it, they will be the subject of general shame and general contempt. There is nothing in the history of the Government to encourage the fear that, if they all came forward and claimed it together, the Government would be moved to repay one dollar of it. What has the Government always held in regard to duties not paid under protest? That they were voluntarily paid, and that it was its duty to avail itself of the most strict and technical defects, even in a protest that was honestly intended to save the rights of the party whose money it had received.

So, if the Court please, let me dismiss that point with the rest of their argument. I say we have demonstrated that what your Honors have held as to real estate and the income of real estate is true as to personal estate and the income of personalty, and that it is impossible to make any distinction between them. The same principles that your Honors have applied to the one do, as your Honors have said, apply to the other, and there is nothing in the way, in the shape of any decided case, to prevent this Court so holding now.

There are two other subjects, if the Court please—the question of uniformity, and the question whether the whole tax is not invalidated by the inroad made upon it by your Honors' decision already made, and that which we believe will necessarily be made in regard to the income of personal property. I again invoke the attention of your

Honors to what I said on the former argument, very elaborately and painfully, on the question of the principle of uniformity, going to show that territorial uniformity which many people talk about is a phrase without meaning;—that the prescription of the rule for measuring “duties, imposts and excises” was the first attempt of the Government to administer a power which they had then for the first time derived, not through the States, not as between the States, but as between the Government and the people, by means of which the Government of the United States was to reach out and lay its powerful hand upon the citizens upon whom its lawful demand for taxes was imposed. What was meant was, not uniformity in mere form or method, but, proceeding upon the principle of the absolute equality of all men before the law, the provision intended an approximate equality, and that every excise, every duty, every impost should be uniform as between man and man, and between all the subjects and the Government. I cannot detain the Court by repeating those arguments, but I beg that it will again consider the reasons which I adduced on this view, on pages 42 to 60 of my printed argument on the former hearing. And especially do I invoke attention again to the illustration I used, which I have never heard answered—that from the beginning of the Government, from the beginning of enactments under the Constitution, until now, there has never been any pretense that in levying an excise, or an impost on imported merchandise, Congress could claim to lay one rate of duty for one man and another rate of duty for another man, because of his ownership; and that is really the limit of uniformity for which we contend as to each and every duty, impost and excise.

I wish to call your Honors’ attention, for one or two moments, for time will not permit me to make more extended reference—

The Chief Justice: You need not feel troubled about time.

Mr. Choate: I am unwilling to exhaust your Honors’ patience by going beyond the time, which will end at 2 o’clock. I shall, therefore, fall back upon our former argument upon this head and upon what Mr. Guthrie has so very forcibly presented in his brief and in his oral argument. But I should like to touch upon one or two of the exemptions in the first place, and especially the exemption of mutual insurance companies.

I understand from the announcement of the Court that some of your Honors are hesitating about declaring that the exemption of mutual insurance companies is a breach of uniformity, and, therefore that the Income Tax sections of the act are void. The concrete argument will best enforce our claims on that subject. I shall take a single in-

stance of a mutual insurance company, named from the mere nature of its business, in respect to which the record shows that, by the methods of business in which it has been engaged for the last twenty-five or thirty years, it has, beginning with nothing, accumulated \$204,000,000 invested in every possible form of property and securities, all exempt by the act. Your Honors are called upon to say whether the exemption of that company is not beyond all bounds of reason—is not arbitrary. If it is, the whole law must fall. They talk as if a mutual insurance company were a charitable organization, and I dare say, in the infancy of the institution, there was an idea of promoting thrift among a few men who got together and formed it, to enable them to make savings in the event of their untimely death. But do your Honors know what you are doing when you are thinking of excepting such a mutual insurance company as that referred to—and that is a sample of all of them? *Ab uno disce omnes.*

What is a mutual insurance company as thus personified? It goes under the reputable name of a moneyed corporation. If your Honors please, it is a moneyed monster. It lives upon money, it swallows money, it digests money, and it breeds money. It lays golden eggs by the basketful every day, and then it coils a few lengths of its person about them for the purpose of hatching them, and so carries on the process of breeding *ad infinitum*. This monster has as many arms, through its agents and agencies, as there are States in the Union, and those arms are raking in, raking in, raking in money all the time. It is not limited to one nation or to one continent or to one hemisphere. Those arms reach beyond the sea, and the company is raking in British gold and French gold and German gold and every other Nation's gold from across the ocean. What does it get it for? To make more money with, to invest. And how shall it invest the money? It cannot invest it in its own strong box. How does it invest the money? It creates trust companies, it owns trust companies—more than one. It creates banks—more than one. It owns the stock of the trust companies and banks, and through them it does all manner of business in which moneyed institutions engage. It builds railroads; it is the medium of the emission of great issues of railroad bonds upon which the railroads are built. More than that, it is the chief factor in the reorganization of railroads—that most profitable industry of modern civilization. It is a principal factor in the great financial syndicates that are formed. I do not know whether the term “syndicate” has been judicially defined by this Court, but, as a classification, the mutual insurance company embraces them all. It floats Government loans. There is probably not an issue of

Government bonds, on which a commission is to be made, that this same mutual insurance company does not come in for its share. Through its arms and organizations, it transacts almost every kind of business that will pay. It loans money on mortgages, and, upon foreclosure, it becomes the owner of the land mortgaged. I can point you to block after block of immensely valuable houses covering all the line between street and avenue, one block, two blocks, three blocks, representing money thus accumulated, thus made, thus derived, and thus invested, and all exempt by this law.

Mr. Justice Shiras: This part of the argument proceeds, of course, upon the existence of the power. Now, is Congress shut off from exercising that power in full in any one statute? Suppose, in addition to the statute now under discussion, there had been another, making these exempted companies the subject of taxation; would both those acts of Congress, in your view, be void because each included the subject-matter enclosed in the other?

Mr. Choate: I have already stated, if your Honors please, that the Government can specifically lay excise duties upon the business of all kinds of corporations doing the same business. That is what they have done here. They have undertaken here to lay a tax upon the income derived from insurance business, but have *exempted* all *mutual* insurance companies, *although doing exactly the same business as the stock companies which are not exempt*. Whether this defect in this law might have been cured by another law, passed at the same time, or shortly after, taxing in like manner with the rest all the companies of whose exemption we complain, is a question that I do not feel called upon to answer. But the form and scheme of this law shows that there was no such purpose. Besides, such an Act as Mr. Justice Shiras speaks of would be simply a *repeal*, to that extent, of what we claim to be unconstitutional parts of this. If you decide that this Act is unconstitutional and void, because of these exemptions alone, perhaps Congress might try to cure it, by repealing these exemptions, but this Court cannot do that.

But I have not got through my enumeration of all that these companies do. They not only own trust companies and banks and railroads and telegraph lines, but they control Legislatures; they control Congress. The Attorney General has told you that they procured their own exemption from this very law, after its authors had brought it in, proposing to tax them as they had always been taxed before.

I was recognizing what is suggested by Mr. Justice Shiras, that Congress can pass a law to-day levying a tax upon the earnings of

insurance companies and another law as to the earnings of express companies, just as they could upon the earnings of distillers, the earnings of blacksmiths, the earnings of lawyers, or the earnings of doctors. But when Congress undertakes to pass a general income tax law, levying a tax upon all kinds and conditions of men and all corporations, *it cannot exempt a particular class of insurance corporations, especially when it leaves the income tax on all the other corporations doing the same business of insurance*, except that in the one case it is done for the benefit of stockholders and in the other case for the benefit of the policy holders.

Now, if the Court please, there are one or two other points, under the question of uniformity, which I think deserve to be pressed still more strongly home upon the attention of the Court than they have been heretofore. That is, first and fundamentally, the exemption of every man having an income of less than \$4,000. Whom does that exempt? What portion of the income of the country does that exempt? Nobody will deny that it exempts a vast majority of the incomes of the country. On what doctrine can an exemption be placed? It can be placed upon the doctrine of poverty or the prevention of poverty. It can be placed upon the doctrine of promoting religion or education, if you please, although, as I said before, I think it very doubtful if, in such a tax, Congress can make the men of Nebraska and Dakota, who have not yet any college of their own, pay for the endowment of Harvard, Yale and Columbia. But who are exempted by this \$4,000? Your Honors can take judicial notice of some things, I suppose. Four thousand dollars is affluence over $999/1000$ of the surface of the United States. It represents an investment in Four Per Cents. of \$133,000. It represents three times the average annual earnings of professional men throughout the United States. It represents more than double the best master mechanic's wages throughout the United States. It exempts tradesmen, for tradesmen—shall I say nine-tenths, ninety-nine one-hundredths of the tradesmen throughout the United States—get a net income less than \$4,000. Now, is that arbitrary, or is it in pursuance of a recognized lawful public policy, or is it in pursuance of a legislative discretion? I say it is certainly not the latter. When you come to see the object for which it was passed, the object, namely, of concentrating the obligation to pay the tax upon the people of a few States, where the only, or almost the only, incomes exceeding \$4,000 can be found, and of exempting the people represented in the other three-quarters of the States, or four-fifths of the States, who voted it,

and who will pay no tax at all, you must see that it was purely arbitrary, as it was avowed to be by its creators.

There is another matter. Was it an arbitrary distinction, or was it an arbitrary blow at corporations, when Congress decided that a man who drew his income of \$4,000 from a corporation should pay a tax upon every dollar of it, and the man who got \$4,000 without the intervention of a corporation should be exempt? I submit to your Honors that there is nothing that is not arbitrary in that rule. It strikes home to almost every family in the land, especially those families who have lost their breadwinners, who have lost their heads, and the strong, stalwart arms of father, husband, or brother. The authors of the bill knew perfectly well that it did so. Take the great corporations of this land. Who owns their stock? The stock of each is distributed among ten thousand holders, and the widow, the orphan, the dependent, the helpless dependent, has a little in a few companies, never aggregating four thousand in all. Yet that poor widow, that poor child, has to pay on every dollar, whereas his neighbor, who earns the same amount by shopkeeping or in other industry, is absolutely exempt, until his income amounts to a sum greater than ninety-nine one-hundredths ever dream of getting in the year.

Then, once more, the distinction made between a corporation and an individual is a grossly arbitrary distinction. I do not know whether your Honors have taken the trouble to look at the debates in Congress, to see what the Senators said when they resisted the refusal to allow a corporation, because it was a corporation, the exemption of \$4,000. Senator Platt said that in the State of Connecticut alone there were 950 corporations—I think he said—whose incomes did not aggregate more than that sum, or which were, at any rate, mere trading corporations of small capital and income. They are made up of the hard-fisted, hard-working men and women of the country, who choose, for the purposes of convenience, to do their business under a corporate organization, and are thereby condemned by this act to forfeit the exemption from the tax, and so punished, for making use of the corporate method, to the full extent of the tax.

You may say what you will about saving the expenses of administration. I am not talking about great companies that employ superintendents. I am talking about those countless corporations, encouraged by the public policy of every State throughout the land, 950 in Connecticut, thousands of them in the State of New York, tens of thousands of them scattered all over the country, earning in all less than four thousand dollars a year, or not much more than that, doing an honest

trading business, encouraged by the law, and permitted by the law, to do it in that form. To them Congress says, "We are levying a general income tax on all incomes over \$4,000, but we except you from that exemption, although you have no other source or means of existence, although the men or women who constitute you have no other means of livelihood." So much, if your Honors please, for the subject of uniformity—except that I desire still to emphasize one point already presented in my former argument as to the exemption of \$4,000.

The representatives of the Government expressly admit that, even considered as an excise, this income tax violates the Constitutional provision requiring uniformity—if considered by itself as an excise—but they claim that such violation of the Constitutional rule is justifiable, because the object of the act is to equalize a supposed lack of uniformity resulting among the people of the United States out of certain other indirect taxes, namely, the duties imposed by the Tariff Act, into the midst of which these Income Tax provisions are incorporated. They say that the general effect of the tariff provisions is to impose undue burdens upon the great mass of the people who consume the goods imported, and that by the invention of the exemption of four thousand dollars which, as they say throws, and is intended to throw, the whole burden of the Income Tax upon a selected class of rich men, one inequality or breach of uniformity is cured by a contrary one. Thus, on the original brief of the Government, at page 83, it is said:

"It is, of course, not claimed that this Income Tax standing alone has the quality of equal incidence. It omits all whose incomes are four thousand dollars or less. It must, however, be regarded not as standing alone, but as a part of our general system of taxation. So regarded, it is an approximation to equality of taxation."

And again on page 84:

"A second reason for the Income Tax was the desire to equalize in some degree the burden of taxation. The prior taxes, customs and internal revenue alike, being laid on consumption, they bore more heavily on the poor, and what is sometimes called the lower middle classes of the population."

And again at page 86:

"If the Income Tax were the only tax and there was no tariff taxation to be countervailed, doubtless one thousand dollars would be too high, and perhaps six hundred dollars would be the fairest limit, the smaller incomes being exempt on the principle of householders' exemption from execution!"

I desire, with all the earnestness which I can command, to press again upon the attention of the Court the proposition that, under our constitution, no such doctrine of equivalents can possibly be put in operation by Congress. It may be entirely practicable in Great Britain, where Parliament is of unlimited power, or in any despotic Government, but, whenever a tax is laid by Congress under our Constitution, it must be made to conform to one or the other of the measures prescribed by the provisions which we have been considering. If it be a direct tax, it must be apportioned among the States according to numbers; if it be an excise, duty or impost, it must be levied according to the rule of uniformity throughout the United States, that is, between all the people of the United States, and each such duty, each excise, each impost must be uniform in itself, without regard to any other duty, impost or excise, and, if not uniform, it is necessarily unconstitutional and void. So that the frank admissions of the representatives of the Government under this head do fully substantiate our argument that the Income Tax, if regarded as an excise, is necessarily void for the want of uniformity.

Now, I have a few minutes more to speak upon the other question left open by the Court, namely—let me state it exactly as it is—whether the inroads made upon the law by the decision already made, and that which we hope will be made, or even without the latter, constitute an invalidation of the whole act. I think, if the Court please, that there is no doubt about what the question really is, which is intended to be thus submitted. Does it follow, because the act has been left in its present mangled and mutilated condition, that it should be buried? I submit that it does necessarily follow that that question must be answered in the affirmative. This mangled and mutilated corpse has too long remained unburied. In its present condition, it shocks the sensibilities of the entire people of the United States.

What is the rule? It has been stated in many ways, in many cases, but I prefer, as I always do prefer, when I can get the aid of such a jurist as Chief-Justice Shaw, to bring him to my support. And it has never been stated in any better or clearer way than by that great jurist in the case of *Warren v. Charlestown*, 2 Gray, 84. He there said that although parts of an act are unconstitutional—

“other parts of the same act may not be obnoxious to the same objection, and, therefore, have the full force of law, in the same manner as if these several enactments had been made by different statutes. But this must be taken with this limitation, that the parts so held respectively constitutional and unconstitutional must be wholly independent of each

other. *But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."*

It is also stated by this Court *that unless the Court can see that it was the intention of Congress to pass the law as it is left, shorn of the part found to be unconstitutional, the whole must fall.* What has happened here? What is the subject of exemption, not intended by Congress, not a part of their general scheme and plan, which, by the decision of your Honors already made, has fallen out? What is the body of that real property? I understand that the census reports show that it exceeds \$40,000,000,000. The income of that sum, whether at four per cent., or five per cent., or six per cent., is an enormous sum, and the two per cent. upon that income is to be counted by many millions. What was the declaration made here on the former argument? What was the declaration made in Congress at the time of the passage of this law? What was the estimate made by the Treasury Department as to what the tax would yield, levied upon all these incomes? From thirty to fifty million dollars. The returns have come in, revised under your Honors' ruling, omitting rents. What do they amount to? That is locked up in the bosom of my learned friend, the Attorney General. Your Honors can extract it; I cannot. I venture to say that half of the income is gone; that not one-half of what Congress intended will be yielded by it, because of what your Honors have already decided, and when your Honors come to gratify our prayer by striking out also the income from personal property, how much will there be left of it? What will there be left of it? It has somehow leaked out that the Government does not now estimate the probable yield to exceed ten millions.

This was a general scheme of income tax, to bear upon the whole people, having over \$4,000 per year, who could not procure their exemptions in due season at the hands of the committees of Congress. What was the object of it? It was to strike at the accumulated wealth of the old seaboard States. If your Honors please, in the debates of Congress the name of one man, conspicuous above all the rest, was said to be the object struck at, because he lived abroad, because he owned acres and square miles of income-yielding real estate, because he used nothing in America which was the subject of an indirect tax, and

therefore there was no other way of reaching him. And he has slipped through their hands under your Honors' decision; and everybody in the same category has done the like. Can you see that Congress, under the circumstances, would have agreed upon the passage of the law, if it had been foreseen that the principal objects of the law were to escape it by reason of the unconstitutionality of its chief provisions?

Again, who are left? Landholders have escaped; bondholders have escaped. We believe your Honors will be constrained to hold that the receivers of incomes from personal property will escape. Who are left to be taxed? We are left—the bone and sinew and brains and nerve scattered throughout this great community of 70,000,000 people. What was intended to be a tax upon capital turns out to be a tax upon labor. How long do you suppose a Congress in which the balance of power was held—to give it the most dignified name—by what is called the People's Party, would have consented to levy a tax upon the people only, omitting all recourse to the accumulated wealth of the country and its income?

We cannot enter into the bosoms and breasts of Congressmen for their views, but when those views are announced to the Court by the authorized representatives of the Federal Government, by its Law Officers, we can take them into consideration. They filed their briefs here claiming validity for the law upon the ground that it is an income tax levied upon a small body of picked men, a selected class of very wealthy people. Now, of those, the heaviest, the richest, the biggest fish, which were intended to be caught in the net, have got out through the rent that your Honors have made in the meshes.

There is another matter—the object of the tax. They say the object of the tax is not this alone—that Congress would not have thought of making this tax by itself. What is it? They say there is an inequality, and this is one of their great arguments. Your Honors heard it in stentorian tones here, on the former argument. It is the object of the tax—so our opponents say—to qualify, reduce, limit, cure inequalities produced by the indirect taxes, because those fall on the poor and middle classes. The Government's representatives divide us into classes, and they say they want to qualify that. That object fails them. Then, did those who passed the law, who inspired the law, have another object in view? Did they think to get away from that original branch of the compromise and the compact that was not expressed literally in the Constitution, namely, that a direct tax should be levied only in times of great emergency and great necessity, and that, in the main, for the ordinary expenses of the Government, the United

States should rely upon indirect taxes, as they generally have done until this new departure was made? Did they think that here was an experiment for avoiding that condition in the future, first gradually, and then more rapidly, and finally by making direct taxes serve for all the ordinary occasions of the Government—a substitute entirely for indirect taxes? Then, did they meditate increasing, by a future law, the exemption from \$4,000 to \$10,000 or to \$40,000, and increasing the tax from two per cent. to ten per cent., or to twenty per cent., and so establishing a new theory of constitutional government, namely, that in the future, as rapidly as we can attain that position, we may maintain this Government, not on the product of the imposts, as was originally intended, but on the incomes of real and personal estates, thereby thrusting substantially the whole burden upon the property of the land? Whatever way you look at it, whether at the mangled condition of the law, the failure of its purpose, its incidence just where the people who passed it, the Legislature, did not intend it should fall, or the purpose—actual, declared and avowed, or possible and only to be guessed at—that they had in view—I say that whatever way you look at it, within Chief Justice Shaw's definition, or any definition ever laid down which can be called authoritative, your Honors cannot see that the legislature ever would have passed, in this form, this act as it now stands, mangled by the pruning knife of the Constitution in the hands of this Court. On the contrary, we can see, and, unless we shut our eyes to absolute blindness, we must see, that the legislature never would have so enacted it.

III

ADDRESSES ON INTERNATIONAL
AFFAIRS

IMMUNITY OF PRIVATE PROPERTY AT SEA

ADDRESS DELIVERED BEFORE THE FOURTH COMMISSION, SECOND
HAGUE CONFERENCE, JUNE 28, 1907 *

Mr. President: The government of the United States of America has instructed its delegates to the present conference to urge upon the nations assembled the adoption of the following proposition:

"The private property of all citizens or subjects of the signatory powers, with the exception of contraband of war, shall be exempt from capture or seizure on the sea by the armed vessels or by the military forces of any of the said signatory powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said powers."

This proposition involves a principle which has been advocated from the beginning by the government of the United States, and urged by it upon other nations, and which is most warmly cherished by the American people; and the President is of opinion that whatever may be the apparent specific interest of our own or of any other country for the time being, the principle thus declared is of such permanent and universal importance that no balancing of the chances of probable loss or gain in the immediate future on the part of any nation should be permitted to outweigh the consideration of common benefit to civilization which calls for the adoption of such an agreement.

At this rare moment of universal peace existing throughout the world, the representatives of all the nations of the world are assembled for the first time to consult and agree upon what may tend to make this peace permanent; and while each nation is, of course, at liberty to contend here for what its own peculiar interests demand, there should be a spirit of mutual concession and compromise, which would favor the adoption of a principle so clearly for the common benefit of mankind, although it may demand of particular nations the yielding of some relic of ancient belligerent rights.

We are here under circumstances which demand of the conference the fullest and fairest consideration of this important question. In the

* Mr. Choate's addresses at the Second Hague Conference were officially published by the Conference, and in 1910 they were included, with notes, in "American Addresses at the Second Hague Conference," edited by James Brown Scott, and published by the International School of Peace, Boston.

First Peace Conference in 1899 the subject was not included in the programme, and being embodied in a memorial of the United States Commission addressed to his Excellency M. de Staal, president of that conference, strongly urging its consideration, the memorial was referred by him to the appropriate committee, which reported that the committee did not consider itself competent to discuss the subject, and that it was therefore not ready to consider the question upon its intrinsic merits, but that it had instructed its chairman to report in favor of a resolution to be adopted by the conference, expressing the hope that the whole subject would be included in the programme of a future conference. And after the representatives of two of the great powers had announced that, in the absence of instructions from their government, they were obliged to abstain from voting, the report of the committee was unanimously adopted; and accordingly, in the Final Convention adopted on the 29th of July for the specific regulation of international conflicts, it was unanimously voted, saving the abstentions referred to, as follows:

"The conference expresses the wish that the proposal which contemplates the declaration of the inviolability of private property in naval warfare may be referred to a subsequent conference for consideration."

We are here, therefore, to-day, with our favorite proposition, as a matter of right, the same having been included in the original programme for this conference proposed by his Imperial Majesty the Emperor of Russia, and assented to by all the powers, so that no nation can properly refuse to vote upon it on the plea of want of instructions.

We have said that the immunity of the private property of belligerents at sea has been the traditional policy of the United States from the formation of its government, and, as will appear, it was so even before that date.

But at the outset, to avoid any misapprehension that might arise from this statement, I ought most frankly to concede that the United States has never been able to put this policy into practical operation, because other powers, although sometimes resorting to it for temporary purposes or by special agreement, have never consented to make such immunity a permanent rule of international law. And as this could not be accomplished except by the general consent of all the nations, it has in practice in all its wars, following the usages of other nations, made use of the belligerent rights of capture of enemy's

private ships, and sometimes, as in the War of 1812, to a very large extent; and only very recently has it by statute abolished prize money, which has generally been regarded as a material incentive to such capture. We thus confess that our government has heretofore acted without regard to the growing sentiment of our own citizens and of those of other nations in favor of immunity, and in this respect we claim to be no better than any other of our sister nations when acting as belligerents. It never would be possible or practicable for any belligerent to adopt the rule unless it becomes, as we hope it eventually will become, a positive rule acknowledged by every maritime power.

But now, in the light of our own experience of the comparative benefits and mischiefs that have resulted in the past from the exercise of this belligerent right, and of its constantly decreasing value to belligerents by reason of increased facilities of transportation by land from neutral ports and through neutral territories to belligerents, and because the great powers are to-day concentrating their fleets for purely military operations looking to the control of the sea, and are only building vessels which are useful for combat, we think the time has come to appeal to the maritime nations of the world assembled in this conference to agree to desist from this antiquated and mischievous resort to the capture of enemy's ships, and to leave the high seas free for the prosecution of innocent and unoffending commerce, the security and integrity of which is of such vast consequence to all the world.

In his message to Congress, in December, 1903, President Roosevelt, quoting and enforcing a previous message of President McKinley in December, 1898, said:

"The United States has for many years advocated this humane and beneficent principle, and is now in a position to recommend it to other powers without the imputation of selfish motives."

In response to this message the Congress of the United States, on the 28th of April, 1904, adopted the following resolution:

"That it is the sense of the Congress that it is desirable in the interest of uniformity of action by the maritime states of the world in time of war, that the President endeavor to bring about an understanding among the principal maritime powers, with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents."

In the negotiation bearing upon the treaty of peace with Great

Britain in 1783, four years before the adoption of the Constitution of the United States, that great lover of peace, Benjamin Franklin, our accredited plenipotentiary in Europe, strongly urged the adoption of this principle and proposed the insertion in the treaty of this clause:

"And all merchants or traders with their unarmed vessels, employed in commerce, exchanging the products of different nations and thereby rendering the necessary conveniences and comforts of human life more easy to obtain and more general, shall be allowed to pass freely unmolested. And neither of the powers, parties to this treaty, shall grant or issue any commission to any private armed vessels empowering them to take or destroy such trading ships or interrupt such commerce."

Our Secretary of State, Henry Clay, in his instructions to the delegates representing the United States at the Panama Conference in 1826, directed them to bring forward at the contemplated congress the proposition to abolish war against private property and noncombatants upon the ocean, declaring that this had been an object which the United States had much at heart since they assumed their place among the nations.

And Secretary of State John Quincy Adams, in his instructions to our minister to England in July, 1823, had said:

"It has been remarked that by the usages of modern war the private property of an enemy is protected from seizure or confiscation as such, and private war itself has been almost universally exploded upon the land. By an exception, the reason of which it is not easy to perceive, the private property of an enemy upon the seas has not so fully received the benefit of the same principle. Private war, banished by the tacit and general consent of Christian nations from their territories, has taken its last refuge upon the ocean, and there continues to disgrace and afflict them by a system of licensed robbery bearing all the most atrocious characteristics of piracy."

President Monroe, in his annual message to Congress in 1823, stated:

"Instructions have accordingly been given to our ministers with France, Russia, and Great Britain, to make proposals to their respective governments to adopt the principle as a permanent and invariable rule in all future maritime wars. And when the friends of humanity reflect on the essential amelioration of the condition of the human race, which would result from the abolition of private war on the sea, and on the great facility by which it might be accomplished, requiring only

the consent of a few sovereigns, an earnest hope is indulged that these overtures will meet with an attention animated by the spirit in which they were made, and that they will ultimately be successful."

Not only by such declarations, embodied in official instructions, has the United States asserted this principle, but in its diplomatic dealings with other nations it has carried it into actual effect as far as possible. In its treaty with Frederick, king of Prussia, negotiated in 1785, two years before the adoption of the federal Constitution, negotiated by Benjamin Franklin, Thomas Jefferson, and John Adams, it was embodied in the treaty in almost the identical language in which it had been proposed by Franklin to Great Britain two years before.

A similar provision was inserted in the treaty between the United States and the king of Italy in 1871. When our government was invited to give in its adhesion to the declaration of the Congress of Paris in 1856, in which it was not represented, whereby it was provided that privateering is and remains abolished, that the neutral flag covers enemies' goods, with the exception of contraband of war, and that neutral goods, with the same exception, are not liable to capture under an enemy's flag, it declined to do so unless the declaration should be extended to include the exemption of enemies' ships as well as their goods in neutral vessels. But then and ever since it has declared its willingness to give up the right of privateering, if the other maritime nations would agree to recognize its declared principle of the immunity of the private property of noncombatants at sea.

It is pertinent to call the attention of the conference to the extent to which our principle has been carried into active effect by other nations from time to time and for temporary periods.

The principle was adopted and carried out in the War of 1866 by Prussia, Italy, and Austria, the three powers concerned; and in 1854, when the Crimean War broke out, it was announced that operations would be confined to organized military and naval forces of the enemy. But the announcement was accompanied with the distinct reservation that the rights enumerated were waived for the time being only. And on the outbreak of the Franco-Prussian War of 1870 an attempt was made by one of the belligerents to protect noncombatant commerce, but the protection was eventually withdrawn on the claim that it was not properly reciprocated by the other belligerent.

In 1865 Italy adopted a maritime code forbidding the capture of mercantile vessels of all hostile nations, provided reciprocity in that

respect was observed by the other belligerent, and the rule was observed in the war between Italy and Austria shortly afterward.

There have also been frequent declarations upholding our principle by bodies whose utterances were entitled to very great respect.

In 1859 an assembly of influential merchants and shippers held at Bremen declared in favor of the doctrine, and Hamburg, Stettin, Breslau, and the Chambers of Commerce of upper Bavaria concurred in this expression of enlightened policy.

"On the 18th of April, 1868, the Reichstag of the North German Confederation adopted almost unanimously a resolution proposed, which directed the chancellor of the federation to undertake negotiations with other powers, in order to secure the recognition of the principle of immunity. And the declaration of Delbrück in the Bundesrath left no room to doubt that the Bundesrath, and especially the Prussian government, regarded the reaching of this goal as desirable as corresponding to the traditions of Prussian policy."

Professor von Bar, to whom we are indebted for the last facts above recited, says further:

"Even in England pronouncements of a like kind had been several times made. And in the Brussels International Conference of 1874, which busied itself with the laws of war, the Russian government introduced a projet in which it was expressly said that operations of war should not direct themselves against private persons, a principle incorporated in Article 40 in the projet of the Brussels conference in the following words: 'Private property ought to be respected.' In 1875 the Institution of International Law declared expressly for the immunity of enemy private property (enemy merchant ships), reserving, however, the right of capture of contraband."

It may be stated without qualification that the Chambers of Commerce throughout the world have declared in favor of our principle and urged its adoption by their various governments.

It may not be improper to observe that the government of the United States has uniformly advocated the doctrine of immunity under all the vicissitudes through which it has passed, without regard to its effect upon its temporary interests for the time being. Before we had an organized government, with no army and no navy, and only a feeble merchant marine, afterwards as that marine gradually but surely increased in amount and value, until at last it became a close second to the mercantile marine of England,—at a later period, in our Civil War, when by the incursions of a few Confederate cruisers our merchant shipping engaged in foreign commerce was actually

swept from the seas, so that at the end of the Civil War, when our extemporized navy was dispersed, we had neither naval nor commercial marine,—and so on, down to the present time, when we have an efficient navy, but only a meager tonnage engaged in foreign commerce, only about seven per cent. of our great exports and imports passing in and out of the port of New York under our own flag;—in all these varying circumstances, without regard to its direct or indirect effect upon our own fortunes and interests, we have uniformly advocated the doctrine as one of immense importance to civilization and to the general welfare of all nations.

In this we may fairly claim that we have been sustained by the general consensus of statesmen and jurists of many countries, who have made themselves felt upon the question. Beginning with England, we have the utterance of Lord Brougham in 1806:

“The private property of pacific and industrious individuals seems to be protected, and except in the single case of maritime capture it is spared accordingly by the general usage of all modern nations. No army now plunders unarmed individuals ashore, except for the purpose of providing for its own subsistence. And the laws of war are thought to be violated by the seizure of private property for the sake of gain, even within the limits of the hostile territory. It is not easy at first sight to discover why this humane and enlightened policy should still be excluded from the scenes of maritime hostility, or why the plunder of industrious merchants, which is thought disgraceful on land, should still be accounted honorable at sea.”

And Lord Palmerston, in his address to the Liverpool Chamber of Commerce on November 8, 1856, declared:

“I cannot help hoping * * * that in the course of time those principles of war which are applied to hostilities by land may be extended without exception to hostilities by sea, so that private property shall no longer be the object of aggression on either side. If we look at the example of former periods, we shall not find that any powerful country was ever vanquished through the losses of individuals. It is the conflict of armies by land and of fleets by sea that decides the great contests of nations.”

And Mr. Cobden, in 1862, in his address to the Manchester Chamber of Commerce, after referring to the refusal of the government of the United States to adhere to that part of the Declaration of Paris abolishing privateering, said:

“That government * * * stated that they preferred to carry out the resolution which exempted private property from capture by

privateers at sea a little farther, and to declare that such property should be exempted from seizure whether by privateers or by armed government ships. Now, if this counter proposal had never been made, I contend that after the change had been introduced affirming the rights and privileges of neutrals it would have been the interest of England to follow out the principle to the extent proposed by America."

And John Stuart Mill, in a speech in 1867, said:

"Those who approve of the Declaration of Paris mostly think that we ought to go still farther; that private property at sea, except contraband of war, should be exempt from seizure in all cases, not only in the ships of neutrals but in those of the belligerent nations. This doctrine was maintained with ability and earnestness in this house during the last session of Parliament, and it will probably be brought forward again, for there is great force in the argument on which it rests."

Sir Henry Maine, a great authority on international law, as well as upon the principles of justice in general, writing in 1888 with a view to satisfy his government that it was greatly for the interest of Great Britain to concur in the American doctrine, said:

"These, of course, are economical reasons, but I also look on the subject from the point of view of international law. Unless wars must be altogether discarded, as certain never again to occur, our situation is one of unexampled danger. Some part of the supplies which are matter of life and death to us may be brought to us as neutral cargo with less difficulty than before the Declaration of Paris was issued, but a nation still permitted to employ privateers can interrupt and endanger our supplies at a great number of points, and so can any nation with a maritime force of which any material portion can be detached for predatory cruising. It seems, then, that the proposal of the American government to give up privateers on condition of exempting all private property from capture might well be made by some very strong friend of Great Britain. If universally adopted, it would save our food, and it would save the commodities which are the price of our food, from their most formidable enemies, and would disarm the most formidable class of these enemies."

And finally, as expressive of the sentiments of at least a portion of the English government and people of the present day, we have the letter to the *Times* of October 14, 1905, of the present lord chancellor of Great Britain, in which he most emphatically indorses the American doctrine. He says:

"It may be asked, what prospect is there of altering the law in this respect, even if we desired it. An answer may be found in the history of this question, upon which, instructive though it be, a few words must suffice. During the last fifty years or more the United States have persistently advocated this change, even to the point of refusing to abandon the right of privateering in 1856 unless all property, other than contraband, should be declared free from maritime capture. Germany, Austria, Italy, Russia, have all, within the last half century, either adopted in their own practice or offered to adopt the American view, and continental jurists have almost without exception denounced the existing law. Last year President Roosevelt declared in favor of a new international conference at The Hague, and notified that among other matters for deliberation the United States intended again to press this very subject on the attention of the powers. Unquestionably the American President, with the immense authority he now wields, will exert every effort to maintain his point. I trust that his Majesty's government will avail themselves of this unique opportunity. I urge it not upon any ground of sentiment or of humanity (indeed, no operation of war inflicts less suffering than the capture of unarmed vessels at sea), but upon the ground that on the balance of argument coolly weighed the interests of Great Britain will gain much from a change long and earnestly desired by a great majority of other powers."

It may also be safely asserted that the judgment of many eminent English writers on international law has been pronounced in support of the American doctrine.

Nor have continental authorities been backward in support of the same policy. Chateaubriand declared on behalf of the French king that, could all nations be induced to agree to the principle, "his Majesty would congratulate himself on having given a salutary example, and in having proved that without compromising the success of war its scourge could be abated."

Count Nesselrode, who for many years controlled the foreign affairs of Russia, expressed himself to Mr. Middleton, the American minister at St. Petersburg, who negotiated the treaty of 1824 between the two countries:

"That the emperor sympathized with the opinions and wishes of the United States, and as soon as the powers whose consent was indispensable to make it effective was obtained, he would authorize his minister to discuss the different articles of an act which would be a crown of glory to modern diplomacy."

And many eminent continental writers on international law, whose

authority is not limited to the boundaries of their own country, such as Bluntschli, Calvo, Rolin-Jaequemyns, Pierantoni, Ahrens, Perels, Dupuis, and de Martens, might be cited in strong support of the same view.

By authority of President Roosevelt, we ask for the adoption by the conference of this historic American doctrine on broad humanitarian grounds, as tending greatly to promote the cause of civilization, as removing the last relic of barbarism in maritime warfare, and as a great principle of justice which is sure to advance the cause of peace, as indispensable in the general interests of neutrals, and for the preservation of the integrity of commerce in which the community of interest of all nations is at last finally established.

There is no reason for the immunity of private property upon land from wanton plunder and destruction, which does not equally apply to similar property upon the sea. We do not ignore or in any way seek to evade the rules of military law by which private property upon land may be occupied and held for legitimate military purposes, such as making requisition for the support of armies, or for levying taxes, or with a view to ultimate annexation by the victor, of which the unrestricted right of commercial blockade is a fair equivalent on the sea.

But leaving aside all that part of military law which is undisputed, because it has no bearing upon the present question, we submit that there is a perfect analogy between the exemption of private property on land not needed for military purposes from spoliation and destruction, which is now established for centuries by the usage of nations, and a similar exemption which we claim for private property on the sea, not needed for military purposes.

We do not deny that a private house and its contents, which stood in the way of a hostile advancing army, in its efforts to reach and attack the other belligerent, might properly be swept away and be entitled to no exemption. But nothing can be better settled than that, apart from the military necessities already referred to, for the commander of an army to send out forces for the purpose of robbing private houses of their contents and destroying the residences of unoffending noncombatants would be a gross violation of every principle of justice and good morals and of the existing laws of war; and to this extent, in the same way, the wanton spoliation of noncombatant ships and cargoes not needed for military purposes, for the mere purpose of enriching the captors or their government, or of terrorizing the unfortunate owners and their government and coercing them to submit to the will of the triumphant belligerent and to accept his

terms, is abhorrent to every principle of justice and of right, and ought to be remitted to the same category of condemnation in which similar outrages upon noncombatants on land are now universally included.

It may not be out of place at this point to define the limits of the concession which our proposition demands of belligerent nations, or of those who are liable at any time to become so. In demanding the exemption of enemy ships, with whatever cargo they may contain, from capture and destruction, we are but following in the footsteps of Great Britain and the other parties to the Treaty of Paris of 1856, and carrying to its logical conclusion the great step in advance towards the amelioration of the horrors of war that was then made by them. By her Order in Council of April 15, 1854, Great Britain declared that her Majesty, being desirous of rendering the war (that is, the Crimean War) as little onerous as possible to the powers with whom she remained at peace, and in order to preserve the commerce of neutrals from all unnecessary obstruction, was willing to waive a part of the belligerent rights appertaining to her by the law of nations, and "that her Majesty would waive the right of seizing enemy's property laden on board a neutral vessel unless it be contraband of war," which was a wide and magnanimous departure from the doctrine which up to that time she had tenaciously held of the right of seizing enemy's goods wherever found.

The credit of this first step in this progress to peace belongs exclusively to Great Britain, and should be universally acknowledged, as it is a complete answer to any suggestion that she stands in the way of such progress. The declaration that followed the close of the war, signed by the representatives of France, Austria, Prussia, Russia, Sardinia, Turkey, and England, established this first step as a full and final one on the part of those nations and of about forty other states which have since given in their adherence. And, as Mr. Sheldon Amos says, "It is well known that the continual refusal to adhere on the part of the United States is solely due to their insisting on securing still greater immunities for commerce as the price of abandoning their right to use privateers."

The reason which the United States of America gave for refusing to adhere to the Declaration of Paris was that it did not go far enough, in that while exempting from seizure merchandise, enemy's property, on neutral vessels, it did not carry that doctrine to its logical conclusion and exempt also from seizure ships belonging to individuals of the enemy.

In a letter addressed to the Count de Sartige, French minister at Washington, July 28, 1856, Mr. Marcy, Secretary of State, proposed, in the name of his government, to add to the first article of the Declaration of Paris (abolishing privateering) the following words: "And the private property of subjects or citizens of any one of the belligerent powers shall not be subject to seizure by the vessels of the other unless they contain contraband of war." After saying, "Justice and humanity demand that this practice (of subjecting private property on the ocean to seizure by belligerents) should be abandoned, and that the rule in relation to such property on land should be extended to it when found upon the high seas."

And he justified his proposition in an elaborate argument. Our position then was, and ever since has been, that we were ready to give up privateering whenever the other powers should consent to extend the principle of immunity to enemies' ships as well as to their goods on neutral vessels.

It is significant that Russia welcomed the proposition of Mr. Marcy in terms that deserve to be recalled. In September, 1856, Prince Gortschakoff wrote to the Russian minister at Washington:

"Your Excellency will have occasion at Paris to take notice of the note of Mr. Marcy, in which the proposition of America is developed in a manner so able and so luminous that it commands conviction. The Secretary of State does not give exclusive weight to the interest of the United States. He maintains that of all the peoples. He has supported this generous idea by arguments which admit no reply. The attention of the emperor has been excited to the highest degree by these overtures of the American cabinet. In its way of putting the question they deserve to be taken into serious consideration by the powers signatory to the Treaty of Paris. They would honor themselves in proclaiming to the world in a unanimous resolution the principle that the inviolability which they have always recognized as to private property on land should be also extended to that property at sea. They would thus crown the work of pacification which has called them together, and they would give to peace a new guarantee of duration. By order of the emperor you are invited to lay these views before the minister of foreign affairs and to let him know that if the American proposition becomes the subject of deliberation in common among the powers, it will receive a decided support on the part of the representative of his Imperial Majesty. You are likewise authorized to declare that your august master would be disposed to take the initiative in that matter."

And Mr. Laveleye says in the same connection: "The proposition of the United States was well received by all the other states signatory to the Congress of Paris, above all by France and Russia. Piedmont and Holland applauded it and even England did not reject it."

Since this declaration, all that remains to the parties to it, as belligerents, of the ancient right of capturing and destroying enemy's property, is limited to enemy's ships. And the question is, whether this remnant of belligerent right under present circumstances is of sufficient value for military purposes to justify a belligerent state in refusing to waive it in response to the general demand of public opinion already everywhere pronounced in the most emphatic manner, and which is sure, sooner or later, to command on the part of all nations obedience to its behests; for nations, like individuals, however powerful in themselves, are the subjects of public opinion, which in the end must rule the world.

As to the value of this remnant of belligerent right, it is to be observed that in modern times it has greatly diminished and is still rapidly diminishing. In ancient times it was perhaps the principal factor in maritime war,—the power to destroy enemy's property of every kind, public and private, wherever it could be found afloat. But now that war has properly come to be regarded as a test of strength between the organized armed forces, and the financial ability of the respective contestants to maintain the contest by sea and land, the power to destroy enemy's noncombatant ships upon the sea is no longer a very potent factor.

No instance, we think, can be found in modern wars of a war having been prevented or shortened by the exercise of this power, and the destruction of merchant shipping has been and is, and is likely to be, a comparatively trifling incident in the contests of nations. Take, for instance, our own Civil War, which lasted for four years, and during which, as we have said, our mercantile shipping was substantially destroyed or swept from the seas by a few Confederate cruisers. The fact distressed us very much, but it exercised not the slightest influence in bringing the war to a close, which was brought about by the maintenance of an effective blockade and the overwhelming superiority of the military and financial power of the Union.

Our experience in that contest shows that the first thing that happens on the commencement of a war to which a maritime nation is a party, is the transfer to neutral flags and bottoms of the principal part of its carrying trade, and a transfer, by means of insurance against the war risk and largely to foreign nations, of liability to loss by the destruc-

tion of that which remains under the flag. So that this remnant of belligerent power, whether regarded as a deterrent from war or as a means of terrorizing the enemy's government and reducing it to submission as a means of terminating the war, has ceased to be an important factor.

Again, this remnant of right to destroy enemy's noncombatant merchant ships is not to be confounded with the right of blockade, which, if our demand is granted, will still remain in full force. It has been argued, on the part of those who would maintain for belligerents the continuance of the ancient practice, as if we were demanding some impairment of the right of blockade. But our proposition as we have stated it excludes all possibility of this idea, as we ask only for the exemption from capture of enemy's merchant ships not carrying contraband of war and not attempting to violate a blockade.

It is, therefore, for every nation to judge for itself whether, since the Declaration of Paris which gave much more than half the right away, and since these changes in modern methods of business which have so materially minimized the value of the remnant of the right, it is of sufficient importance to justify it in refusing to abandon what remains, in deference to the general demand of the civilized world, and whether it may not safely comply with this demand and give up what is of so little value, and carry out to its logical conclusion the humane reform of the evils of war, which was so nobly commenced in 1854 and 1856.

On behalf of the United States of America we make this appeal to our sister nations to give their assent to our humane and pacific proposition which we for more than a century have sought to bring about. First, on humanitarian grounds. The capture and destruction of enemy's private property at sea, belonging to unoffending noncombatants who are pursuing international trade, not for their own benefit alone, but for the common benefit of the world, is the last remaining element of ancient piracy. To despoil innocent and unoffending merchants, who are taking no part in the war, of their ships and the goods contained in them, or to destroy them if the convenience of the captors requires, savors of the savagery of ancient war. It ought no longer to be tolerated by civilized nations. And as it is generally accompanied by holding, under most unwholesome conditions, the crews of the captured ships, this greatly adds to the cruelty and barbarity of the proceeding. As matters now stand, the damage to the

individual owners far outweighs any possible benefit to the belligerent state.

Secondly, we place it on the ground, more important still, of the unjustifiable interference with innocent and legitimate commerce, which concerns not alone the nation to which the ship belongs but the whole civilized world. The growth and development of international trade and commerce during the last fifty years is one of the marvels of history. It tends more than anything else to bind the nations together in the bonds of peace, and creates a community of interest, which is immediately disturbed by any violent interference with it in any part of the globe. There is hardly an interest in any nation that is not immediately disturbed and subjected to jeopardy and loss by any such interference.

The merchant ship itself is but a fragment, and an inconsiderable fragment, of the commercial adventure in which it is engaged. The transportation of the cargo interests generally the neutral world and that interest ramifies in all directions. And the capture and destruction of the ship involves all such interests in damage and ruin. As a very distinguished English writer has said:

"The organization of international trade demands for its conditions stability and confidence, and whatever impairs these not only to that extent weakens the organization but goes a long way to destroy it.

"But the capture of private property at sea is simply the ruin of this organization and of all on which it depends. Were maritime wars at all more common than they are, international trade would be impossible and the most pacific nations would suffer equally with those most frequently belligerent. As it is, the miserable and trivial gains acquired by making maritime prizes, and the loss occasioned to the enemy's resources by hampering his commerce, make but a poor compensation for the utter disorder in which even the capturing state involves its own trade, and the widespread confusion and disaster which is spread on every side among neutral states."

We insist upon our proposition in the third place as a direct advance towards the limitation of war to its proper province,—a contest between the armed forces of the states by land and sea against each other and against the public property of the respective states engaged. If this rule, which we advocate, is adopted by the common concurrence of nations, that portion of destructive war which has heretofore wrought only mischief to mankind will be put an end to, and armies and fleets, instead of being employed for the protection or destruction of innocent property of noncombatants, will be left to their proper

duty of fighting each other, of maintaining blockades, and protecting seacoasts. If it be said as was objected by Lord Palmerston already quoted, and who afterwards changed his mind and in 1862 declared, "that if we adopted these principles we should almost reduce war to an exchange of diplomatic notes," we reply, as Sir John Lubbock (now Lord Avebury) did in the House of Commons, "Well, that would be a result which we could contemplate not only with equanimity but with satisfaction."

"The tendency of history," he declared, "had been to render wars more humane as civilization progressed, and the extension of the Declaration of Paris to all property afloat was merely another step in that direction."

And finally we object to the old practice and insist upon our demand for its abolition on the ground that it is now no longer necessary, and that it tends to invite war and to provoke new wars as a natural result of its continuance.

At the present day, by the general consent of the civilized nations of the world, and independently of any expressed treaty or other public act, it is an established rule of international law that coast fishing vessels, with their implements and supplies, cargoes and crews unarmed, and honestly pursuing their peaceful calling, are exempt from capture as prize of war. This rule is one which prize courts, administering the law of nations, are bound to take judicial notice of and to give effect to, in the absence of any treaties or other public acts of their own government in relation to the matter.

The reason given is a purely humanitarian one, that they are engaged in feeding the hungry even though it be the hungry of the other belligerent, and that it would be too hard to snatch from poor fishermen the means of earning their bread.

This matter was well put by Louis XVI, when his forces were engaged in the American war of independence, in a letter addressed by him on June 5, 1779, to his admiral, informing him that the wish he had always had of alleviating as far as he could the hardships of wars had directed his attention to that class of his subjects which devoted itself to the trade of fishing and had no other means of livelihood; that he had thought that the example which he should give to his enemies, and which could have no other source than the sentiments of humanity which inspired him, would determine them to allow to fishermen the same facilities which he should consent to grant; and that he had therefore given orders to the commanders of all his ships not to disturb English fishermen nor to arrest their vessels laden with

fresh fish, even if not caught by those vessels, provided they had no offensive arms and were not proved to have made any signals creating a suspicion of intelligence with the enemy. The capture and ransom by a French cruiser of the *John and Sarah*, an English vessel coming from Holland, laden with fresh fish, were pronounced to be illegal. The whole subject was fully considered by the Supreme Court of the United States in the case of *The Paquette Habana*, 175 U. S. 677.

In the changed conditions of commerce and of naval warfare at the present day it is difficult to understand why the same principle of immunity should not be extended to the unarmed vessels of the enemy which are engaged in the peaceful pursuit of "exchanging the products of different places and thereby rendering the necessities, conveniences, and comforts of life more easy to obtain."

The temptation to any nation desiring or likely to be engaged in war to attack and prey upon the mercantile marine of its adversary as a first blow to impair his strength is very pressing and urgent, and is an inducement much more likely to lead to war than is the fear of a similar attack from the adversary a deterrent from it, especially in the case of a nation that itself has a small mercantile marine but can muster cruisers or gunboats sufficient to attack the unarmed merchant vessels of the other side upon the sea.

And history shows us many instances where the spoliation of a nation's commerce has led, out of revenge and a spirit of retaliation, to new wars. Indeed our own experience, as the result of our Civil War, is a marked illustration of this tendency. The destruction of our mercantile marine necessarily led, under the circumstances which brought it about, to the presentation on our part of what were known as the Alabama Claims, the existence of which, unsettled, produced for many years a very disturbing and embittered state of feeling between us and Great Britain, which was finally and happily relieved by the exercise of mutual patience and forbearance in sending the whole subject for amicable adjustment to the arbitration at Geneva, which resulted in the restoration of friendship and good feeling between the two countries which have subsisted to the present day.

To quote again from the distinguished writer to whom we have already referred: "There is no doubt that the widespread irritation occasioned by the capture of private property at sea as much as on land is one of the main provocatives of enduring national hatred."

Apart from all historical and ethical points of view, it may well be claimed that there is another strong ground in support of the immunity of private property at sea not needed for military purposes, for

which we contend. From economical considerations it is no longer worth the while of maritime nations to construct and maintain ships of war for the purpose of pursuing merchant ships which have nothing to do with the contest. The marked trend of naval warfare among all great maritime nations at the present time is to dispense with armed ships adapted to such service, and to concentrate their entire resources upon the construction of great battle ships whose encounters with those of their adversaries shall decide any contest, thus confining war, as it should be, to a test of strength between the armed forces and the financial resources of the combatants on sea and land. It is probable that, if the truth were known, there has been an actual diminution by all the maritime nations in the construction of war vessels adapted to the pursuit of merchantmen, and indeed a sale or breaking up of such vessels which had been for some time in service. Indeed, none of the great navies now existing could afford to employ any of their great and costly ships of war or cruisers in the paltry pursuit of merchantmen scattered over the seas. The game would not be worth the candle, and the expense would be more than any probable result.

This presents in another form the idea already referred to, that war has come to be, as it should be, a contest between the nations engaged, and not between either nation and the noncombatant citizens or individuals of the other nation; and it results from it that the noncombatant citizens should be let alone, and that no amount of pressure that can be brought to bear upon them will have any serious effect in preventing or shortening any controversy.

We believe it to be true also that the policy and the necessary policy of maritime states to-day is to concentrate their fleets, so as to be prepared to meet any emergency of war with the aggregate force of such fleets, which practically will forbid to any considerable extent the pursuit of scattered merchantmen.

It is not within our province, nor would the proprieties of the occasion permit us, to attempt to convince the representatives of any nation taking part in this conference that its own national interest requires it to give up the ancient practice and accept our proposition. There seems in several of the nations to be some division of opinion upon the subject, the merchants, the statesmen, the jurists, and the majority of the press being generally in favor of our proposition.

What we hope to do is to satisfy the conference as a body, and that by a great majority, that the general welfare of all the nations together, as having a community of interest in the commerce of the world, requires the adoption of the principle of immunity of private property

at sea, with the exceptions embodied in our proposition. Of course it will require an agreement of all to bring about a passage of a resolution in the name of the conference, and thereby to put an end to the existing practice. But we feel so strongly that our cause is just, and that the general opinion of the nations is with us, that we deem it extremely desirable that after the discussion a vote shall be taken of all the nations engaged in the conference, with the hope that although such a vote may not result in the adoption of a unanimous decision, it will so impress the nations who dissent, as to dissuade them in future conflicts from carrying the existing rule any longer into actual practice, except in the last necessity. The strict international legal right of capture may remain unimpaired, but the moral effect of a general expression of opinion against it may prevent its any longer being carried into actual operation.

It is not incumbent and may not be proper for us at this time to anticipate the objections which will be raised and presented to our proposition. But one or two which have already been often presented in public discussion may properly be referred to.

It is said that the most effective means of preventing war is to make it as terrible as possible, and that to this end the destruction of private property at sea, carrying havoc among private owners and to a certain extent enfeebling the government and nation of which they form a part, is a justifiable expedient.

We deny that it is the duty or the right of any nation to make war as horrible as possible, and that no such proposition can for a moment be tolerated by any conference of civilized states. If it be true, the whole labor that has been expended in the last fifty years towards mitigating the horrors of war, towards preventing its recurrence and bringing about its speedy termination, has been wasted and spent in vain. If it be true that our duty is to make war as horrible as possible, let us undo all that we have accomplished since the world set itself seriously at work to prevent and mitigate the horrors of war. Let us repeal the Declaration of Paris. Let us resume all the savage practices of ancient times. Let us sack cities and put their inhabitants to the sword. Let us bombard undefended towns. Let us cast to the winds the rights of security that have been accorded to neutrals. Let us make the sufferings of soldiers and sailors in and after battle as frightful as possible. Let us wipe out all that the Red Cross has accomplished at Geneva, and the whole record of the First Peace Conference at The Hague, and all the negotiations and lofty aspirations that have resulted in the summoning of the present conference.

Of course there is no truth or sanity in such a brutal suggestion. Our duty is not to make war as horrible as possible, but to make it as harmless as possible to all who are not actually engaged in it, to prevent it as far as we can, to bring it to an end as speedily as we can, to mitigate its evils as far as human ingenuity can accomplish that result, and to limit the engines and instruments of war to their legitimate use,—the fighting of battles and the blockading and protection of seacoasts.

Again, it is urged that the retention of this ancient right of capture and detention is necessary as the only means of bringing war to an end; that when you have destroyed the fleets of your enemy and conquered its armies, it has no object in suing for peace as long as its commerce and its communication by transportation with other nations in the way of trade is left undisturbed.

But this seems to us to be a purely fanciful and imaginary proposition. The history of modern wars and, in fact, of all wars shows that the decisive victory over an enemy by the destruction of his fleets and the defeats of his armies is sure to bring about peace. The test of strength to which the parties appealed has thereby been decided, and there is no further object in continuing the war.

The picking up or destruction of a few harmless and helpless merchantmen upon the sea will have no appreciable effect in reducing the government and nation to which they belong to submission, if the defeat of fleets and armies has not accomplished that result. Besides, there is a limit to the legitimate right of the victor upon the seas, for the time being, to employ his power for purposes of destruction. Victory in naval battles is one thing, but ownership of the high seas is another. In fact, rightly considered, there is no such thing as ownership of the seas. According to the universal judgment and agreement of nations they have been and are always free seas, free for innocent and unoffending trade and commerce, and in the interest of mankind in general they must always remain so.

Again, it has been urged that the power to strike at the mercantile marine of other nations is a powerful factor in deterring them from war; that the merchants having such great interests involved, liable to be sacrificed by the outbreak of war, will do their utmost to hold their government back from provoking to or engaging in hostilities. But this we submit is a very feeble motive. Commerce and trade are always opposed to war, but have little to do with causing or preventing it. The vindication of national honor, accident, passion, the lust of conquest, revenge for supposed affront, are the causes of war, and

the commercial interests, which would be put in jeopardy by it, have seldom if ever been persuasive to prevent it.

And as to its continuance or termination, commerce really has nothing to do with it. When the military and financial strength of one side is exhausted, the war, according to modern methods, must come to an end, and the noncombatant merchants and traders have no more to do with bringing about that consummation than the clergymen and schoolmasters of a nation.

Once more, it is said that the bloodless capture of merchant ships and their cargoes is the most humane and harmless employment of military force that can be exercised, and that in view of the community of interest in commerce to which we have referred, and the practice of insurance in distributing the loss, the effect of such captures upon the general sentiment and feeling of the nation to which they belong is most effective as a means of persuading their government to make peace.

But we reply that, bloodless though it be, it is still the extreme of oppression and injustice practiced upon unoffending and innocent individuals, and that it has no appreciable effect in reaching or compelling the action of the government of which the sufferers are subjects.

We appeal then to our fellow delegates assembled here from all nations in the interest of peace, for the prevention of war and the mitigation of its evils, to take this important subject into serious consideration, to study the arguments that will be presented for and against this proposition, which has already enlisted the sympathy and support of the people of many nations, to be guided not wholly by the individual interest of the nations that they represent, but to determine what shall be for the best interest of all the nations in general, and whether commerce, which is the nurse of peace and of international amity, ought not to be preserved and protected, although it may require from a few nations the concession of the remnant of an ancient right, the chief real value of which has long since been extinguished.

In the consideration of such a question the interest of neutrals, who constitute at all times the great majority of the nations, ought to be first considered; and if they will declare, on this occasion, their adhesion to the humane and beneficent proposition which we have offered, we may rest assured that, although we may fail of unanimous agreement, such an expression of opinion will represent the general judgment of the world and will tend to dissuade those of us who may become belligerents from any future exercise of this right, which is so abhorrent to every principle of justice and fair play.

INTERNATIONAL PRIZE COURT

REMARKS BEFORE THE SECOND SUBCOMMISSION OF THE FIRST COMMISSION, SECOND HAGUE CONFERENCE, JULY 11, 1907 *

Mr. President: It may be timely for me at this moment, with your approval, to express the views and position of the delegation which I represent on several of the questions which have been discussed.

Representing as we do a widely extended maritime nation, and a nation which hopes and confidently expects always in the future to be a neutral nation, we deem the establishment of an international court of prize by this conference to be a matter of supreme importance, and while we have very distinct and generally very positive views upon each of the questions under discussion, we consider the establishment of a court far more important than to impose upon it our own local or national views either as to its constitution or its powers. It will certainly be a tremendous triumph of justice and peace if this conference, before it dissolves, shall succeed in creating such an arbiter between the nations.

Therefore I think that the best possible service I can now render on the part of our delegation and of the entire subcommittee is not to urge strongly our strong and fixed opinion, but to suggest, if possible, some middle way by which the opposing views entertained by different nations may be harmonized and reconciled so as to create the court. Better any court, however constituted, and with whatever powers, than no international court at all. One great international court will be a marked advance in the progress of the world's peace and will go far to satisfy the universal demand which presses upon us so strongly from every section of the world.

You will not then regard me as waiving or receding from our national views upon any question if I proceed now, with a view to that harmony without which it is impossible to create any court, to consider very briefly some of the particular questions which have agitated the committee, and upon which the views of the able representatives of many powers have been expressed in such highly intelligent and useful ways.

* The American Delegation succeeded in arranging a compromise between the proposals of the British and German delegates, so that a Convention Relative to the Creation of an International Prize Court was signed on October 18, 1907. The court, however, was never constituted, because the convention was never ratified by Great Britain.

Take for instance the fourth question,—whether the appeal to the international court of prize shall be directly from the court of first instance or from the court of last resort. If we were now pressed to a vote on that particular question, we should have to side very strongly with the position taken by the British delegation, and it would be found that our tenacity upon that would be as firm, and, if I might use a stronger word, as obstinate, as that of our British colleagues; because our people, by history and tradition, are so much in love with the Supreme Court of the United States, which they so believe to be the tribunal in which the gladsome light of jurisprudence rises and sets, and to be a court which commands the almost equal respect and admiration of other nations, that we could hardly go home in safety with the report that we had unnecessarily consented to any plan which would leave that court out of the administration of prize law. I think we may state, without contradiction, that in the last hundred years it has taken a very considerable part in the making of the prize law which now constitutes a portion of the established international law of the world, and that its decisions in prize are in substantial conformity with the decisions in all the maritime jurisdictions which have dealt with the subject, so that we are as firmly wedded to it as an indispensable factor in the future adjudication of prize law as our colleagues of the British delegation are to their court of last resort. It was to the decisions of the great Lord Stowell that our great jurists Marshall and Story looked for light and leading on such questions, and it is not too much to claim that together they settled the law for the world.

And so in respect to the second question,—as to whether the appeal should be taken by the individual suitor whose property has been condemned in a prize court, or by the nation to which he belongs. We entertain a pretty clear view upon that point, that if the appeal is to go from the court of last resort it may well be taken by the individual suitor and not by his nation, but possibly under some general rules of limitation, to be prescribed by his nation, so that the nation may have some power to prevent an individual appeal, perhaps on some very trifling case, from embarrassing or calling into conflict its established policy.

But strong as our views are on these two questions, I deem it our duty, if possible, to find some middle way by which they may be reconciled or at least adjusted and coordinated with those of other nations, who quite as firmly contend that the appeal should be from the court of first instance and by the nation to which the subject or citizen whose property has been condemned in prize shall belong. We should

like therefore to suggest the possibility of the introduction of a feature which should accomplish the result in both these respects desired by both the contending parties, and that is, that the appeal should be taken from such court and by such party, whether individual or nation, as the laws of the nations to which the respective parties belong and to whose entire jurisdiction they are subject, shall by reciprocal legislation prescribe. Certainly a suitor against whom the case had gone in the court of first instance would cheerfully submit to whatever the law of his country prescribed in that respect, whether he should himself appeal or submit it to his nation to do so or not, as it might decide, and whether he should appeal directly to the international court of appeal in prize or seek the judgment of the higher court or courts of the nation condemning him.

As to our firm conviction in favor of the appeals being taken only from our own Supreme Court, it might well be that Congress, with a view to adjustment of the question, might reciprocally consent to an appeal by aliens from the courts of first instance, and, in view of the enormous benefits to be derived by the whole world from the successful establishment of an international prize court, would be sustained in so doing by the popular judgment.

In respect to the third question, the one point which we should insist upon in any choice that might be made between the two alternatives proposed by the question, is one which I think will be agreed upon by all the nations. Necessarily, whichever alternative is adopted, neutrals, whether as individuals or governments, will have the greatest interest in the proceedings and decisions of the court, but in no event must we allow to a national an appeal against the decision of the highest court, or of any court of his own nation, condemning him for a violation of its own law or of a blockade which it has established. Experience shows that when a nation establishes a blockade its own citizens are apt to be the most flagrant in their attempts to violate it, and it would never do to allow to the subject of any nation an appeal to any other tribunal from the decision of the courts of his own country condemning him for a violation of its own laws, as for instance its Foreign Enlistment Act, or for an attempt to violate a blockade established by it.

Then as to question five,—whether the international jurisdiction of the prize court shall have a permanent character or shall be constituted for the occasion of each war. The delegation of the United States of America is most earnestly in favor of a permanent court lasting not for each war, which might make it almost an annual affair,

because wars are so numerous, but a court which should last for all time, and should gradually settle all international differences in prize law and establish an international jurisprudence which should cover all cases and satisfy and command the confidence of all nations. But here, too, is there not a middle ground which might afford a resting place for all conflicting views? With much diffidence we would suggest that the court might, as to its jurisdiction, be permanent in its character, but with a special feature or element adaptable to each war as it might arise.

Suppose the court to be composed permanently of three or five judges and thereby maintain its continuity through all wars and under all circumstances, with a right, in the case of war arising, to each belligerent to add a member to the court. Will not that be practicable, and ought it not to satisfy the reasonable demands of each party to any war that might unfortunately arise? I offer this, not as a final proposition, but as a possibility for ultimate consideration in the effort to solve the difficulties that confront us.

And lastly, as to the equally important question, What element shall enter into the composition of the court, whether it be permanent or temporary? It is most earnestly contended on the part of several nations that that court should consist only of learned jurists, and that no other element should enter into its composition, and we are one of the nations who are strongly convinced of that view. A court is a court, and a jurist is a jurist, and in our judgment the introduction of any other element than jurists tends to detract to that extent from the true judicial character which the tribunal should possess. On the other hand, it is claimed, with equal confidence and earnestness, that it should consist in part, at least, of admirals who are not jurists and do not claim to be, but who are justly claimed to have special qualities and skill to contribute to the solution of maritime and prize questions. Now while we cannot consent to accept that method of constituting a court, is there not an approach to it which may satisfy, approximately at least, the claims of both contending parties? I think myself the importance of the claims of those who contend for the introduction of admirals or naval experts as a component part of the court are greatly overestimated. If, as Monsieur Kriege of the German delegation concedes, the two admirals appointed by the contending belligerents should neutralize each other, it might be a useful and interesting contribution by belligerents to neutrality, but would it really do any good? If each admiral, sitting at either end of the court, is to neutralize or kill the other off, why have them at all? Will it not simply end in their mutual

slaughter without adding any new life, strength, or vigor to the court? Why put them up upon such an exalted bench for the mere purpose of shooting each other down?

And if, as M. de Martens of the Russian delegation has insisted, it is necessary to have the presence in the tribunal of experienced admirals or learned naval experts, without whose advice and concurrence the decisions of the court cannot be reached, is it absolutely necessary to give them seats upon the exalted bench itself, and will not chairs placed a little lower satisfy all the necessities and reasonable demands of the occasion? May they not be present, not absolutely as judges to give the decision, but as advisers without whose full advice no decision can be rendered? No one would claim that they should be present as expert witnesses to be examined and cross-examined; but they would be in the highest degree useful as skilled experts with the same authority as the judges to examine and cross-examine the witnesses and to collate and arrange the proofs. Would it not also be entirely practicable to admit them to the consultations of the secret chamber of the judges and to provide that no decision should be rendered until they had been admitted to such consultations and fully maintained their views?

And so, Mr. President, on the subsidiary question contained in question six,—whether in a given litigation in prize judges of the nationality of the parties concerned shall be admitted to sit,—our delegation has very positive views that they should not be so admitted, that the admission of nationals to a conflict should not be and could not be permitted, because they could not be impartial judges in a litigation to which they were really parties in interest. But it must be admitted that in many important arbitrations to which our nation has heretofore been a party it has not only consented, but sometimes insisted, that some member of the tribunal should be of our own nationality, and even appointed by our government, so that this is also a question upon which contending views may well, and perhaps easily, be harmonized.

Now, Mr. President, I have thrown out these views, or I might rather say suggestions, crude as they are, to lead up to a proposition which, in the interests of harmony, I think may well be made at this moment. You observe that I have not attempted to enforce any of our opinions, however firmly we may hold them, for I think that it is impossible, in a subcommittee consisting of a hundred or more members, to solve any such questions. The more we discuss them, the more our divergences of opinion are likely to be increased, and there

is danger that a protracted and persistent discussion in a committee of such large dimensions may result in putting us wider apart instead of bringing us nearer together. There is a certain pride of opinion which asserts itself in public discussion before such an audience and leads each of us to be more unwilling to yield anything of our contentions in such a presence. But convinced as I am that there are no questions here involved that are not capable of solution if each of us is inspired, as I hope we all are, by a desire to make mutual concessions for the sake of the immense benefit to be gained by all by the constitution of an international court of prize, though we may not really come to accept each other's views, we may give and take until a harmonious solution is reached. I therefore suggest, with all deference to the entire subcommittee, that the only way out of our present difficulty is by remitting all the questions, after the valuable discussions that have now been had, to a committee of five or seven members to be appointed by the chair to consider and report upon a plan for the court, and this whether they are or are not able to answer with one voice all the questions which have been framed by the committee of three already appointed, and which the entire subcommission, in plenary session, has found it so difficult to answer.

I have not referred to those very important questions, numbers seven and eight, because we have not yet reached those in the orderly course of discussion, and because I assume that if the suggestion of our delegation is followed, those two questions, on which important reservations will doubtless be made before the subcommission, will be remitted with the rest for the consideration of the special committee to be appointed.

AMERICAN PROJECT FOR INTERNATIONAL ARBITRATION

REMARKS BEFORE THE FIRST SUBCOMMISSION OF THE FIRST COMMISSION,
SECOND HAGUE CONFERENCE, JULY 18, 1907 *

Mr. President: In presenting our scheme for a general agreement of arbitration among the nations I desire to preface it with a brief statement explanatory of the position of the United States of America upon the subject, in the hope of commending it to the general acceptance of the nations taking part in the conference.

The dangers which threaten the world from the constant and progressive preparation of all the great nations for war, and from the constantly increasing power and burden of their armaments, which were so strikingly portrayed in the rescript of his Imperial Majesty, the Emperor of Russia, of August 24, 1898, and in the circular letter of Count Mouravieff, of January 11, 1899, were mitigated to a certain extent by the excellent work of the First Peace Conference of 1899.

That conference, it is true, did not see its way to adopt the specific remedy suggested by his Imperial Majesty, but it took a great step forward in providing what it deemed to be the only practical remedy,—in commending arbitration to all the nations of the world as the true method of settling their differences, and establishing a court before which such arbitration might, at the pleasure of the parties, be submitted and decided. The principle of arbitration was firmly established, and it was expressly agreed that in questions of a judicial character, and especially in questions regarding the interpretation or application of international treaties or conventions, it was recognized by the signatory powers as the most efficacious, and, at the same time, the most equitable method of deciding controversies which have not been settled by diplomatic method. And the establishment of the court of arbitration, as a first step in the plan of carrying arbitration into effective operation among nations, was one of the greatest advances that have yet been made in the cause of civilization and of peace.

But, Mr. President, great events have happened since the close of the First Peace Conference, which have attracted the attention of the world and convinced it of the necessity of taking another long step forward and of making arbitration, as far as human ingenuity can do

* The proposed convention failed of adoption because of the opposition of the German delegation.

it, a substitute for war in all possible cases. Two terrible wars have taken place, each productive of an incalculable amount of human suffering and misery, and these wars have been followed by a steady increase of armaments, which offer a convincing proof that the evils and mischiefs which the Russian emperor and Count Mouravieff deplored, are still threatening the peoples of all the countries, and that arbitration is the only loophole of escape from all those evils and mischiefs. So thoroughly have all the nations, great and small, been convinced of this proposition that many of them have made haste to interchange with other individual nations agreements to settle the very questions for which arbitration was recognized by the last conference as the most efficacious and equitable remedy, by that peaceful method instead of by a resort to war. I believe that some thirty treaties have been thus exchanged among the nations of Europe alone, all substantially to the same purport and effect. In 1904 the United States of America, beholding from a distance the disastrous effects of those terrible conflicts of arms from which they were happily removed, proposed to ten of the leading nations to interchange treaties with them of the same nature and effect. Their proposition was most cordially welcomed and ten treaties were accordingly negotiated and exchanged, but failed of ratification by an internal domestic question which arose between the different branches of the treaty-making powers of the United States. But all parties were of one mind that all the questions for which arbitration had been recommended by the former conference should be settled by that method rather than by resort to arms, and that the Hague Court should be the tribunal to which they should be submitted.

In 1901, at the Second International Conference of the American States, held in Mexico, to which the United States was a party, an obligatory convention was entered into and signed by all the parties taking part in the conference, by which they agreed to submit to arbitration all claims for pecuniary loss or damage which may be presented by their respective citizens and which cannot be amicably adjusted through diplomatic channels when said claims are of sufficient importance to warrant the expenses of arbitration, and that the Hague Tribunal should be the court for the trial and disposition of all such controversies unless otherwise specially agreed. And in case, for any cause whatever, the Permanent Court of The Hague should not be open to one or more of the high contracting parties, they obligated themselves to stipulate in a special treaty the rules under which the

tribunal shall be established for taking cognizance of the questions to be submitted.

This convention was for five years, and was ratified by eight of the parties, including the United States of America.

Later still, at the Third International Conference of the American States, held at Rio in 1906, for the holding of which this meeting of the Second Conference at The Hague was, by the courtesy of the signatory parties, postponed until the present year, the Mexican treaty was renewed for a further period of five years by all the parties that had ratified it and by all the other countries in the conference, and is now being ratified by them one after the other.

At the Rio conference the subject of a still further extension of obligatory arbitration was again considered, and at that time all the parties to that conference had been invited to take part in this Second Conference at The Hague. And in view of that fact, and of a general desire on their part to defer to the judgment of this present conference, the committee to whom the matter was referred, reported a resolution to ratify adherence to the principles of arbitration and, to the end that so high a purpose may be rendered practicable, to recommend to the nations represented that instructions be given their delegates to the Second Conference to be held at The Hague to endeavor to secure by said assemblage of world-wide character the negotiation of a general arbitration convention so effective and definite that, meriting the approval of the civilized world, it shall be accepted and put in force by every nation. The conference unanimously ratified the report of the committee and the United States was a party to the ratification.

It is under these circumstances that the delegation of the United States of America comes here instructed by its government to advocate the adoption of a general treaty of arbitration substantially to the tenor and effect of the treaties which it entered into in 1904, to which I have already referred, and which became abortive by the circumstance already mentioned.

Happily, Mr. President, we are encouraged in the presenting of this treaty by your own wise suggestion in the eloquent address with which you opened the first meeting of the First Commission, that, inasmuch as many of the nations had now separately agreed in pairs, one with the other, to the submission of the same questions to arbitration, to be disposed of by the Hague Tribunal, it might now be timely, as well as possible, for them all to enter into the same treaty together and so make this further step forward in the cause of arbitration a world-wide movement. There seems to be no intelligent

reason why nations having grave interests at stake which may come into possible difference, and who have already separately agreed to submit such differences to arbitration before the Hague Tribunal, should not all together agree to exactly the same thing, and why other nations should not follow them in the paths of peace so happily inaugurated.

In conclusion, Mr. President, it is only necessary for me to call the attention of the subcommission to the particular articles of our proposed treaty.

Article I provides that differences of a judicial order, or relating to the interpretation of treaties which have not been able to be settled by diplomatic methods, shall be submitted to the Permanent Court of Arbitration at The Hague, always provided that they do not involve vital interests or the independence or honor of either of the states, and that they do not affect the interests of other states not parties to the controversy.

Article 2 provides specifically and expressly what might have been necessarily implied without any such expression, that it shall be for each of the powers concerned to decide for itself whether its vital interests, or independence, or honor are involved.

Article 3 provides that, in each case that may arise, a special agreement or protocol shall be concluded by the parties in conformity with the constitution or laws of the respective parties determining precisely the subject of the litigation, the extent of the powers of the arbitrators and the procedure and details to be observed in whatever concerns the constitution of the arbitral tribunal.

The form of this article is rendered necessary by the constitutional needs of securing for every such agreement or protocol, before it can become effective, the approval of some other department of the government besides the one which signs the agreement as a part of the treaty-making power; for instance, in the United States, the Senate of the United States, and, as is believed, other departments of government in many other states.

Article 4 provides for the ratification of the treaty and its communication to the other signatory powers.

And Article 5 provides for the effect of a denunciation of the treaty at any time by either of the parties to it.

Thus, Mr. President, we offer a plan by which the conference may enter into a general convention, which ought to be entirely distinct and independent, for the settlement by arbitration among all the powers of such questions as shall come within its scope. We believe that it

will satisfy a world-wide demand for such a treaty and will go far to promote the cause of arbitration, which all the nations are every year expecting more and more confidently as a substitute for the terrible arbitrament of war.

At the proper time, Mr. President, I shall ask an opportunity to explain our view of the project we have offered for fortifying the present Permanent Court of Arbitration and building up out of it a tribunal which shall compel the confidence of the nations, and which will be the necessary sequel to the general arbitration agreement which we now offer.

PROPOSED JUDICIAL ARBITRATION COURT

ADDRESS BEFORE THE FIRST SUBCOMMISSION OF THE FIRST COMMISSION, SECOND HAGUE CONFERENCE, AUGUST 1, 1907*

Mr. President: In commending to the favorable consideration of the subcommission the scheme which our delegation has embodied in a proposition relative to the Permanent Court of Arbitration, I cannot better begin what I have to say than to quote a sentence from the letter of President Roosevelt to Mr. Carnegie on the fifth of April last, which was read at the Peace Congress held at New York. He says:

"I hope to see adopted a general arbitration treaty among the nations, and I hope to see the Hague Court greatly increased in power and permanency, and the judges in particular made permanent and given adequate salaries so as to make it increasingly probable that in each case that may come before them they will decide between the nations, great or small, exactly as a judge within our own limits decides between the individuals, great or small, who come before him. Doubtless many other matters will be taken up at The Hague, but it seems to me that this of a general arbitration treaty is perhaps the most important."

And our instructions are to secure, if possible, a plan by which the judges shall be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented, and that the court shall be made of such dignity, consideration, and rank that the best and ablest jurists will accept appointments to it, and that the whole world will have absolute confidence in its judgments.

There can be no doubt, Mr. President, of the supreme importance of the step in advance which we ask the conference to take in developing and building up, out of the Permanent Court of Arbitration created by the conference of 1899, a tribunal which shall conform to these requirements and satisfy a universal demand which presses upon us from all quarters of the world for the establishment of such a tribunal. The general cause of arbitration as a substitute for wars in the settlement of international differences has advanced by leaps and bounds since the close of the First Peace Conference, and nothing more strongly demonstrates the utility of the great work accomplished

* The project to establish the court failed because of disagreement as to the method of selecting judges.

by that conference than the general resort of the nations to agreements for arbitration among themselves as the sure means of securing justice and peace and avoiding a resort to the terrible test of war.

Our plan, if adopted, will preserve and perpetuate the excellent work of the First Conference and carry it to its logical conclusion. Following the noble initiative of Lord Pauncefoot, that great and wise statesman who was the First Delegate of Great Britain, whose persuasive words upon the subject will never be forgotten, the First Conference, after establishing for all time the principles of arbitration, created a tribunal to which all nations, whether signatory powers or not, might voluntarily resort for the determination of all arbitrations upon which they might agree. But one cannot read the debates which ushered in the taking of that great step by the First Conference without realizing that it was undertaken by that body as a new experiment and not without apprehension, but with an earnest hope that it would serve as a basis, at least, of further advanced work in the same direction by a future conference. The project was as simple as the purpose of it was grand, but, as Mr. Asser has well said in his eloquent speech, it created a court in name only by furnishing a list of jurists and other men of skill in international law from whom the parties to each litigation might select judges to determine the case, who should sit at The Hague according to machinery provided for the purpose, and proceed by certain prescribed methods, if no others were agreed upon by the parties.

We have with us, I believe, as members of the present conference, some seventeen members of the former conference who participated in that great work, and about an equal number of the judges whose names were placed upon the list by the various nations in conformity with the power given them by the convention of 1899. And our present effort is by no means to belittle or detract from their work, but to build upon it a still nobler and more commanding structure, and it is their support that we would seek especially to enlist in this new undertaking.

We do not err, Mr. President, in saying that the work of the First Conference in this regard, noble and far-reaching as it was, has not proved entirely complete and adequate to meet the progressive demands of the nations, and to draw to the Hague Tribunal for decision any great part of the arbitrations that have been agreed upon; and that in the eight years of its existence only four cases have been submitted to it, and of the sixty judges, more or less, who were named as members of the court at least two thirds have not, as yet,

been called upon for any service. It is not easy, or perhaps desirable, at this stage of the discussion to analyze all the causes of the failure of a general or frequent resort by the nations to the Hague Tribunal, but a few of them are so obvious that they may be properly suggested. Certainly it was for no lack of adequate and competent and distinguished judges, for the services they have performed in the four cases which they have considered, have been of the highest character, and it is out of those very judges that we propose to constitute our new proposed court.

I am inclined to think that one of the causes which has prevented a more frequent resort of nations to the Hague Tribunal, especially in cases of ordinary or minor importance, has been the expensiveness of a case brought there; and it should be one element of reform that the expense of the court itself, including the salaries of the judges, shall be borne at the common expense of all the signatory powers, so as to furnish to the suitors a court at least free of expense to them, as is the case with suitors of all nations in their national courts.

The fact that there was nothing permanent or continuous or connected in the sessions of the court, or in the adjudication of the cases submitted to it, has been an obvious source of weakness and want of prestige in the tribunal. Each trial it had before it has been wholly independent of every other, and its occasional utterances, widely distant in point of time and disconnected in subject-matter, have not gone far towards constituting a consistent body of international law or of valuable contributions to international law, which ought to emanate from an international tribunal representing the power and might of all the nations. In fact it has thus far been a court only in name,—a framework for the selection of referees for each particular case, never consisting of the same judges. It has done great good as far as it has been permitted to work at all, but our effort should be to try and make a tribunal which shall be the medium of vastly greater and constantly increasing benefit to the nations and to mankind at large.

Let us then seek to develop out of it a permanent court, which shall hold regular and continuous sessions, which shall consist of the same judges, which shall pay due heed to its own decisions, which shall speak with the authority of the united voice of the nations, and gradually build up a system of international law, definite and precise, which shall command the approval and regulate the conduct of the nations. By such a step in advance we shall justify the confidence which has been placed in us and shall make the work of this Second Conference worthy of comparison with that of the conference of 1899.

We have not, Mr. President, in the proposition which we have offered, attempted even to sketch the details of the constitution and powers and character of our proposed court. We have not thought it possible that one nation could of itself prescribe or even suggest such details, but that they should be the result of consultation and conference among all the nations represented in a suitable committee to be appointed by the president to consider them.

The plan proposed by us, Mr. President, does not in the least depart from the voluntary character of the court already established. No nation can be compelled or constrained to come before it, but it will be open for all who desire to settle their differences by peaceful methods and to avoid the terrible consequences and chances of war.

In the first article of our projet we suggest that such a permanent court of arbitration ought to be constituted; and that is the great question of principle to be first decided. And to that end we submit that it should be composed of not more than seventeen judges, of whom nine should be a quorum,—men who have enjoyed the highest moral consideration and a recognized competence in questions of international law; that they shall be designated and elected by the nations, but in a way prescribed by this entire conference, so that all the nations, great and small, shall have a voice in designating the manner of their choice; and that they shall be chosen from so many different countries as fairly to represent all the different systems of existing law and procedure, all the principal languages of the world, all the great human interests, and a widely distributed geographical character; that they shall be named for a certain number of years, to be decided by the conference, and shall hold their offices until their respective successors, to be chosen as the conference shall prescribe, shall have accepted and qualified.

Our second article, Mr. President, provides that our Permanent Court shall sit annually at The Hague upon a specified date, the same date in each year, to be fixed by the conference, and that they shall remain in session as long as the necessity of the business that shall come before them may require; that they shall appoint their own officers and, except as this or the preceding conference prescribes, shall regulate their own procedure; that every decision of the court shall be by a majority of voices, and that nine members shall constitute a quorum, although this number is subject to the decision of the conference.

We desire that the judges shall be of equal rank, shall enjoy diplomatic immunity, and shall receive a salary, to be paid out of the com-

mon purse of the nations, sufficient to justify them in devoting to the consideration of the business of the court all the time that shall be necessary.

By the third article we express our preference that in no case, unless the parties otherwise agree, shall any judge of the court take part in the consideration or decision of any matter coming before the court to which his own nation shall be a party. In other words, Mr. President, we would have it in all respects strictly a court of justice, and not partake in the least of the nature of a joint commission.

By the fourth article we would make the jurisdiction of this Permanent Court large enough to embrace the hearing and decision of all cases involving differences of an international character between sovereign states, which they had not been able to settle by diplomatic methods, and which shall be submitted to it by an agreement of the parties; that it shall have not only original jurisdiction, but that room shall be given to it to entertain appeals, if it should be thought advisable, from other tribunals, and to determine the relative rights, duties, or obligations arising out of the sentences or decrees of commissions of inquiry or specially constituted tribunals of arbitration.

Our fifth article provides that the judges of the court shall be competent to act as judges upon commissions of inquiry or special arbitration tribunals, but in that case, of course, not to sit in review of their own decisions, and that the court shall have power to entertain and dispose of any international controversy that shall be submitted to it by the powers.

And finally, by Article 6, that its membership shall be made up as far as possible out of the membership of the existing court, from those judges who have been or shall be named by the parties now constituting the present conference, in conformity with the rules which this conference shall finally prescribe.

Mr. President, with all the earnestness of which we are capable, and with a solemn sense of the obligations and responsibilities resting upon us as members of this conference, which in a certain sense holds in its hand the fate and fortunes of the nations, we commend the scheme which we have thus proposed to the careful consideration of our sister nations. We cherish no pride of opinion as to any point or feature that we have suggested in regard to the constitution and powers of the court. We are ready to yield any or all of them for the sake of harmony, but we do insist that this great gathering of the representatives of all the nations will be false to its trust, and will deserve that the seal of condemnation shall be set upon its work, if it does not strain

every nerve to bring about the establishment of some such great and permanent tribunal which shall, by its supreme authority, compel the attention and deference of the nations that we represent, and bring to final adjudication before it differences of an international character that shall arise between them, and whose decisions shall be appealed to as time progresses for the determination of all questions of international law.

Let us then, Mr. President, make a supreme effort to attain not harmony only, but complete unanimity in the accomplishment of this great measure, which will contribute more than anything else we can do to establish justice and peace on everlasting foundations.

The commission will distinctly understand that our proposed court, if established, will not destroy but will only supplement the existing court, established by the conference of 1899, and that any nations who desire it may still resort to the method of selecting arbitrators there provided.

Gentlemen, it is now six weeks since we first assembled. There is certainly no time to lose. We have done much to regulate war, but very little to prevent it. Let us unite on this great pacific measure and satisfy the world that this Second Conference really intends that hereafter peace and not war shall be the normal condition of civilized nations.

SELECTION OF JUDGES FOR THE PROPOSED JUDICIAL ARBITRATION COURT

ADDRESS AND REMARKS BEFORE THE COMMITTEE OF EXAMINATION
B, FIRST COMMISSION, SECOND HAGUE CONFERENCE,
SEPTEMBER 5 AND 18, 1907

The committee has now reached a stage in its deliberations which marks a most important advance towards the creation of a permanent court of arbitration which shall satisfy the universal demand that presses upon us. We have decided with practical unanimity that there shall be such a court, and have adopted a constitution for its organization and powers with equal unanimity. It is true that the representatives of several powers have declined to take part in the discussions involved in the second reading of the projet until they should know what plan would be adopted for determining the number of the judges of the court and the mode of their partition among the nations. But I do not understand that even those nations find any objection to any feature of the projet, and, in fact, the observations which fell from them, and their acquiescence in the action of the committee on the first reading of the projet, manifested an entire approval of it.

If the conference could do no more than this, it would have made very marked progress in the work, for in the First Conference the very idea of the creation of such a court was promptly laid aside as impracticable, if not impossible. But we owe it to ourselves, and to the nations that we represent, not to let the work stop here, but, by a supreme effort for conciliation, to agree upon the important and vital subject of determining the number of judges and the mode of their distribution and the measure of their action. Whether we do this permanently or provisionally is not of very great consequence. To accomplish it in either way will make the conference a great success. If we fail to bring it about in one way or the other, the conference itself will be to that extent a failure. And having come to The Hague accredited by the nations that sent us, we shall return to them seriously discredited.

It may, therefore, not be out of place for me, who originally introduced the proposition for the court,—which up to this point has been sustained with such general favor,—to review very briefly the various suggestions that have been made on this important subject.

When the subcommittee that had in charge the preparation of the projet, consisting of one from each of the delegations,—British, Ger-

man, and American,—had completed it, they attempted to devise a scheme, a possible scheme, which should serve as a basis of discussion and challenge the presentation of any and every other scheme that any member of the committee might regard as possible. It was not even recommended by them for adoption, nor was it in any sense a joint scheme of the three powers or a separate scheme of either,—American, British, or German. It recognized and was based upon the equal sovereignty of the nations, and took account at the same time of the differences that existed between them in population, in territory, in commerce, in language, in systems of law, and in other respects, and especially the difference in the interests which the several nations would normally and naturally have at stake in the proceedings before the court and in the exercise of its jurisdiction. It provided for a court of seventeen judges, to be organized for a period of twelve years, and that of the seventeen, eight nations, who will be generally recognized as having the greatest interests at stake in the exercise by the court of its powers, should each have a judge sitting during the whole period of the organization.

It provided also that each of the other powers should appoint, in the same way and at the same time, a judge for the same period, but who should be called to the exercise of judicial functions in the court for variously measured periods, according to their population, territorial extent, commerce, and probable interest at stake before the court, these measured periods ranging from ten years down to one.

By this method the absolute and equal sovereignty of each of the forty-five powers was duly respected and their differences in other respects not lost sight of.

The presentation and distribution of this scheme, as an anonymous one, has answered the purpose of inviting abundant criticism and the presentation of counterschemes. The main objection to it, held by many of the nations to whom it assigned less than a full period for the exercise of judicial functions by their judges, has been that the failure to give to the judges appointed by each nation full power to sit all the time, was in some way a derogation from the dignity and sovereignty of each of them, and that the same principle which recognized the equal sovereignty of each of the forty-five nations required a recognition of the claim that they were equal in all other respects. This claim, if insisted and acted upon, would of course render the establishment of an international court on any such basis of par-

tition an absolute impossibility, and require a court of forty-five judges sitting all the time.

As was expected, a very interesting counterscheme was proposed, based upon the alleged equality, not only in sovereignty but in all other respects, of all the states. It proposed to abolish the existing court, and for a new court to be constituted, consisting of forty-five judges, one to be appointed by each state, and these to be divided into groups in alphabetical order, of fifteen each, which were to sit for alternate periods of three years. This scheme was offered as an illustration of what was possible, based upon a recognition of the absolute equality of all states. Two objections to it were suggested: first, that an allotment of periods by alphabetical order was really the creation of a court by chance; and second, that it deprived each nation of any hand or voice in the court for six years out of the nine for which it proposed to establish it; whereas the first scheme had given every nation a seat in the court by a permanent judge for a fixed period, besides the right to have a judge of its own appointment upon the court whenever it had a case before it for decision.

Another proposal has been that seventeen nations, including the eight first mentioned and nine others which together should represent all parts of the world, all languages, systems of law, races, and human interests, should be selected by the conference, with a power to each to appoint a judge for the whole term of the court, thus recognizing the principle of equality of sovereignty to be exercised in the power of creating the court and selecting the judges.

Another proposal has been that four judges should be assigned to America, as a unit, trusting to that cordial and friendly relation which exists at the present time, and it is hoped will always exist, between the United States and all other nations of Central and South America, and which has been successfully fostered and maintained by several Pan-American conferences, to enable them to make a distribution among themselves of the four judges so assigned, in a manner that should be satisfactory to all.

This plan would have relieved the problem of all questions raised in regard to America, and would have left it for the other nations to make a similar distribution of the thirteen judges among themselves, which it was hoped might be done by means of the peaceful and friendly relations now existing between all the nations of both continents.

The practicability of this scheme, as of all the others, is still open for the consideration of the committee.

The suggestion has also been made, that for the purpose of the partition of the judges of the court the nations should be classified upon the sole element of comparative population; but it has been found, upon examination, that there were so many other essential factors that ought, upon every principle of justice and common sense, to enter into the distribution of judges that no definite project for such a distribution has been proposed.

The statements already made demonstrate the extreme delicacy and difficulty of the problem presented to the conference in the formation of the Permanent Court, but I confidently believe that it is entirely within the power of the committee, on a frank and candid exchange of views, and with the disposition that possesses it, to make such mutual concessions as may be necessary to solve the problem.

It has been suggested that it would be better to put the several plans proposed to the vote so as to draw the line of distinction clearly between its advocates and its opponents; but, as all are believed to be in favor of the Permanent Court, the expediency of such a proposition is doubtful, for such a vote would not in any way indicate what nations were in favor of a permanent court and which of them were opposed. And to have the project of a court voted down because linked with a scheme for the distribution of judges that was unacceptable to a majority, would convey to the world a wrong impression,—that the conference was not in favor of the creation of such a court.

It has also been suggested that the difficulty should be regarded as insuperable in the present conference, and avoided, or rather evaded, by securing a unanimous vote for the establishment of the court upon the constitution now under consideration, and leaving it to the powers or to the next conference to establish, if possible, a mode of selecting the judges that should be satisfactory to all the powers.

As I have already said, the adoption of this plan would be perhaps an advance upon anything that has heretofore been accomplished. But it would be surely a serious failure, and should not be resorted to with any false illusions, as it might practically result in the burial of the project for a permanent court altogether.

We must solve the problem—either permanently or provisionally. This is a solemn duty that rests upon us, and it would be ignominious in the last degree for us to confess our inability to discharge it, and we therefore have to consider a wholly different method from any of those heretofore suggested, namely, a free election by the whole conference, voting by states, each exercising sovereign power on an absolute equality, and accepting the result of such an election,

as electors or elected, as such an exercise of the elective power might produce.

There is nothing to prevent the conference voting freely and without any restraints whatever for a definite number of nations,—seven or nine or eleven, thirteen or seventeen,—who should each be authorized to appoint a judge for the full term of the court. This would concede all that is claimed in the way not only of equal sovereignty but of equality in all other respects, and each nation would take its chance of a successful canvass, and I have no doubt it would result in the successful establishment of an excellent court to which all nations could resort or refrain from resorting in each case that should arise, as they should see fit.

Another plan worthy of consideration, and which, I think, might successfully solve the problem, is to resort to an election—in which all the states should have an equal voice—of individuals, jurists, or statesmen of distinction, to constitute the court. If this method is resorted to, it might be in connection with the plan for establishing the court and its constitution, and leaving the method of final and permanent selection of judges to the nations—or to the next conference. For it might and perhaps ought to be resorted to as a temporary and provisional plan to secure the organization of the court as soon as it should be ratified by a sufficient number of powers constituting a majority.

The plan would be for an election, each state casting one vote, of a prescribed number of judges, which should be deemed suitable for the temporary and provisional organization of the court, to hold office either until the next conference or for a specified number of years, or until the powers, by a diplomatic interchange of views, should adopt some different method as a permanency.

There is ample material within the conference itself and within the existing court, in the constitution of which all the powers have had an equal hand, for the creation and installation of such a tribunal provisionally. The selection might be limited to the members of the existing court, or extended to other jurists whose names are familiar to all, every one of them of the highest character and of world-wide reputation, and any quorum of whom, sitting as a court, would command the confidence and admiration of the entire world, and be relied upon to do justice in any case that might arise. For one, speaking for the United States of America, I should be perfectly willing to intrust the fortunes of the court, and the success of this conference in creating it, to the result of any election that might be made as suggested, and I

hope that it will be taken into serious consideration and recommended for action by the committee, in the event of no plan being proposed that can command more general approval.

A further method of election, under further limitations, has been proposed and is also worthy of consideration, and that is, that the nations should nominate each a number of jurists, selected from the old court or at large, to constitute the new court, whether provisionally or permanently; that these nominations should be received by an executive committee of three, to be appointed by the president of the conference; and that the names of all candidates nominated by five or more powers should be placed upon a ballot and offered for the final choice of the conference, voting by states; and that those receiving the largest number of votes on such final ballot, to the requisite number prescribed for the court, should be declared the elected judges.

I am not without hope that still other plans will be evolved from the discussion of this intricate and important matter which is now to take place that may command the approval of the committee and secure the establishment of the court.

So sure am I that the establishment and organization of the court will be a great triumph of civilization and justice, and an effectual guarantee of the peace of the world, that I would urge, with all the earnestness of which I am capable, the adoption even of one of the provisional schemes referred to, if no permanent method for the choice of judges can be now agreed upon. And I trust that, laying aside all prejudices and national differences, all pride of opinion and all desire to secure special advantages for our respective nations, we shall devote ourselves, with one mind and one heart, to the solution of the problem that is now before us.

REMARKS ON THE SELECTION OF THE JUDGES, SEPTEMBER 18, 1907

I do not think that the time has come to give ourselves up to despair. We must do something to realize the hopes of the civilized world.

It follows from the speech of M. Barbosa that he objects to accepting any other plan than his own. That is another form of despair. But in any case, as the president has very clearly shown, the investigating committee has not yet decided the question.

Many plans have been presented to this committee, but they have not been sufficiently studied and discussed.

I persist in thinking that the *plan of rotation* would be the cleverest and the most just. However, in face of the opposition of certain powers, we have given it up.

The only method which, under the present conditions, offers any chance of success is therefore that of the *election* of a court, whether it be a permanent or a provisional one.

The objections made to this method of composition of the court are purely imaginary. It is the laying down of distrust as a principle,—the distrust of the wisdom and of the loyalty of the electors.

One fears the coalitions of small powers against the great. I declare that I do not share these apprehensions.

The representatives of the small nations are as qualified to be electors as the others, and they will agree to choose the best judges, independently of nationality. And assuredly, worthy judges can be found among the subjects of these same small nations. If we have not confidence in each other, why do we strive, then, to conclude a convention? Why do we not adopt a method which admits the principle of the equality of nations?

For myself, personally, I would run the risk of an election, whether it be made by the governments, or by the Permanent Court, or by this same conference, provided that all nationalities, all languages, and all systems of law be represented. It matters little to me whether my nation may have a judge or not. We are not here for the sole advantage of our own country, but for the benefit of the community of nations.

The plan of M. de Martens, which has been submitted to us, is excellent as a whole. He proposes that each country designate an elector, taken from the list of the members of the Permanent Court, and that these forty-five electors should, in their turn, choose fifteen judges, who should form the court.

Nevertheless, in this plan a certain number of judges is ascribed to Europe, to America, and to Asia, and that is its vulnerable point, for that recalls to mind the old plan of rotation. On the other hand, it does not appear indispensable to assemble again all the electors at The Hague, for practically the vote would be issued by the governments. One could therefore dispense with the formality of the reunion and have the electors vote through the medium of the bureau.

I take the liberty in this class of ideas to make a proposition to the committee which seems to me to answer all of the objections.

PROPOSITION WITH REGARD TO THE COMPOSITION OF THE COURT OF ARBITRAL JUSTICE

Article 1. Every signatory power shall have the privilege of appointing a judge and an assistant qualified for and disposed to accept such positions and to transmit the names to the international bureau.

Article 2. The bureau, that being the case, shall make a list of all the proposed judges and assistants, with indication of the nations proposing them, and shall transmit it to all the signatory powers.

Article 3. Each signatory power shall signify to the bureau which one of the judges and assistants thus named it chooses, each nation voting for fifteen judges and fifteen assistants at the same time.

Article 4. The bureau, on receiving the list thus voted for, shall make out a list of the names of the fifteen judges and of the fifteen assistants having received the greatest number of votes.

Article 5. In the case of equality of votes affecting the selection of the fifteen judges and the fifteen assistants, the choice between them shall be by a drawing by lot made by the bureau.

Article 6. In case of vacancy arising in a position of judge or of assistant, the vacancy shall be filled by the nation to which the judge or assistant belonged.

This plan is so simple that there is no need of long discussions. If fifteen nations only accept it, it could become the point of departure of a general agreement. The example of 1899 is there to prove that the adhesions could come afterwards.

The immediate adhesion of any particular nation, great or small, would not be indispensable. This would be an experiment, and the nations who would not accept it to-day would be able to come to a decision later on.

I think that my proposition, if it is adopted, will give us good judges and will satisfy all the world.

It is a matter of indifference to me whether the election takes place here or elsewhere, whether the court be permanent or provisional, constituted for five, for three, for two years, provided that we may not return to our countries with empty hands. It is better to do something than to do nothing. I do not yet share the despair which some of the delegates who support our plan have expressed. As long as the conference lives there is cause for hope.

ANGLO-AMERICAN
PROJECT FOR INTERNATIONAL ARBITRATION

ADDRESSES BEFORE THE FIRST COMMISSION, SECOND HAGUE CONFERENCE, OCTOBER 5 AND 10, 1907*

Mr. President: It is now ten weeks since I had the honor to present, in the name of the delegation of the United States of America, the projet for a general agreement of arbitration which is to-day before the consideration of the committee. It has, I think, erroneously been called a projet of a convention for "obligatory" arbitration. In my judgment the true name for it should be a projet for a "general" convention of arbitration. There is nothing any more obligatory about it than there is in any other agreement of arbitration, whether between two individual states or several. It is obligatory upon them from the mere fact of their agreeing, in the one case as in the other. The *Comité d' Examen* to which the projet was sent, has very carefully discussed it, clause by clause and article by article, and in spite of all the efforts made to defeat it and to reduce it to an impossible minimum, the proposition, modified in only two important points of view,—the introduction of a brief list of subjects in respect to which the honor clause should be waived, and the addition of the article providing for a protocol,—has finally received the hearty support of the *Comité*.

I should like to say a few words in reply to the important discourse delivered by the First Delegate of Germany, with all the deference and regard to which he is justly entitled because of the mighty empire that he represents, as well as for his own great merits and his unfailing personal devotion to the consideration of the important subjects that have arisen before the conference. But with all this deference it seems to me that either there are, in this conference, two First Delegates of Germany, or, if it be only the one whom we have learned to recognize and honor, he speaks with two different voices. Baron Marschall is an ardent admirer of the abstract principle of arbitration and even of obligatory arbitration, and even of general arbitration between those whom he chooses to act with, but when it comes to putting this idea into concrete form and practical effect he appears as our most formidable adversary. He appears like one who worships a divine image in the sky, but when it touches the earth it loses all charm

* The proposed convention failed of adoption because of the opposition of the German delegation.

for him. He sees as in a dream a celestial apparition which excites his ardent devotion, but when he wakes and finds her by his side he turns to the wall, and will have nothing to do with her.

But seriously. What response has been given to our proposition? What is the fatal obstacle that we find in the way? How is all this desire to accomplish arbitration, so dear to the hearts of all the nations, manifested in fact? What hindrance is there to carrying out the purpose so general among all the nations? If the United States, France, Germany, Great Britain, and Russia, and a number of other nations can exchange individual treaties with each other for the purpose of arriving at the desired result,—a result which we all profess to desire,—why is it not possible to arrive at the same accord in a general way, by means of a mondial treaty?

But if we yield to the suggestions of the First Delegate of Germany, it is absolutely necessary for us to limit ourselves to individual treaties with each other and to come to a dead stop at the very suggestion of a general mondial arbitration agreement. That is the very question. If each nation can agree with each other separately, why cannot each agree to the same thing with all the rest together? They accept our projet of an arbitration agreement on the sole condition that it be individual and not general in the form it takes, and that it never shall be a world-wide general agreement. Why? Yes, why? I ask. Why cannot a nation which is ready to enter into an arbitration agreement or agreements as to certain subjects with twenty other states come to a similar agreement with all the forty-five, if such is the imperative desire of the nations? Let Germany answer the question. 'The rest of us are ready to conclude a general convention in this sense because we have absolute confidence, each of us, in all the other nations. We respect the equality of all the other powers upon the basis upon which they are represented and on which they exercise suffrage in the conference. We recognize by their conduct here their equal manhood, intelligence, independence, and good faith. There are really two questions here,—one of confidence or good faith and the other of a resort to force.

It has been truly said by Baron Marschall that the immediate result of the conference of 1899 was to stimulate and advance the cause of arbitration throughout the world. You remember, gentlemen, how quickly after the conclusion of the labors of that conference a great number of important powers gave in their adhesion to the principle by exchanging individual treaties of arbitration of exactly the same tenor as that which now lies before you. We hope that the same will

be the case this time, for I am sure that our labors, however imperfect the results may be, will at least still further advance the world-wide desire for arbitration and a resort to it as a universal substitute for war. And I predict that if we, who have sufficient confidence in each other, shall enter into this treaty that is now proposed, the German government itself, even if it decides for the present not to sign, will soon be ready to adhere with the rest, and will not only be ready, but will eagerly seek, to be admitted to the universal compact. She, with her enthusiasm for the principle of arbitration, will not be willing to be left out in the cold, but will be eager to unite with the majority.

We have learned much in the protracted labors of the conference, but the best thing that we have learned is this confidence in each other and how the nations who have united in its labors are entitled to equal credit for honest intention and good faith.

Now as to the question of the reservation of the right or the purpose to resort to force, which is the only other reason that I can conceive of for declining to join in a general arbitration agreement on the part of those who are ready to accomplish the same thing by individual treaties. The idea of the opposition, as I understand it, is that we should maintain our right to select our own company, and not be compelled to admit all the nations into a general agreement with us. But suppose you do agree with twenty nations and conclude such treaties with that limited number, either separately or jointly, what do you mean to do with regard to the twenty-five other nations whom you will have refused to admit into your charmed circle of arbitral accord? You must reserve, must you not, you must mean to reserve, the right to resort to war against the twenty-five nonsignatory states, when differences with them cannot be settled by diplomatic means? Those are the two alternatives always,—arbitration or force. And if you will not agree to arbitration, it must be because you reserve the right, if not the intent, to resort to force with them. But, gentlemen, empires and kingdoms, as well as republics, must sooner or later yield to the imperative dictates of the public opinion of the world. Every power, great or small, must submit to the overwhelming supremacy of the public will, which has already declared and will hereafter declare, more and more urgently, that every unnecessary war is an unpardonable crime, and that every war is unnecessary when a resort to arbitration might have settled the dispute. These are the two alternatives between which the opponents of our projet must finally choose.

The projet, as we presented it some weeks ago, is not new. We do

not claim the credit of inventing it. We have borrowed its language from other powers, as, for example, from Germany, from Great Britain, and from France, from treaties which they had already concluded with each other. If it is not perfect, the responsibility for its imperfections rests on those powers as well as on ourselves.

After the masterful discourse of M. Renault, to which we have just listened, there remain very few points for me to make clear. Baron Marschall is of opinion that the term "questions of a juridical nature" is obscure. But during the discussion of the even more important projet relative to the establishment of the *cour de justice arbitrale*, in which he was our cordial colaborer, this difficulty was not raised.

It may be at times difficult to distinguish a juridical question from a political question, but the difficulty is the same in the application of individual treaties as in that of a general treaty, and this objection, like almost all the others which Baron Marschall has raised, applies equally to both kinds of treaties.

Again it has been urged, in support of the position, that a nation may make a general treaty with twenty states and yet refuse to extend it to the forty-five; that the same difference arising between A and B may be of a juridical nature, and arising between C and D may bear a political character. Our projet contains in itself the reply to that objection. If, on the difference arising between A and B, the question is of a juridical character, the treaty by its very terms will apply. If the same question, when it arises between C and D, proves to be, as it is claimed that it may be, a political question, the very terms of the treaty will exclude it.

The only reason why M. Baron Marschall prefers individual treaties to a mondial treaty is that the latter does not leave to each party the choice of its cosignatories. To this I answer: "The whole matter is one of mutual confidence and good faith. There is no other sanction for the execution of treaties. If we have not confidence one with another, why are we here?" There is no other rule among us than that of mutual good faith. That is the only compelling power which can restrain or enforce our conduct as nations. If we feel that we cannot trust each other, that is a conclusive reason for refusing to enter into treaties of arbitration with the rest. If we can, it is our solemn duty to do so, and thereby substitute arbitration for war as the world demands.

A single word now as to the perpetual hue and cry that the opponents of our projet have raised as to the necessity of every compro-

mis being subject to the approval of the Senate of the United States, and the baseless plea that this makes a lack of equality or reciprocity between us and other states who may enter into this treaty with us.

Without doubt, in certain cases, for the execution of the convention by the establishment of the compromis the cooperation of several departments of a state will be necessary. As with the United States, so with almost all the other nations, and there is no international executive power to compel them to make it, but it is certain that the several branches of government, whose cooperation is in each case constitutionally required for the making of the compromis, will comprehend their duty to honor their international obligations, and we have not the right to question their good faith.

The same question of the compromis will always arise under every treaty, whether individual or general, because it is the only method known to diplomacy for settling the terms of the arbitration that has been agreed upon, and whatever may be the constitutional requirements as to the need of the cooperation of coordinate branches of the respective governments in making it. The making of it will always be a matter between government and government, and it is no concern of either government whether the other will have to act or sign by one or two or three branches to make it valid. The same difficulty in settling the terms of the compromis may be raised by a single foreign office, or by either of however many branches of government whose concurrence may be necessary.

If we begin now with a restricted number of obligatory arbitration cases, as our projet proposes, there is no doubt that before the next conference meets the number will be considerably augmented by additions under the article providing for a supplementary protocol. At the same time it is clear that a mondial treaty will not prevent the powers from continuing to conclude among themselves individual conventions of arbitration, under all of which the same inevitable necessity for a compromis will always recur. But in signing a mondial convention, does a nation renounce absolutely the choice between arbitration and force? If one of the parties should refuse to conclude the compromis or to execute the award, the other has always the same right of recourse to force which it ever had if no treaty had been made. In that case the only question will be, whether it will venture upon that extreme remedy, in defiance of public opinion, or will have patience still and make further amicable efforts to bring the adversary to reason.

So far as regards the compromis, the arguments of the opponents of the projet have been refuted by the words, as logical as they are eloquent, of M. Renault. Whether it is a question of an individual arbitration treaty or a mondial treaty, a compromis, as he has shown, will always be necessary. At the same time he has conclusively shown that the United States, by reason of the fact that the Senate must approve the compromis, is not less bound than other powers by a general treaty of arbitration. He has manifested a masterly knowledge of the force and effect of the detailed provisions of our Constitution and of its general working. No American lawyer could have explained it better.

Sometimes the settlement of the terms of the compromis is the most important question involved in the treaty and in its execution, as has been well illustrated by M. Renault in the case of the Alabama Claims, which resulted in the Geneva arbitration, where the settlement of the compromis is generally believed to have really settled the case and compelled the decision which was subsequently made by the arbitrators. That is why the United States, as well as Great Britain, in the examination of the projet for the creation of the *cour de justice arbitrale*, refused to intrust the special committee with the settlement of the compromis, preferring to reserve the right to themselves to make their own international bargains in matters so important.

Again we have heard from Baron Marschall a new illustration drawn from the "open door." Three or four years ago we used to hear a great deal about the "open door," but of late the whole world has been silent on the subject until our distinguished friend brought it up for illustrative purposes on the present argument. The making of the treaty, he says, always leaves an inner door to be passed through, to wit, the making of the compromis; and, he says, to this door each of the high contracting parties holds a key, and when one of them presents himself with his key for the opening, the other may come and say, "I cannot open my lock with my key because my Senate has got the key." Well, the Senate is just as essentially a part of the power that holds the key for the United States as the President is, and until they are both ready to give the word, the door cannot be opened. But so it is with every government which requires the concurrence of more than one branch to the making of the compromis; and the same difficulty arises if the foreign secretary of one party, who is enabled to act alone, says, "I am not ready to produce my key."

A sufficient reply has been given by M. Renault. It is not a question of knowing whether there are several keys, but whether the door

is open or closed. From the moment when the arbitration treaty is concluded, each party is bound to unlock the door for both to pass through upon reasonable terms. One party cannot settle for the other what terms are reasonable, and until both parties agree, the compromise is not settled and the door is not open, whether the settlement of the compromise and of the opening of the door depends on the Senate, an executive council, a parliament, a sovereign, or any other administrative entity. Always, as I have so frequently insisted, it is a question of good faith in the action of the government on either side, however that government is constituted. Arbitration is concluded not between two or more underlying administrations of government, but between the two states, between the two powers, as distinct national entities, and the carrying out of every step is between them.

This atmosphere of mistrust or distrust in which it has been sought to envelop the whole question ought to be cleared away. It is the most noxious atmosphere in which international questions can be discussed in an international conference, and it ought to give place to the mutual spirit of abiding confidence and good will. For the government that I represent, I can best dispel it by a reference to our past, which answers more eloquently than any words of mine can do, all the objections that have been raised. During the last fifty years the United States have, I believe, concluded as many treaties of arbitration as any other power, and never in one instance has it failed to conclude the compromise required by the treaty. From the moment the arbitration agreement has been entered into which required the compromise, it has regarded the making of it on reasonable terms as a national necessity and the imperative requirement of good faith. And should it continue as a nation for a thousand years to come, it will never fail to honor its engagements, and the Senate, in the future as in the past, will ever be ready to complete the compromise in the spirit that the treaty requires.

Throughout the world the necessity of general arbitration is felt and proclaimed. The joint action of all the states of America, North and South, at the Pan-American conferences at Mexico and at Rio de Janeiro, demonstrates that all the states of America are of one mind, that the whole western hemisphere is a unit on this subject, and with one voice aspires to conclude a mondial convention for the settlement of international disputes as preventive of war. If in this great cause you will lend us your cooperation, you will sustain the interests of humanity and civilization, and by the unanimous adoption of our project we shall grandly promote the welfare of mankind.

ADDRESS ON THE AUSTRO-HUNGARIAN RESOLUTION, OCTOBER 10, 1907

I did not expect, Mr. President, to have had to trouble the commission again, or to occupy any moments of its time. In view, however, of the startling proposition developed by the First Delegate of Austria-Hungary, I cannot refrain from entering my earnest protest.

After having discussed for three months the subject which occupies our attention to-day, the commission has expressed its will by an overwhelming majority of thirty-one votes against five or eight,—a majority of four or more to one,—and has thereby declared emphatically in favor of obligatory arbitration. It has voted upon an entire series of articles, separately and all together, and the same majority has stood steadily by its decision. The minority has been so feeble that one could almost count its number upon the fingers of a single hand, and now it is proposed to annul everything that we have done in the last three months, and it is said by the distinguished First Delegate of Austria that there is no alternative,—that either we must accept the rule of absolute unanimity, or the proposition which he has presented, which is absolutely contrary to the clearly manifested will of the commission, and is a fearful step backward from that which that will has so strongly expressed.

What conclusion would have to be drawn if we should accept the proposition of M. de Merely? Why, that a single member of the conference can prevent it from doing anything, and can nullify that which all the rest have succeeded in doing up to the present time. Even if it were possible to find reasons on which one could base a conclusion so cruel, it would not be for the commission to decide the question. The last word would not belong to it. Our duty as a commission is to follow out our deliberations to the end, and if our decisions have been taken by an absolute majority, we must submit them to the conference. There lies the duty with which we are charged. It is not for us, the commission, to dictate to the conference or to decide what it only can decide. Assuming, then, that there were grounds for the very destructive proposition which the First Delegate of Austria has laid down, I insist that it is not a question within the competence of the commission at all, but solely for the conference itself in plenary séance.

As to the merits of the proposition, can it possibly stand? Can five votes nullify the will of the thirty-one? That is not possible. Such a proposition cannot be sustained. By this decisive vote we have accepted the principle that we would submit to obligatory ar-

bitration cases of a juridical order, and especially those arising upon the interpretation of treaties. We have agreed, also, that the treaty should not apply in cases where national honor or the vital interests of either party were involved, and that each power should have itself the right to determine for itself whether such was the case. We have further voted a list of cases in which arbitration should be obligatory, waiving the honor clause, and finally we have agreed to the protocol proposed by the delegation of Great Britain, which would enable subsequent subjects to be added to the list. There only remain some details for us to determine.

Now, behold M. de Meréy comes forward with his proposition, which is directly contrary to all this, which nullifies it all, which undoes all that we have been doing since we first took up the projet for consideration; and we are told that we must accept his proposition or nothing. He would have us remit to the powers for further study a proposition on which we are all agreed. Surely we have not come here for any such trivial purpose. We have come at the behest of our governments and the general call of the nations, to establish obligatory arbitration. It has not been our purpose to labor during three months to accomplish that end, and to annul it all at last at the suggestion of five dissenting powers, and destroy at one blow the result of all our work. And will the governments succeed any better than we? Will they succeed as well as we? Have we not reached that approximate unanimity which justifies the carriage of this proposition one step further, and submitting it to the final decision of the conference? In the Third Commission that experienced diplomatist, Signor Tornielli, decided over and over again that all that was necessary to carry the proposition to the conference was that it should receive in the commission an absolute majority, that is to say, a majority of all the nations constituting the conference. At any rate, I so understood him.

It is for the conference alone to determine whether it will accept it with unanimity or with that approximate unanimity which we claim to be sufficient, and whether it shall find a place in the Final Act. It is absolutely impossible for this commission to determine any such question. Let us be faithful to our duty and hold on to that advanced ground which we have attained thus far. If there is any question to be solved, let us submit it to the conference to which it belongs. Assuredly, I pay all respect to the minority, but I have no doubt of the rights of the majority. I mean such a majority as has established this proposition,—the proposition of an obligatory agreement into which

those of the nations may enter who desire to do so, and the rest may abstain until each desires to come in. You will search in vain the records of the First Conference and of this conference, and the correspondence that preceded both, for any assertion of this fatal claim of the necessity of absolute unanimity in order to secure for any act or convention a place in the Final Act of the conference. And the proof on the records is clear to the contrary. Such a rule would paralyze the will and the action of the conference at the behest of one power, even the smallest, and even though it should dissent for the mere purpose of destroying the unanimity. Seeing this, the advocates of this monstrous proposition take various shifting grounds.

It is said, on the one part, in answer to the clear proofs, that such unanimity has not been in all cases required, that the rule of absolute unanimity "generally" holds. But in saying "generally" you abandon the whole position, for who but the conference is to determine when the exceptions arise, and whether the given case comes within the "general" recognition?

On the other hand, it is said that the vote must be unanimous or "nearly so." And this again is a clear and total abandonment of the position, for who but the conference is to determine what is the meaning of "nearly so." It has no meaning, and certainly our vote of four to one on obligatory arbitration is in any sense "nearly so."

And again it is said that the rule of absolute unanimity is maintained unless the dissentients be few and do not insist upon the proposition so carried by a great majority being included in the Final Acts of the conference as a part of its work.

This suggestion also is a complete abandonment of the preposterous claim.

Clearly, this commission has no right or power whatever to meddle with the question. Its work, as I have said before,—including this proposition of ours which has been carried by such a great majority,—must go to the conference, and it is for the conference alone, where *non constat* but that it may be adopted unanimously, to determine whether it shall go into the Final Act.

They say that it was the rule of the former conference and should be the rule of this, but I deny the proposition altogether. This claim, whoever makes it, is not founded in fact. Twice the conference of 1899 acted on the opposite theory and repudiated this suggestion of absolute unanimity being necessary, and more recently—only last week—in this very conference the proposition was ignored and denied.

In the conference of 1899 the decisions of the conference on two

important subjects were taken and carried into the Final Act not only against the dissent but against the earnest protest of two great powers, if Great Britain and the United States of America are entitled so to be called—I mean the propositions relative to the use of asphyxiating gas and the dumdum bullets. According to the theory which has here been developed, these decisions ought not to have become a part of the law of the world, as they did become, by the act of the First Conference; there being the dissent of two great powers, they should have been thrown out, as it is proposed to throw out our great majority on the subject of obligatory arbitration.

But here, in this present conference, is another equally strong proof of the baseless character of the present contention. It is but a few days ago that we voted for the international court of prize. It has been accepted. It is to be embalmed in the Final Act as, in the opinion of many, the most important and valuable work of the conference; but there was one clear vote declared against it, that of Brazil. And yet nobody claimed that the rule of absolute unanimity should apply to the case. That is the established act and decision of this very conference. The First Delegate of Brazil was too magnanimous to offer any objection, based upon his negative vote, to its becoming the decision of the conference. He was generous enough to say that the accord would hold good in spite of his dissent.

Let us then, gentlemen, put to the vote of this conference the proposition of the honorable delegate of Austria-Hungary, and let us see whether those who thus far have constituted this great majority, on the one hand, wish to support their own action, or, on the other, to accept the remarkable proposition of M. de Merey, which utterly nullifies it. Let us occupy ourselves with that which is our business and leave to the conference the duty to give an answer to the question which has here been raised.

It has been said by the eminent president of the conference that my proposition would impose the will of the majority upon the minority. That, gentlemen, is a clear misapprehension. I made no such claim. The claim is, that when the vast majority of the conference desire to establish the agreement for obligatory arbitration for those who will to enter in, and those who will not to stay out, they have the right to do so, and to do it under what M. de Martens has so well described as *le drapeau de la conférence*. But the contrary proposition, which M. de Merey and others have advocated, subjects not a great majority only but the entire conference but one to the dominating and

destructive will of that single one. Certainly there is neither justice, nor reason, nor common sense in a proposition that will bring about such an iniquitous result and render any decisive action on any important question absolutely impossible.

LÉON BOURGEOIS

TRIBUTE TO M. LÉON BOURGEOIS, DELEGATE FROM FRANCE AND PRESIDENT OF THE FIRST COMMISSION, SECOND HAGUE CONFERENCE; BEFORE THE FIRST COMMISSION, OCTOBER 11, 1907

Mr. President: You are in yourself, if I may be permitted to say so, the subject which, when we come to distribute the eulogies of the commission, commands and receives that absolute unanimity which some claim to be necessary, but which it has been so difficult always to obtain in the course of our labors.

What we are now considering, our parting word to you, sir, is neither a vœu, nor a resolution, nor a recommendation, but a heartfelt declaration in which all your colleagues will be most happy to concur. All those among us, who in the exchange of compliments which you have so freely distributed, have escaped any share therein, are of one mind, if we may be permitted to add to the happy words of his Excellency the President of the Conference, just addressed to you, and we cannot fail to recognize with profound admiration the absolute impartiality, in all other respects, with which you have from the beginning guided our proceedings.

It is now four months ago that we assembled here. We have discussed, we may say without boasting, most difficult and delicate subjects all the time, which involved not only serious thought but sometimes our deepest feelings, and what is truly remarkable is, that in all that time not a single day has witnessed, so far as I can remember, the least bad temper. Certainly there have been some lively moments. The earth has occasionally trembled beneath our feet. Etna has rumbled and Vesuvius occasionally has given a flash, but never once has there been a volcanic eruption. At every moment the commission has been mistress of its own passions. This truly is a remarkable circumstance, and no assembly of such importance that I have ever heard of has met and continued together so long a time and given such a marvelous example of order and harmony.

All this I attribute, Mr. President, to the powerful influence which you have never ceased to exert over those who are subject to your sway. It is your genial presence and the gladness and light that always radiate from your person that are accountable for this happy result. No other man among us could possibly have kept us more closely together or brought us more nearly to the desired goal of absolute unanimity.

Certain newspapers which I have read have given the impression that our labors have not been considerable or important, but, on the contrary, I am of opinion that we have a right to be proud of what we have done, and that everything that high endeavor and conciliatory spirit and untiring industry could bring about has been actually accomplished.

To begin with, the international court of appeal in prize constitutes a new departure of very high importance. It will substitute for the selfish edicts of national courts, rendered under the excitement of war in which their states were engaged, the supervising judgment of a serene and impartial appellate tribunal, which will aim at nothing short of absolute international justice and right. I have little doubt that it will be accepted and approved by the governments, and that it will not fail to advance the cause of justice and of peace. Under its administration the common welfare of the nations will take the place of self-interest in the adjudication of national disputes.

We have also the earnest conviction that the day is not far distant when the *cour de justice arbitrale* will be established in reality on lasting foundations. It is true that in forming the constitution of such a court and recommending to the nations its establishment thereon, when they shall have arranged among themselves as to the number and distribution of judges, we have not completed the work, but we have laid the corner stone upon which this new and great tribunal of arbitration will be erected, just as we aided our distinguished president in laying the corner stone of the new *Palais de la Paix* within whose walls the sittings of these new tribunals will be permanently held. They say that we cannot guess how long a time will elapse before this final result of our labors shall be realized, but what we could not finish in four months, the nations that we represent—in whose lives four years are as nothing—will, before the meeting of the next conference, I am sure, complete.

We have done much besides. We have, with actual unanimity, established the rule that force shall not be resorted to for the collection of contractual debts against a nation until arbitration has been had or refused, by adopting a resolution which will carry the name of General Porter into all quarters of the earth where nations borrow money, and down to distant generations as long as they shall fail to pay their debts, which perhaps means as long as grass grows or water runs.

We have also made suitable arrangements for better preparation for the work of the next conference, for its being regulated from the

outset by the joint action of the powers, and for its more suitable organization and procedure, so that its labors may be rendered more easy and more effective than ours have been.

There are many other steps forward in the path of progress that we have taken, and although it is true that we have failed now to reach complete unanimity on the subject of obligatory arbitration, we who have advocated it do not despair, and have never been better assured than at this moment that that great cause will triumph at last, and that by the common consent of the nations arbitration will be substituted for war,—a result which will at last obtain universal approval.

During these four months, Mr. President, we have lived happily under your benign dominion. We have worked hard and have earned the bread of the conference by the sweat of our brows, and there have been moments of trial and suffering, but in separating we look back with satisfaction upon our labors, thanks greatly to your beneficent and harmonizing spirit.

WASHINGTON TO-DAY—ABROAD AND AT HOME

ORATION DELIVERED ON UNIVERSITY DAY, UNIVERSITY OF PENNSYLVANIA, FEBRUARY 22, 1908, IN THE ACADEMY OF MUSIC, PHILADELPHIA*

The birthday of Washington is celebrated everywhere to-day as a great national holiday, but nowhere so fitly as in Philadelphia, the birthplace and cradle of the Republic, where it was observed as a holiday even in his lifetime, and in this ancient University which for nearly a century has continued to devote it to the commemoration of his matchless virtues—and his sublime triumphs.

Had our great experiment failed, had Burgoyne worked his way through to the Hudson, and separated New England from her sister colonies, had Cornwallis been victor at Yorktown and received the sword of Washington as the token of final surrender, the name and memory of our great commander would still have been tenderly cherished by a grateful people and an admiring world, very much as the name of General Robert E. Lee is now cherished by the South, honored by the North, and admired wherever men do homage to military genius, to heroic achievement, to self-sacrificing devotion. But Washington's

* When the honorary degree of LL.D. was conferred upon Mr. Choate, Mr. John Cadwalader made the following presentation statement:

"Under governments based upon written constitutions the legal profession is absolutely essential for the instruction of citizens in their obligations, and what Lord Eldon called 'the educated conscience of the lawyer' is required to define them.

"You, sir, have truly obeyed the admonition of Webster, that as the profession has honored you, you should honor it. With great ability you aided in rescuing the city of your adoption from criminal pillage.

"Your efforts restored to the country's roll of honor the name of a great soldier unjustly condemned, and you have rebuked the highest in authority when the integrity of your profession was assailed.

"Whether presiding over the Constitutional Convention of your State, or representing your country at a foreign court, or at The Hague, with learning and experience, legislating to secure peace throughout the world, your services have been invaluable.

"As Cicero said of Quintus Scaevola, you are 'Juris peritorum eloquentissimus eloquentium juris peritissimus,' the greatest orator among lawyers, the greatest lawyer among orators.

"To-day when you come to pay further tribute to one whose memory will ever be revered, I deem it a high privilege, by the authority of the Trustees, to ask the Provost of this University to confer upon you, Joseph Hodges Choate, the degree of Doctor of Laws."

seven years' struggle for true and living liberty, unmarred by any bar sinister, was blessed by a kind and faithful Providence with complete and everlasting success. The independence of America was established forever. And it was truly the survival of the fittest that he, whose military genius had led the way to the creation of the Republic, should live to preside at the birth of the Constitution, and for eight years, as its President, to lead the Councils and shape the policies of the infant nation. So that when he died, not only was the voice of calumny, which until then had never spared him, hushed at his grave, but he was embalmed in the hearts of all his countrymen forever, as "the greatest of the sons of men"—and foreign nations, so far as they had knowledge of him, joined in our obsequies as sincere mourners. Victorious France craped her standards and vanquished Britain dipped the flags of her fleet, in token of submission to his sublime character.

My own observation of English opinion leads me to believe that all English hearts respond in devout sympathy to Lord Brougham's unique eulogy, "It will be the duty of the historian and sage in all ages to let no occasion pass without commemorating this illustrious man—and until time shall be no more, a test of the progress which our race has made in wisdom and virtue, will be derived from the veneration paid to the immortal name of Washington."

When your distinguished Provost did me the great honor to invite me to take part in this day's celebration, I was fresh from a four months' sojourn at the Hague, in attendance upon the "Peace Conference," whose mere existence had seemed to me to mark the progress which our race had made in wisdom and virtue. I was saturated with the spirit of peace and human fellowship which had prevailed there, and in accepting your summons it seemed to me that I could not better serve the purpose of the day, than by an attempt to reflect the spirit of that great assembly—the first real Parliament of mankind—towards the great policy and purpose of Washington—and then to imagine the judgment of Washington, if he were here to-day, upon our present relations with the nations there assembled, and upon their well-intended efforts to press one step forward to promote the welfare of mankind.

We shall thus have a much needed rest, for an hour, from all our internal problems and anxieties and take a world's-eye view of the footing on which we stand with the rest of humanity.

In his letter to James Warren of Massachusetts on the 7th of October, 1775, Washington laid it down as the cardinal maxim of our foreign policy: "*We must keep good faith with the rest of the world.*" This, I believe, has been the general rule which has guided our conduct

towards other nations in peace and in war, and was certainly the spirit of the rest of the world towards us as manifested at the Hague. The gates of the Temple of Janus are said to have been shut only four times in the whole history of Rome, and almost never since the reign of the Prince of Peace upon the earth began. But it was a happy omen for human progress that when we assembled in the capital of the gracious Queen of Holland, the cradle of many treaties, universal peace reigned throughout the world—

No war or battle's sound
Was heard the world around,

when, for actually the first time in human history, all the civilized nations of the earth assembled upon the invitation of President Roosevelt, as the preamble of their Final Act declares, to take counsel together how the existing universal peace of the world might most securely be preserved and continued. Without distinction of age, size, color, creed, language, history or interest, they had gathered to that one spot from all the corners of the globe, intent upon but one object, and that the noblest that can enlist the study of mankind—and if you had asked them why they had come, they would have answered to a man in the language of Washington's Farewell Address, "to observe good faith and justice towards all nations, and to cultivate peace and harmony with all." Surely the call and the object at least indicated the highest water mark yet reached by the rising tide of human progress. Of the nations assembled only a few had existed under their present organizations at the time of Washington's death, and fewer still had had any relations or intercourse with the United States up to that time, so that his personal fame was mainly restricted to the nations which had had more or less to do with our Revolutionary War, like England, France, Spain and Holland and the dominions of the great Frederick—and probably not so many as ten millions of the inhabitants of the earth had ever heard his name.

But in the hundred years that have since elapsed, the multiplication of nations, the growth of populations, the advance of education and civilization, the interchange of languages and of intercourse, and the wonderful increase in the facilities for communication by steam and electricity, have actually annihilated space, and brought the ends of the earth together, so that the remotest nations have come to know and honor him, as the champion of liberty and the advocate of peace and harmony, throughout the world. And the marvelous growth of the nation which he founded, in territory and population, in wealth and influence, no longer hid in a corner, but circling the globe with its pow-

er, has so magnified his fame, that he stands to-day in the thoughts of all men as the ideal of perfect manhood, of spotless virtue and unselfish patriotism, and as the leader of a great nation into light and liberty. I am sure then that if it had been put to vote among the forty-five nations at the Conference to say who is the noblest public character in modern history, with one voice they would have selected Washington.

In truth the summons of President Roosevelt, which initiated the call for the Conference, and the letter of the Emperor of Russia which convoked it, were the distant but direct echo of the Farewell Address which preached the gospel of Peace and Harmony with all.

Thus Washington stands to-day with foreign nations, as the friend, the guide and benefactor of all—and wherever there is an aspiration for liberty in the hearts of the oppressed, of whatever nationality, creed or color, it is invoked in his name. So that when we went to the Hague as the representatives of America, to confer with the delegates of the rest of the world as to how peace could best be preserved and perpetuated, we carried in that name a talisman, which opened all hearts to us and secured us a fair hearing on any question—and Washington's influence was potent in guiding the deliberations of the assembled world. His ideas, his principles, his aspirations and his hopes found expression and fruition there.

If it thus be true that all foreign nations look up to the Founder of our Republic as peerless among men—as the noblest example of human conduct that history furnishes—we may now consider how he would view our foreign relations, if he were to reappear to-day, and how he would judge our present conduct and bearing towards the rest of the world.

It is the great good fortune of the people of the United States that in the main they have followed, in respect to foreign policy, the lines laid down by Washington himself in that priceless legacy which he left them in his Farewell Address, and to that is largely due the peaceful and honorable relation we sustain to the other nations to-day. Absolute independence of every other power, perpetual peace with all, and complete neutrality in all foreign conflicts, were the cardinal maxims of that immortal instrument—or as he said to Patrick Henry in the letter of October 9, 1795, tendering to him the State Department, "My ardent desire is, and my aim has been, to comply strictly with all our engagements, foreign and domestic; but to keep the United States free from political connections with every other country, to see them independent of all and under the influence of none. In a word, I want an American character, that the powers of Europe may

be convinced we act for ourselves and not for others. This in my judgment is the only way to be respected abroad and happy at home"—and this is the way we are following now, and enjoying the happy results which he foretold.

Once recovered, if recovery were possible, from the dazzling spectacle of our boundary extended from the Mississippi, where he left it, to the Pacific Ocean so as to embrace the entire heart of the continent—and all within instant reach of the Seat of Government, while in his day it took weeks to communicate through the narrow confines of the Republic—he would naturally turn his attention from the great capital city on the banks of the Potomac, to some of those things that are just now illustrating the stupendous power of the nation.

Our continental boundaries from ocean to ocean, from the lakes to the gulf, with Alaska stretching almost to the pole, would seem far to surpass the realization of his prophecy—"for sure I am," he said, "if this country is preserved in tranquillity twenty years longer, it may bid defiance in a just cause to any power whatever; such in that time will be its population, wealth and resources"—and "a century hence, if this country remains united (and it is surely its policy and interest to do it), it will produce a city, though not so large as London, yet of a magnitude inferior to few cities in Europe, on the banks of the Potomac." Even his imperial imagination would be staggered by the actual sight of our insular possessions, following the sun and keeping company with the hours as the day revolves. I will not venture to analyze his thoughts and feelings, as he read the story of their acquisition by conquest, by annexation or by purchase—but of this we may be absolutely sure—that as to the people of that great oriental archipelago which we have made our own, nothing would satisfy him but that we should discharge to the utmost, at whatever cost, all the obligations and responsibilities which we have assumed toward them, and lose no time in preparing them for self-government by the speediest and most effectual methods.

We may be sure too, that our Interoceanic Canal would appeal most strongly to the aspirations of his great American heart. "Harmony and liberal intercourse with all nations," he said, "are recommended by policy, humanity and interest," and by what other means could such harmony and liberal intercourse be so effectually promoted? He would learn, with profound interest, how this great scheme for the advancement of international intercourse had been long retarded by the existence of a treaty, which trespassed very closely upon that true policy

which he prescribed to us "to steer clear of any permanent alliances with any portion of the foreign world"—inasmuch as it bound us to a perpetual partnership with England in the work—how by a happy triumph of diplomacy, in which the liberal spirit of England met our demands at least half way, it was converted into an absolutely American enterprise—but to be held by us in trust forever for the equal benefit of all nations, for the transit on equal terms of their ships of war and ships of commerce alike—and how by the colossal energy, courage and determination of his latest successor the world's dream of centuries is about to be realized.

A glimpse of our brilliant navy too, working its dignified way on a peaceful excursion around the Western Hemisphere, would not escape his broad and worldwide vision. It would recall to his mind his speech to both Houses of Congress on the 8th of January, 1790, in which he declared, "To be prepared for war is one of the most effectual means of preserving peace," and of his other speech to the same body on December 7, 1796, when he said—(the United States having at the time no navy at all)—"To an active external commerce the protection of a naval force is indispensable. To secure respect to a neutral flag requires a naval force organized and ready to vindicate it from insult or aggression. This may even prevent the necessity of going to war, by discouraging belligerent persons from committing such violations of the rights of the neutral party, as may first or last leave no other option. These considerations invite the United States to set about the gradual creation of a navy. The increasing progress of their navigation promises them, at no distant period, the requisite supply of seamen, and their means in other respects favor the undertaking. Will it not then be advisable to begin, without delay, to provide and lay up the materials for the building and equipping of ships of war, and to proceed in the work by degrees in proportion as our resources shall render it practicable, without inconvenience, so that a future war of Europe may not find our commerce in the same unprotected state in which it was found by the present?" With our seacoast quadrupled in length, our exposure to possible attack increased a hundredfold, and our commerce a thousandfold, would he not lend the whole weight of his influence to support the vigorous policy of our present President and Congress to the future upbuilding of our navy, till it shall suffice for effective service on both oceans and for any emergency?

Nor would he, nor should we, in this regard lose sight of the perpetual necessity of supporting the principles of his famous Proclamation of Neutrality, his greatest achievement in statesmanship, and one

rarely equaled in American Annals of State, by which, as his most distinguished biographer has said, "The world was told that a new power had come into being, which meant to hold aloof from Europe, and which took no interest in the balance of power or the fate of dynasties, but looked only to the welfare of its own people—and which received their final acceptance and extension twenty-five years afterwards in the promulgation of the Monroe Doctrine"—that doctrine which I should like to state anew, without attempted corollary or gloss, in the simple and plain words of President Monroe himself, "We owe it to candor and to the amicable relations existing between the United States and the European Powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety." This doctrine, so declared, has never, I believe, been formally agreed to by any European power. It has been treated by all with increased politeness as our naval strength increased. It is an exclusively American doctrine, which, as President Roosevelt has over and over again truly declared, will hold good only as long as we have the naval power to make it good—and who can fail to see, in the wise words of Washington which I have quoted, the complete concurrence of our first President in the spirit of this utterance of his latest successor?

Finally, I would invoke the benignant and peaceful spirit of the Father of his Country, upon our latest effort to promote the cause of international peace and goodwill by the part we took under the instructions of the President in the late Conference at the Hague. Although that quiet and undemonstrative body, pursuing great objects, with no inconsiderable success, has been almost lost sight of in the glare and thunder of urgent political events, its silent work will result in great and permanent benefit to the cause of Peace, long after the internal and partisan strifes of to-day have died away and been forgotten.

Let us recur to our original text from the Farewell Address, "Cultivate Peace and Harmony with all Nations."

It was on that errand that we were sent to the Hague with instructions that might well have emanated from the hand of our great Founder. Though these have never yet been made public I may be pardoned on this occasion for quoting a single paragraph, to show in what a pacific spirit our President through his eminent Secretary of State can instruct his emissaries sent on peaceful missions.

"In the discussions upon every question it is important to remember that the object of the Conference is agreement and not compulsion.

It is important also that the agreements reached shall be genuine and not reluctant. Otherwise they will inevitably fail to receive approval when submitted for the ratification of the powers represented. Comparison of views and frank and considerate explanation and discussion may frequently resolve doubts, obviate difficulties and lead to real agreement upon matters which at the outset have appeared insurmountable. It is not wise, however, to carry this process to the point of irritation. After reasonable discussion, if no agreement is reached, it is better to lay the subject aside, or refer it to some future conference, in the hope that intermediate consideration may dispose of the objection."

Again, "each conference will inevitably make further progress, and by successive steps results may be accomplished which have formerly appeared impossible. You should keep always in mind the promotion of this continuous process through which the progressive development of international justice and peace may be carried on and you should regard the work of the Second Conference, not merely with reference to the definite results to be reached in that conference, but also with reference to the foundations which may be laid for further results in future conferences. It may well be that among the most valuable services rendered to civilization by this Second Conference, will be found the progress made in matters upon which the delegates reach no definite agreement."

It was in this spirit that we went and labored—and with surprising results in the way of progress.

I am aware that widespread misapprehensions have existed as to the work of the Conference, and I gladly avail myself of this opportunity to correct some of these, and to give you a hasty glimpse at least of some valuable results achieved.

For some reason or other not easy to explain, the press both of England and America has given currency to the idea that the Conference wholly failed to accomplish the purpose for which it was convened—and that it might as well not have assembled at all. The conservative press of England especially, hostile certainly to the present government by whom its part in the programme was arranged, and its delegates appointed and instructed, looked coldly upon the Conference from the outset, and followed its proceedings from first to last with depreciation, satire and denunciation. Led by that powerful organ of public opinion, the London Times, it seemed determined very early that nothing would come of it—and when all was over it proclaimed with equal emphasis and bitterness that nothing had come of

it. Because we did not do everything that was expected, it was asserted that we did nothing. Because in many things we did not reach final and definite results, but left them, as we were instructed to leave them, for future conferences or intermediate diplomacy to carry on, the world was told that there were no results.

A more earnest and devoted body of men never assembled. With assiduous attention and study they applied themselves for four months to the consideration and discussion of the difficult and delicate questions submitted to them. Assembled as they were from all the corners of the earth, representing all the nations great and small, you might have expected to find some rough customers among them. But in truth there was not one. They were generally picked men from their respective nationalities, and even the smallest and youngest nations sent competent and accomplished men well qualified for the work in hand, and actuated by the spirit of high endeavor. And yet the London Times, on the 7th of October said: "They (the members) have negotiated and compromised and tried to dupe each other and resorted to all the little tricks and devices of second class diplomacy." And again on the 19th of October: "In plain English the Conference was a sham and has brought forth a progeny of shams—because it was founded on a sham. We do not believe that any progress whatever in the cause of peace or in the mitigation of the evils of war can be accomplished by a repetition of the strange and humiliating performance which has just ended."

It seems to have been forgotten that we were not a Congress or a Parliament, entitled and bound to force through measures for which a majority might be obtained, but strictly a Conference, met as Franklin said in the Federal Convention, not to contend, but to consult, in a friendly and mutually yielding spirit, on questions of general concern to all, but on which interests and opinions might radically differ, and which could only reach conclusions with substantial unanimity.

It is only by comparing the situation in which each important question considered had been left by the First Conference, with the position in which it was placed by the action of the Second, that any just idea can be formed of the advance or progress made in each, and in this view I may be pardoned for stating, in respect to four or five of the measures which we were instructed to advocate, their relative situations before and after the Conference.

First, there was that great American idea of making commerce free from the perils of spoliation by war—the immunity of enemy's private property in enemy's merchant ships in case of war. For more than a

hundred years the United States had advocated this, ever since Franklin in the negotiation of our Treaty of Peace with Great Britain in 1783, had tried unsuccessfully to have it incorporated as a cardinal article of that Convention. He had procured its insertion in our first treaty with Prussia, and once again in later years it had found a place for a few years in a treaty we made with Italy, and once or twice in engagements exchanged at the commencement of hostilities it had been agreed to for the purposes of the war only for the time being, by the parties to the contest, but no substantial or lasting effect had resulted from the repeated efforts of our Presidents and Statesmen, to have the principle recognized in the law of nations. At the first Conference in 1899, although presented by our government in an able memorial signed by the whole delegation, and a powerful address by Ambassador Andrew D. White, it was refused a hearing, on the technical plea that it was not embraced in the programme, although to the common mind it seemed to be as much so as many other subjects that were considered and acted upon—and it was referred to the next Conference. There, however, it was fully and fairly discussed, and for some weeks intelligently considered, and finally adopted by a vote of two to one—twenty-two nations to eleven—Germany alone, of the great military nations was with us—the others vigorously and consistently opposed, on the openly avowed ground, that they would not give up the right to strike at the most vulnerable point of their enemy on the outbreak of war. It cannot be doubted, however, that the moral effect of the vote of such a large and emphatic majority of the nations will go far to dissuade future combatants from the exercise of the right, or to lead them to agree together not to exercise it during the war—and the way is now open to the twenty-two nations, who voted for the suppression of the right, to enter into general or separate treaties agreeing to abandon this relic of barbarous warfare.

And this seemed to us to be a very decided advance on a most important question. We reported progress and asked leave to sit again.

Next, an International Court of Appeal in Prize was agreed to by an actually unanimous vote of all the nations. Everybody knows how prone all National Courts of prize in every country are to decide in favor of their own captors, sitting as they do in the territory of a belligerent, and in the very heat of conflict. It is unnecessary to tell you how American neutral commerce has suffered from this cause from the time of Washington down to this day. As we expect generally to be neutrals in all the future, as we have been generally in the past—the establishment of this Court—the first real international Court

ever assented to by express agreement of all the nations, is an immense boon to American interests. It was brought before the Conference for final adoption as the joint proposition of Great Britain, Germany, France, and the United States, with a scheme prepared for the constitution and organization of the Court, its powers and procedure and the mode of selecting its judges, all of which met with universal consent.

This we count the second great step in advance made by the Second Conference. What would not Washington have given for the existence of such a Court at the time of the British Order in Council in 1793, or of the subsequent injuries to our commerce sustained by captures from French cruisers when it lay at the mercy of both belligerents, each trying to drive us into war with the other!

Then there was our proposition which was introduced and conducted with such skill and tact by General Porter that in the case of ordinary public debts founded upon contract claimed to be due from one nation to the citizens of another, force should not be resorted to in any case for their collection, until arbitration had been offered and refused, or if accepted only in case its award had not been complied with. This proposition had no particular relation to our Monroe Doctrine, for it applied to all nations alike, great and small, debtor and creditor, European and American; but it does put an effectual barrier in the way of blockading a debtor state, or seizing its territory or revenues, as a means of compelling payment of its contractual debts, until arbitration has been had or refused—and will greatly tend to the peaceful settlement of all such controversies.

And who will say that this was not a great step forward? Finally, the treatment by the Conference of the great question of arbitration—arbitration, the only substitute yet discovered for the arbitrament of war in international disputes, marked a still further advance in civilization.

Our instructions were to press so far as we reasonably could, for a general agreement of all the nations to arbitrate claims of a judicial nature, or involving the interpretation of treaties but not involving the vital interests, the independence or the honor of the contending states—a general treaty substantially of the tenor of the individual treaties which we entered into in 1904 with ten other nations, but which fell through by a difference between the President and the Senate, but now to avoid the possibility of any such difference making each special agreement provided for in such general treaty subject to submission to the Senate.

In the First Conference in 1899, the very idea of a general agreement of arbitration of such a nature had been abandoned as an impossibility. But now from the time of the introduction of the proposition by us on the 15th of July until the early days of October it was debated with great ardor and interest, but with uniform good nature—debates in which almost every nation took part—and being brought to a vote in the first commission, to whose care the question was intrusted, it was adopted by a majority of more than four to one—thirty-two to thirty-five being in the affirmative on the several clauses of the proposition, and five to eight in the negative. This decisive vote in a Parliamentary body would have finally settled the question. But ours was a Conference only, and not a Parliamentary body, and here our instructions came in, not to press any measure to the point of irritation, and not to force a reluctant consent which might be repudiated by the ratifying powers. Although it was proposed that only consenting nations should sign under the aegis of the Conference, leaving it for others to come in afterwards or stay out as they pleased, yet the five dissentients resisted so stubbornly, that fears were entertained of serious discord if the matter were further pressed, and it was generally agreed to go no further, but to adopt instead a rather colorless vote adopting the principle of general arbitration, and recognizing that there were cases that should be so disposed of. But from this substitute we abstained from voting, on the ground that it was a decided retreat from the advanced position to which the great principle had been carried by the previous vote upon our carriage of the measure.

But who can deny the tremendous advance made on this momentous subject? Since it is now open to the thirty-two nations that upheld our proposition to enter into general or special treaties to carry it into effect, or that this great weight of international public opinion will ultimately persuade the dissentients to come in.

In the same connection our project for the creation of a permanent International Court of Arbitration, to which all controversies of an international character might be voluntarily submitted at the option of the parties for settlement, after being fully debated, was adopted by general consent, it being agreed with substantial unanimity that such a Court should be established, and a constitution for its powers, organization and procedure was submitted to the constituent powers, with a recommendation that the Court be established as soon as the powers could agree upon the number of judges and the mode of their selection. It was upon this last feature that the Conference found itself hopelessly divided—the method that had been unanimously adopted

for the Court of Appeal in Prize, for a graded distribution of the judges by years among the different nations, in some proportion to their relative importance, giving to the eight great powers each a judge all the time in the prescribed period of twelve years, and the others graded periods for eleven years down to one as in the case of Panama—was now rejected by all the smaller powers, who claimed that as they were equal in sovereignty, and had equal votes in the conference, they must have an equal judicial voice in this Court of Arbitration. The greater powers could not agree that technical equality of sovereignty made substantial equality of power, and so this knotty question was left for the powers to settle and establish the Court as I have no doubt they will do in the quieter atmosphere of diplomacy.

We struggled hard to bring all the powers to consent to some method of an election of judges, even going so far as to offer for ourselves to run the risk of being left out of the court, as the result of such election, but England and Germany, who had stood loyally with us throughout, were unwilling to take that risk.

When it is remembered that on the First Conference no progress whatever was made with this project the advance accomplished is most notable.

From the days of Washington until now arbitration has been with the government and people of the United States the favorite method of settling all international controversies, and we have resorted to it habitually, and there can be no reasonable doubt that in good time the court and the agreement for which we were so urgent will be established by general consent.

And last of all a resolution was unanimously adopted which secures the meeting of another Conference to carry on the good work, without waiting for any particular power to call it, and the preparation of its tentative programme by an international committee who are also to propose a scheme for its organization and procedure.

Judge then, from these acts accomplished and these advances made, whether the Second Peace Conference at the Hague was a nullity, or whether it did its full share to advance the cause of International Justice and Peace. What I claim is that in what it did, and in what it refrained from doing, it was in direct conformity with the principles of the Farewell Address, and that Washington himself, could he have had cognizance of its proceedings, would have given it his cordial support.

Nothing more strongly marks the impress of the great mind and lofty character of Washington upon the hearts of his countrymen, than that now, after the lapse of a hundred and ten years, under condi-

tions wholly changed and when we have arrived at a height of power and resource which would enable us to cope with any nation under heaven, we cherish at this moment a loyal allegiance to the three fundamental maxims which he laid down for the guidance of our foreign relations—independence of all other nations, absolute neutrality in their quarrels and perpetual peace with them all. Our tremendous and daily growing power would naturally tempt us to aggression—and it will always be told in honor of our present President that although cast in the mould of heroes, and not averse to war when necessary for the ultimate preservation of peace and the vindication of international justice, he has conducted our foreign affairs with a single eye to the preservation of peace founded upon practical justice in all our dealings. With a considerable knowledge of the motives of our diplomacy in recent years I can honestly declare, that a constant and undeviating regard for justice—mutual justice—international justice—has been the mainspring of its action, and on an occasion like this we may well acknowledge the deep obligations of the whole nation to the two eminent Secretaries of State who have been responsible for its conduct.

Wars and rumors of wars are most seductive to the popular imagination—and great are the temptations to inflame it by alarming headlines and foreboding prophecies—but may we not hope that the majestic influence of Washington—ever living—every growing—for peace and harmony with all—may safely counteract all such evil and malignant tendencies. Now and then we hear baleful suggestions of the possibility of future conflict with that interesting and heroic nation, which after the profound seclusion of ages sprang into new life and intercourse with the world at our invitation fifty years ago—which has sedulously cultivated and reciprocated our friendship ever since—and whose predominance in the Far East has thus far proved so beneficial to mankind. But there never has been any real cause for apprehension—there exists to-day no question that diplomacy cannot effectually settle—and it is but just for me to say, that after a long and intimate acquaintance in London—extending over more than six years, with the distinguished statesman who now conducts on behalf of the Mikado the foreign relations of Japan, he will ever be not only ready, but eager, by mutual concessions and just and fair arrangements, to settle all questions in difference, and to exert his influence to the utmost to preserve perpetual peace between his country and ours. He reads the Farewell Address in the same language and spirit that we do.

I cannot lay aside to-day that immortal document without recalling, with reverent heart, the motive which prompted Washington to be-

queath it to his countrymen, and to inculcate in its closing pages the faithful preservation of peace and harmony with all nations. It was that our young nation which he had done so much to create, might forever enjoy the largest blessings of Providence, that our Union might be perpetual, and that the Free Constitution at whose birth he had presided might be sacredly maintained—that he committed to paper, as in a last will and testament, the noble and humane sentiments on which we have now dwelt—and the other great maxims which it contains. No words of his, he said, could fortify or confirm the love of liberty which was interwoven with every ligament of our hearts. But he did proceed at length to inculcate devotion to the Union as the main pillar in the edifice of our independence, as the support of our tranquility at home, of our peace abroad, of our safety and prosperity, and of that very liberty which we so highly prize.

And next he dwelt, with all the emphasis of which he was capable, upon the necessity of a sacred regard and fidelity on the part of the governors and the governed alike, to the Constitution which we had adopted as indispensable to the national safety. "Respect for its authority," he said, "is a duty enjoined by the fundamental maxims of true liberty." And after imploring us always to subordinate party spirit to the dictates of real patriotism, he said, in a single paragraph that seems to me to be the most significant of the whole—

"It is important," he declares, "that the habits of thinking in a free country, should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power and proneness to abuse it which predominates in the human heart is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasion by the others, has been evinced by experiments ancient and modern. Some of them in our country and under our own eyes—to preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers is in any particular wrong, let it be corrected in the way which the Constitution designates. But let there be no change by usurpation, for though this in one instance may be the instrument of good, it is the customary weapon

by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield." And then after dwelling upon the necessity of religion and morality as the necessary springs of popular government—and the absolute importance of cherishing the public credit, he concludes by setting forth his foreign policy as we have already viewed it. The address, like our Constitution itself, must be read as a whole—for each of its sentiments is essential to every other.

An eminent English historian has said of this address that "there are few compositions of uninspired wisdom that will bear a comparison with it," and such, I believe, is the judgment of all the world.

THE TWO HAGUE CONFERENCES

THE STAFFORD LITTLE LECTURES DELIVERED IN ALEXANDER HALL,
PRINCETON UNIVERSITY, ON APRIL 13 AND 15, 1912*

THE FIRST HAGUE CONFERENCE

It was on the 24th of August, 1898—a year which was marked by the death of Bismarck, whose policy of blood and iron had secured the peace of Europe for an entire generation, and by our Spanish war, which had brought the United States into prominence as a great world power—that the youthful Emperor of Russia, Nicholas II, surprised the world by communicating to each of the diplomatic representatives of foreign nations accredited to his Court, his famous proposition for a World's Peace Conference, which meeting, a year later, in answer to his call, by its achievements and its aspirations, is destined to live in history as a great landmark.

The startling summons was due, I believe, to his own initiative, his own love of peace with foreign nations, inspired, no doubt, by the example of Alexander I, who, at about the same age, nearly one hundred years before, in 1804, in a despatch to his envoy at London, in the heat of the contest of the nations with Napoleon, proposed that at the conclusion of the general war, the nations of Europe should unite in a treaty which would determine, to use his own language: "the positive rights of nations, assure the privilege of neutrality, assert the obligation of never beginning war until all the resources which the mediation of a third party could offer have been exhausted, having by this means brought to light the respective grievances, and tried to remove them."

"It is on such principles," he said, "as these that one could proceed to a general pacification, and give birth to a league of which the stipulations would form, so to speak, a new code of the law of nations, which, sanctioned by the greater part of the nations of Europe, would without difficulty become the immutable rule of the Cabinets, while those who should try to infringe it would risk bringing upon themselves the forces of the new Union."

It is true that Alexander I was a dreamer. But what a glorious

* Reprinted with the permission of the Princeton University Press, from the volume entitled *The Two Hague Conferences*, with an introduction and explanatory notes by James Brown Scott, 1913.

dream it was in the midst of that carnival of blood and slaughter which deluged the first years of the Nineteenth Century!

It was in this spirit that the youthful Emperor, who had recently come to the throne of the Czars, proposed to the Nations a Conference to be held at The Hague in the closing year of the century, thinking, he declares, "that the present moment would be very favorable for seeking, by means of international discussion, the most effectual means of insuring to all peoples the benefits of a real and durable peace, and, above all, of putting an end to the progressive development of the present armaments. The maintenance of general peace, and a possible reduction of the excessive armaments which weigh upon all nations, present themselves in the existing condition of the whole world, as the ideal towards which the endeavors of all governments should be directed."

The terrible burden upon all the nations of these excessive and growing armaments has nowhere been so vividly described, not even by the most ardent advocates of peace. He declares that they "strike at the public prosperity at its very source. The intellectual and physical strength of the nations, labor and capital, are for the major part diverted from their natural application, and unproductively consumed. Hundreds of millions are devoted to acquiring terrible engines of destruction, which, though to-day regarded as the last word of science, are destined to-morrow to lose all value in consequence of some fresh discovery in the same field. The economic crises, due in great part to the system of armaments, and the continual danger which lies in this massing of war material, are transforming the armed peace of our days into a crushing burden, which the peoples have more and more difficulty in bearing. It appears evident, then, that if this state of things were prolonged, it would inevitably lead to the very cataclysm which it is desired to avert, and the horrors of which make every thinking man shudder in advance." Another dream which it will take perhaps another century to realize!

There was no other object proposed for the Conference in this first declaration than to limit, and, if possible, in some way to reduce the terrible armaments and the fatal budgets which were involved in their maintenance.

Favorable replies having been received from the other powers, Count Mouraviëff, the Foreign Secretary of the Czar, on January 11, 1899, issued a circular, in which it is stated that since his proposal of August 24, only four months before, "notwithstanding the strong current of opinion which exists in favor of the ideas of general pacification, the political horizon has recently undergone a decided change,"

and that "several powers have undertaken fresh armaments, striving to increase further their military forces."

But, in spite of all that, he proposes a preliminary exchange of ideas between the powers, with the object of "seeking without delay means for putting a limit to the progressive increase of military and naval armaments, a question the solution of which becomes evidently more and more urgent in view of the fresh extension given to these armaments," and, secondly, "of preparing the way for a discussion of the questions relating to the possibility of preventing armed conflicts by the pacific means at the disposal of international diplomacy," and suggesting a programme for the Conference, which was in part accepted and followed by it when it met.

It appears, by the answer of Lord Salisbury, that not only England, but Russia itself, had participated in this recent increase.

The Conference met at The Hague on the 18th of May, the Emperor's birthday, in the famous "House in the Wood," the summer palace of the Dutch royal family—twenty-six Nations, including, besides those of Europe, the United States of America and Mexico alone of American nations, and China, Japan, Persia and Siam, each represented, I believe, by the most competent men that could be selected for such a distinguished service, our own delegation consisting of Andrew D. White, Seth Low, Stanford Newell, Admiral (then Captain) Mahan, representing our Navy, Captain Crozier, of the United States Army, with Frederick William Holls as Secretary.

Notwithstanding the declared object of the Conference, concurred in, actually or professedly, by all the Nations, these terrible and oppressive armaments have gone on steadily increasing from that day to this, and are now multiplying at a rate more excessive than ever. They have become of such enormous weight and so burdensome to the people of many nations, that the cataclysm prophesied by the Emperor in his first rescript, "the horrors of which make every thinking man shudder in advance," seems now to be actually impending.

Strikes of a most formidable character, arising, in large measure, from the burdens resting upon the people, are the threatening symptoms of the approaching storm.

Even in the last session of Parliament the First Lord of the British Admiralty, speaking evidently, with the full authority of his Government, has declared its solemn purpose to keep its naval armaments sixty per cent. or more ahead of those of any other nation, and has thus issued a direct challenge to Germany to approach within that distance. Possibly this was with the hope of forcing Great Britain's great

rival to make or to listen to overtures for an agreement. But he little appreciates the spirit of the German Nation or its Emperor, who believes that they will decline the challenge.

As soon as the Conference of 1899 was organized, the subject which had been the impelling cause of its gathering was referred to a committee which included many of its most able and distinguished members, by whom it was discussed. In concrete form, Colonel Gilinsky, of Russia, proposed, "as to armies, an international agreement for the term of five years, stipulating for the non-augmentation of the present number of troops kept in time of peace" and "the maintenance, for the term of five years, of the amount of the military budget in force at the present time," and "as regards navies, the acceptance in principle of fixing for a term of three years the amount of the naval budget, and an agreement not to increase the total amount for this triennial period," and he made a very earnest and honest appeal for the adoption of these measures.

The chief spokesman in opposition was the representative of the Emperor of Germany, and, after his response, the matter was referred to a sub-committee, who reported that with the exception of Colonel Gilinsky, they were unanimously of opinion that the scheme proposed was impracticable and therefore could not be approved, and that a more profound study of the question by the Governments was desirable.

Thanks, however, to the most eloquent and impassioned appeal of Monsieur Léon Bourgeois, the first delegate of France, a resolution was unanimously adopted, that "the Committee considers that a limitation of the military charges which now weigh upon the world is greatly to be desired in the interests of the material and moral welfare of humanity," and, at the end, the Conference, in its final plenary session, unanimously adopted the resolution proposed by the Committee and remitted the subject to further study by the Nations, who, unhappily, do not seem to have yet begun the study.

There is no doubt that in the condition of Europe at that time, the question was practically impossible of solution, and no other result could have been anticipated from the time the Conference met.

The position of our own representatives in the matter is worth noting. The delegation of the United States concurred in the result which had been reached as the only practicable solution of the Russian proposal: "The delegation wishes to place upon the record that the United States in so doing does not express any opinion as to the course to be taken by the states of Europe, * * * and expresses a determina-

tion to refrain from enunciating opinions upon matters, into which, as they concern Europe alone, the United States has no claim to enter," adding that "the * * * military and naval armaments of the United States are at present so small, relatively, to the extent of territory and the number of the population, as well as in comparison with those of other nations, that their size can entail no additional burden or expense upon the latter, nor can even form a subject for profitable mutual discussion."

And so the Nations of Europe were left free, without any check whatever from the Conference, to increase their military and naval armaments,—a freedom of which they rapidly took advantage.

We may therefore dismiss, with whatever disappointment we may feel, the subject of limitation of armaments by an international Conference, because I believe it is a question that never can be so settled, that can only be determined by treaties or agreements between the individual nations who maintain the armaments, either two by two, or all together, and that to subject such a question to determination by a Conference which now consists of forty-four nations, of which only eight or ten have armaments worth speaking of, and all the rest are without any considerable armaments, is practically an impossibility.

I turn, therefore, with great pleasure, to present very briefly the great things which the Conference of 1899 did accomplish, and which contributed, as I believe, very largely to the advancement of civilization, the mitigation of the horrors of war, and the practical promotion of the cause of peace.

We need hardly more than mention the convention agreed upon by the assembled Nations with respect to the laws and customs of war on land, which was largely of a technical nature. It determined the qualifications of belligerents, and regulations relating to prisoners of war, tending to ascertain and ameliorate their condition, and the rules governing their conduct and treatment. It also concerned itself with the treatment of the sick and wounded, with spies, flags of truce, capitulations and armistice, and the military authority over hostile territory, the detention of belligerents, and the care of the wounded in neutral countries, and other matters of a purely technical character. But these, though technical, were all in the spirit of an enlarged humanity, and tended, in a considerable degree, to mitigate the horrors of war.

This codification of the laws and customs of land warfare was based upon the Laws and Customs of Warfare adopted by the Brussel's Conference in 1874, which in turn grew out of Dr. Francis Lieber's In-

structions for the Government of Armies in the Field, known as General Orders No. 100, of 1863. So the United States may claim a special share in their origin. At Brussels they were made more specific, and in this Conference of 1899 their scope was broadened and they seem to have been made binding upon all the parties attending.

There were three special declarations adopted which concerned the customs of war in connection with modern inventions and improvements, which greatly interested the entire Conference. The first prohibition forbade, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature. This was continued by the Second Conference of 1907, for a period extending to the close of the Third Conference. While the Second Conference was yet in Session, news came from Germany that a dirigible balloon, with a speed of thirty miles an hour, had made a successful ascent, and that in France a cigar-shaped airship had made thirty-one leagues an hour with the wind and eighteen leagues against the wind, and had manœuvred successfully in the environs of Paris. Predictions were freely indulged in that in four or five years the air would be as full of airships as the streets then were of automobiles.

Fortunately, this prophecy has not yet been quite fulfilled, although progress in that direction has been so rapid, that we may well hope that the Third Conference will make the prohibition perpetual, in full sympathy with the declaration of Lord Reay, one of the British Delegates in the Second Conference, that "two elements, the earth and the sea, are quite sufficient for military operations, and that the air should be left free." "What purpose," he asked, "will be served by the protective measures already adopted for war on land, if we open to the scourge of war a new field more terrible perhaps than all the others?" Unless, indeed, some future Conference should be of the opinion expressed by a celebrated Austrian statesman, that "all the armaments in the world will be rendered obsolete by the advent of war-ships in the air" and should, from motives of economy, adopt them as a substitute for all their existing armies and navies. As the matter stands, the Senate of the United States ratified this prohibition as adopted by the Second Conference on March 12, 1908.

In the same spirit of humanity, the Conference of 1899, after much discussion, agreed to abstain from the use of projectiles, the object of which is diffusion of asphyxiating or deleterious gases, and from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope that does not entirely cover the core, or is pierced with incisions.

The Nations assembled, for the first time unanimously accepted the Red Cross Convention of Geneva of 1864 and ratified the same with some amendments, as applied to naval warfare, all tending directly in the interest of humanity.

In the course of the discussions which this subject evoked, interesting objections were made by certain Eastern nations to the provision that all hospital ships shall make themselves known by hoisting, together with their national flags, a white flag with a red cross provided by the Geneva convention. These objections, based on religious grounds, indicate the character of the Conference as not confined to Christian Nations, but as being of a world-wide character.

For instance, the First Delegate of Persia declared that, pursuant to instructions from his government, Persia would claim as a distinctive flag for hospital ships, a white flag with a red sun, the cross being impossible on account of objections likely to be raised in a Mohammedan army.

To the same effect the Royal Government of Siam reserved the right to change on Siamese hospital ships the emblem of the Geneva flag to a symbol sacred in the Buddhistic cult, and calculated to increase the saving authority of the flag.

The representative of Turkey also declared that on all occasions where Turkish hospital ships have to perform their mission, the emblem of the Red Cross would be replaced by the Red Crescent.

The free participation on equal terms, of these Eastern Nations in the Hague Conferences, without regard to race or religion, the absolute and equal sovereignty of each being fully recognized by all the rest, suggests the hope and warrants the belief that, at any rate, we have seen the last of religious wars, which for so many centuries, desolated Europe, although Italy, at the moment, seems doing her best to provoke one. Christians against Mohammedans, Catholics against Protestants, made war the chief business of nations for many ages. For a long era, it seemed as if the coming of the Prince of Peace was at last producing more wars than it prevented. What a terrible idea it was to couple His sacred name and cross with the terrible engines of destruction under the standard "*In hoc signo vinces.*" No more wars, at any rate, for Christ's sake or in His name. His cross will appear upon the battlefield only to bring healing to the sick, help to the wounded and euthanasia to the dying. Perhaps these Geneva Conferences are, to the friends of peace, the best sign of the times. They bring together all the Nations in very close touch in the holy cause of humanity, and do much to promote the idea of the brotherhood of man.

The original initiative of the Red Cross movement having been taken by the Swiss federal government, it was decided that that Government should continue to enjoy the well merited honor of leadership in all matters pertaining to the Geneva convention, and it was recommended to the Government to call a further conference at an early day for that purpose.

Professor de Martens, who was President of the Committee which had in charge the subject,—one of the greatest international lawyers or jurists of his time, and who was also an active and influential member of the Second Conference in 1907, and whose untimely death shortly after the close of that Conference was justly lamented by all Nations, has expressed his sense of the value of this portion of the work of the Conference of 1899 in the following emphatic language:

“Finally, the Red Cross treaty for times of naval warfare, signed by the Conference at The Hague, is the happy solution of the question which the Powers of Europe have been studying for thirty years. Since 1868 the ‘additional articles’ to the treaty of Geneva have existed, whereby the beneficent influence of the treaty of Geneva on wounded and sick soldiers was also extended to sea combats. For thirty-one years diplomatic negotiations have been carried on on this question; all the Red Cross conferences which have taken place in the last twenty years have proclaimed the necessity of recognizing the Red Cross treaty for the sick and wounded in naval warfare. But nothing effectual was accomplished up to the Conference at The Hague. It was this Conference that caused the final adoption by (twenty-six) powers of the principle whereby the wounded in times of naval warfare shall have the same right to have their person, their life, their health and their property respected, as the wounded in case of warfare on land.”

In view, however, of the total failure of the Conference to act at all upon the primal question for which the Emperor of Russia had called it into being, and the recommendation for the further study of that subject by all the Governments, its other work, being of the minor and technical character already indicated, might perhaps have been as well accomplished by diplomatic correspondence. The fame of the Conference, therefore, must and will safely rest upon the great work which it did accomplish by the convention, unanimously agreed upon for the peaceful adjustment of international differences, and especially because it conveyed to the world the united views of all the assembled Nations upon the wisdom and expediency of arbitration as a substi-

tute for war, and because of the creation by it of the first international court to carry that principle into effective operation.

It must be remembered that prior to the meeting of this Conference, there had been no general agreement of the Nations, tacit or expressed, upon these subjects, and no international law of an expressed and defined character which regulated them. Nor must it be forgotten that the Conference itself was not a congress capable of deciding, by the vote of the majority, like a parliament or legislative body, any question that came before it, but simply an assemblage of the representatives of the Nations enrolled for the purpose of deliberating upon all subjects submitted to it, and, so far as they unanimously agreed, of establishing rules which should govern the conduct of the Nations concerned, and that the indirect, as well as the direct, influence of its action upon the world's affairs would be, so far as they did unanimously agree, of an important and effective character.

Prior to this date, it had been left to the discretion of each Nation, or of any two or more nations by agreement, to act at their own risk; and the signal merit of the Conference of 1899 is that by unanimous consent, it laid down rules for the conduct of all the Nations composing it, thereby declaring their common will, and that it established an international court which should act by their united authority, and under a form of procedure to be followed, unless modified by special agreement of the parties.

Preliminarily, the signatory Powers did expressly agree to use their best efforts to insure the pacific settlement of international differences, and in case of serious disagreement or conflict, before an appeal to arms, they agreed to have recourse, as far as circumstances allowed, to the good offices and mediation of one or more friendly powers.

They also agreed that, independently of this recourse, the signatory Powers considered it useful that one or more powers, strangers to the dispute, should of their own initiative and as far as circumstances would allow, offer their good offices or mediation to the states at variance.

It was also agreed that good offices and mediation, whether offered at the request of the parties at variance, or upon the initiative of powers who were strangers to the dispute, should have exclusively the character of advice and never have binding force, and that unless otherwise agreed, the acceptance of mediation should not have the effect of interrupting, delaying or hindering measures of preparation for war, and, if mediation occurred after the commencement of hostilities, it should

cause no interruption to the military operations in progress unless otherwise agreed.

An entirely novel and singular recommendation was agreed upon for special mediation, by which, in case of serious differences endangering the peace, the states at variance should each choose another power to be its second, as it were, with the object of preventing the rupture of pacific relations, and that for the term of not exceeding thirty days, the states in conflict should cease from all direct communications upon the subject of the dispute, which is to be regarded as having been referred exclusively to the seconds, who shall use their best efforts to settle the controversy, and in the case of a definite rupture of pacific relations, these powers acting as seconds remain charged with the joint duty of taking advantage of every opportunity to restore peace.

It will be observed how gradual and tentative and delicate all these agreements and recommendations were, and necessarily so, to secure the unanimous vote that was necessary for their adoption. Mediation had occurred before in many instances and had averted war, and in one case, at any rate, it had been successful after a proposal for arbitration had failed. It is stated on the highest authority that "in 1844, when war between Spain and Morocco was threatened by reason of the frequent raids by the inhabitants of the Rif on the Spanish settlement of Ceuta, Spain declined arbitration on the ground that her rights were too clear for argument. But both she and Morocco subsequently accepted joint mediation at the hands of Great Britain and France."

In the very spirit, also, of the recommendations made by the Conference of 1899, was the action of President Roosevelt, in bringing together the Russian and Japanese Governments and inducing them to appoint representatives to discuss terms of peace, at what appeared to be the very height of their terrible warfare. Whether it came within his constitutional functions as President has been a subject of much discussion, but if it is to be regarded as an exercise of individual power, it demonstrates the immense prestige of his name and personality at that time, and was, in my judgment, one of the most splendid and beneficent acts in his career. If the correspondence which passed between him and the contending parties should ever become public, it would, I think, appear that his action was most effective, not only in bringing the parties together to discuss the terms of peace, but also in reconciling their minds to the terms of settlement actually agreed upon.

The provision for special mediation, to which I have referred and likened to the appointment of seconds by parties mediating a duel under the old code of honor, was the suggestion of the Secretary of the American Delegation, Mr. Frederick W. Holls, who, however, disavowed the original conception of it, and gave the credit for it to Lord Russell of Killowen and previous authorities. This provision has been very highly commended, as restraining those personal and national passions and prejudices by which a growing controversy is rapidly embittered, and as meeting the difficulty which often occurs in arbitration of choosing a referee or umpire satisfactory to both parties. Mediation will doubtless be often resorted to in the case of future wars or threatenings of war, in imitation of the successful example set by President Roosevelt, and although it will in all cases be necessarily simply advisory and not binding, in the growing trend of public opinion for the prevention of unnecessary wars, the advice of a first-class power friendly to both the contesting or threatening powers will necessarily have great effect.

Why Italy, which, with Turkey, was a willing party to the Conference of 1899 and to its agreements and recommendations, entered upon its predatory and apparently barbarous attack upon Turkey in the invasion and seizure and formal annexation of Tripoli, without any attempt at mediation or arbitration, and why it is that the other nations of Europe, who were also parties to the Conference and to its agreements and recommendations, refrained, if they did so, from offering good offices or mediation, are questions which at this distance and for lack of sufficient information, we are perhaps not able to judge, but which the nations themselves will have to answer at the bar of history.

Certainly, so far as made known by the Foreign Secretary of the Italian Government, in his published assignment of grievances, there were none which could not have been readily disposed of by arbitration, and we are yet to learn of any reasonable justification for this one-sided war. "Might makes right" is undoubtedly the motto upon which various nations have acted in appropriating different portions of the African coast, justifying their conduct by the so-called promotion of the cause of civilization, and this was doubtless the example which Italy pretended to follow. But the time is coming, and surely not far distant, when the public opinion of the nations will cease to uphold or justify that rule. Turkey had been active in both of the Hague Conferences, and had been recognized as an equal power vested with complete and perfect nationality and equal sovereignty, and entitled to be treated as a civilized nation, and not to be classed with African aborig-

ines as a fair prey for the spoiler. And certainly, if Turkey had had a powerful navy, this last and saddest incident in modern history would never have occurred.

The avoidance of war and of the terrible war of which the two greatest nations of Europe to-day were on the very brink only in August, 1911, is demonstration to my mind of the mighty pressure of public opinion, in favor of the peaceful settlement of international differences. It was that decent regard for the opinion of mankind, to which nations as well as men are bound to account for their conduct, that led one or both of the parties to the difference to make the concessions that were necessary to avoid a war, which would have deluged the world in blood. The event only shows how necessary it is, with all our might, by every possible means, to strengthen this same pressure of public opinion. Without knowing all the details, it may well be permitted to us to inquire, whether there was anything in the disputes involved in that quarrel, which might not have been disposed of by mediation and arbitration.

The institution by the Conference of Commissions of Inquiry to ascertain and report to the respective parties to a war or to a difference threatening war, the actual facts where there is a difference of opinion on the matter of fact, was a very important piece of work achieved by the Conference, the object being to facilitate the solution of the differences by elucidating the facts by means of an impartial and conscientious investigation. The plan recommended requires that "upon the inquiry, both sides shall be heard; that the powers in dispute agree to supply the International Commission of Inquiry, as fully as they may consider it possible, with all means and facilities necessary to enable it to arrive at a complete acquaintance and correct understanding of the facts in question;" that their report shall be signed by all the members of the Commission and "shall be limited to a statement of the facts, and shall in no way have the character of an arbitral award," but "leaves the powers in controversy freedom as to the effect to be given to such statement."

At first blush, the institution of these Commissions of Inquiry would not seem to be of very great importance or effect, but, in reality, they are signally useful. When such a quarrel breaks out, or is already in progress, there immediately arises an acute and violent dispute about questions of fact. The ever present and ever vigilant representatives of the press of all nations take it up, and are very likely to take sides, and to attempt to determine in advance the facts of the case. The parties too, from their different points of view, may wholly mistake the

actual facts of the situation, and in such a condition of things, if the facts can be ascertained by persons enjoying the mutual confidence of the parties to the dispute, and jointly appointed by them, the quarrel may be settled at once and altogether.

Take the case of the *Maine*, for instance, the destruction of which, by an explosion in the harbor of Havana, in the year 1898 was the occasion, but not the cause, of our war with Cuba. It is quite possible that that war, with all its momentous consequences, might have been avoided and peace preserved, if such a Commission of Inquiry, in which both parties joined, had been resorted to.

As it was, each party investigated the facts by itself on one-sided evidence, without hearing the other side at all, and, of course, they came to directly opposite conclusions. But if, immediately upon the happening of the event, a Commission enjoying the mutual confidence of the parties, had taken the affair in hand, and ascertained, after hearing both parties and all the evidence that each could furnish, and had reported the actual facts, about which there now seems to be no room for dispute, a delay certainly would have been interposed, and time allowed for thought and for further diplomatic interchange of views. Quite possibly large concessions would have been made, which would have had the actual result of preventing the war altogether, and winning for Cuba the independence which Spain seems to have been at last ready to grant, rather than resort to the terrible consequences of war.

But there is an actual illustration in a striking historical incident, which demonstrates the great utility of these Commissions of Inquiry recommended by this very Conference.

It will be remembered that while the terrible war between Russia and Japan was in progress, the Russian fleet, in making its way down the North Sea to the ultimate scene of conflict and of its own destruction, came unexpectedly upon a group of English fishing vessels, and mistaking them for Japanese craft of war, it fired upon them and committed wholly unjustifiable damage and destruction. For the moment Great Britain seemed likely to be drawn into the conflict as a power seriously aggrieved, without warrant by one of the combatants, but Russia and Great Britain had warmly supported the convention arrived at by the Conference of 1899 for these Commissions of Inquiry. Without much difficulty they agreed upon such a Commission of Inquiry and joined not only in appointing its members, but in facilitating it by furnishing it with all possible knowledge on either side. The result was that in a short time, the Commission ascertained and de-

terminated the facts, and that the whole fault grew out of the mistake of those in command of the Russian fleet. They reported the facts and ascertained the damages, which were promptly satisfied by the Government of Russia.

It is easy to imagine that similar instances will be constantly occurring in peace and in war, which can readily be arranged in this way without a resort to hostilities. Indeed, it was argued by the friends of the measure before the Committee of the Conference that had charge of working it out, that these Commissions would in the future probably be resorted to with far greater frequency than arbitration itself. As was very wisely said by one of its advocates: "For practical purposes I expect that we shall use the international *Commissions d'Enquête* nine times for once that we shall use the permanent court of arbitration in any questions of serious importance. The difficulty of securing an impartial investigation of the dispute is, that when it is most needed, the disputants are in the worst possible mood to assent to it. They are distrustful, angry, and inclined to believe the worst of everybody and everything: to ask disputants in such a temper to agree to refer their dispute to an international court of investigation is to secure an almost certain refusal if you ask them at the same time to bind themselves to accept whatever the court or commission may decide."

And it was therefore very wisely provided that the report of the Commission should be regarded as advisory and not binding upon either party. But a report of disinterested parties mutually selected making the facts clear, is very certain to have great weight in putting a stop to the quarrel, as was proved in the case of Great Britain and Russia.

And now we come to what is confessedly the greatest achievement of this First Conference at The Hague, distinguishing it from all previous and subsequent conferences, namely, the actual establishment by the unanimous consent and approval of all the Nations engaged of a permanent International Court of Arbitration, to which all the signatory Powers might and probably would resort for a settlement of their differences which could not be adjusted by diplomatic negotiations, and were not of a character justifying or compelling war.

In approaching the question of the establishment of this Court, which had come to be regarded as the most important piece of work that the Conference could accomplish, the Nations attending unanimously committed themselves to certain articles of agreement on the general subject of arbitral justice, which were of great significance, as, for instance, that international arbitration has for its object the de-

termination of controversies between states by judges of their own choice upon the basis of respect for law.

Everybody knows that from time immemorial, arbitrations have not been particularly celebrated for respect for law or for proceedings upon the basis of such respect, but have been generally the vehicles of compromise and division of the matter in dispute between the parties on some arbitrary basis. But here, for the first time, it was unanimously agreed that respect for law must be fundamental in all international arbitration.

Again, it was declared that in questions of a judicial character and especially in questions regarding the interpretation or application of international treaties or conventions, arbitration is recognized by the signatory Powers as the most efficacious and, at the same time, the most equitable method of deciding controversies which have not been settled by diplomatic methods. There had never before been any such formal and universal utterance as this concurred in by twenty-six Nations.

War had been, from the beginning, the normal condition of the world, interrupted by fitful intervals of peace, but now we are coming in sight of the new doctrine,—the American doctrine, as it may well be called—that peace is and shall be the normal condition of mankind, and that war is only an occasional incident interrupting and disturbing it, for now all nations agree that arbitration is the most efficacious and equitable method of deciding controversies which have not been capable of settlement by diplomatic methods.

Again, it was declared that the agreement of arbitration implies the obligation to submit in good faith to the decision of the arbitral tribunal. This agreement, unanimous like the others referred to, put in concrete and express form, in a convention solemnly agreed to by all the leading nations of the world, what had been before a floating and indefinite understanding among men, and finally disposed of the notion that if nations went into an arbitration, there was no sanction that made the award of the arbitrators binding, much less enforceable.

Indeed, in regard to the whole work of the Conference, it is still occasionally insisted that there is no sanction to the judgments of the permanent Court of Arbitration established by it; that there is no international army and navy, no international executive power to compel obedience to such decrees. But here we have what may be regarded as the common judgment of mankind expressed in the most solemn manner in which an international engagement between nations is capable of expression, that henceforth, in obedience to the public opinion of

all nations, the contending parties shall submit in good faith to the decision of the arbitral tribunal.

The people and the Government of the United States had always been in favor of arbitration as a substitute for war, and had long advocated the establishment of such a tribunal, and the proposition for its creation by the Conference was therefore hailed by their representatives as their chief object in coming to the Conference. It must be also admitted that the Government of Great Britain had cordially shared this view, and one is not surprised, therefore, to learn that the honor of introducing the plan of such a court in the Conference happily belongs to the late Lord Pauncefoot, who did so much for the maintenance of friendly relations between his own country and ours during his long term as Ambassador at Washington.

Russia also proposed a plan and our own Delegation a third plan, but these two Powers agreed that the British plan should be the basis of the deliberations of the Conference.

The discussions which resulted in the perfecting of the plan that was finally adopted and found its place in the Final Act of the Conference, were most protracted and able and interesting. At one point, however, the whole scheme came near being shipwrecked, when the leading representative of Germany took the floor and opposed the whole idea of a permanent tribunal, as one to which Germany could never consent. His Government, he said, regarded it as an innovation of a most radical character, and while it was a most generous project, it could not be realized without bearing with it great risks and even great dangers, which it was simple prudence to recognize, and that, in the opinion of his Government, the plan for a permanent international tribunal was at least premature. "Not yet, not yet," I think it may well be said, has been the general attitude of Germany on all such questions.

When the German objections against a Permanent Court of Arbitration in any form had brought the discussion to a halt, time was allowed for Professor Zorn, the distinguished delegate who had maintained the discussion for Germany, to go to Berlin and lay the whole matter before the Foreign Office, then under the direction of von Bülow, as Secretary of State and afterwards Imperial Chancellor, who seems to have been an ardent friend of arbitration. At any rate, the objection of Germany was waived upon what seems to have been an understanding that any effort to make the resort to arbitration or to the permanent court obligatory would not be insisted upon, and from the time of the return of Professor Zorn to The Hague with this re-

sult of his mission, Germany took a cordial and active part in the discussion, and voted with the rest for the establishment of the Court.

It is always necessary, in considering the work of this Conference, to remember the absolute necessity controlling it at every moment, in order to attain the end of absolute unanimity, to weigh every word in every article proposed, in order to meet any objection that might be interposed from any quarter, and that this was the first attempt at the establishment of such a tribunal. In view of these difficulties, the result obtained was a marvelous success, as it led the way for great and constant advances in the future, and pointed out the road in which future conferences, as well as future diplomacy, should follow.

It was only on the 26th of May that Lord Pauncefoot presented his proposition, and on the 29th of July the Conference ended by the formal signing of the Final Act, by which the Court was established.

Although entitled "The Permanent Court of Arbitration," it was permanent only in one sense, and that was in the composition of the jurists, from the list of whom the arbitrators or judges who were to act in each case as it arose should be selected by the parties. There was also established a Permanent International Bureau at The Hague to serve as the record office for the Court, be the medium of all communications relating to it, and have the custody of its archives and the conduct of all administrative business. Each of the signatory Powers was to select, and they did select, not more than four persons of recognized competence in questions of international law, enjoying the highest moral reputation and disposed to accept the duties of arbitrators. The persons thus selected were enrolled as members of the Court, and appointed for a term of six years, to be succeeded by other appointments in case of death or resignation. The jurisdiction of this Court was declared to extend to all cases of arbitration, unless there should be an agreement between the parties for the establishment of a special tribunal. The sessions were to be held at The Hague; in case of necessity, the place of session might be changed by the Court only with the assent of the parties, elaborate rules of arbitral procedure were also agreed upon for proceedings in the Court.

A permanent Administrative Council was also established to supervise the organization of the Bureau, which should remain under the direction and control of this Council, to be composed of the diplomatic representatives of the signatory Powers accredited to The Hague.

I have said that the indirect results of the Conference were quite as important as the direct results embodied in the Final Act, and Mr.

White well sums it up, so far as regards its effect upon the law of nations, when he says:

"There is also another gain,—incidental, but of real and permanent value; and this is the inevitable development of the law of nations by the decisions of such a Court of Arbitration composed of the most eminent jurists from all countries. Thus far it has been evolved from the writings of scholars often conflicting, from the decisions of national courts biased by local patriotism, from the practices of various Powers, on land and sea, more in obedience to their interests than to their sense of justice; but now we may hope for the growth of a great body of international law under the best conditions possible, and ever more and more in obedience to the great impulse given by Grotius in the direction of right reason and mercy."

There have already been many resorts by Nations, who found themselves in dispute, ourselves among the foremost, to this Permanent Court, whose administration of justice has been most satisfactory, and tends directly in the direction of the evolution of true international law, as prophesied by Mr. White. But there is another indirect result of the establishment of the Court accompanied, as it was, by the common agreement of all the Nations concerned in creating it, that arbitration was the best and most expedient method of deciding international controversies. The result has been that since the adjournment of the Conference, arbitrations and treaties of arbitration, almost without number, have occurred between different Nations who were parties to it, and there has been an almost universal consensus of opinion, not only among jurists and statesmen, but among intelligent men of all countries, that arbitration should be resorted to before a resort to force is tried.

More than one hundred and forty-four standing arbitration treaties have been concluded since the First Hague Conference. Besides these, there have been concluded within recent years a large number of conventions, which, although they have not for their direct object the assuring of peace, yet tend very strongly to contract the area of possible difficulties. An illustration of conventions of this character is to be found in the Postal Union, of which type there are already more than forty-five in existence. In addition to the standing arbitration treaties and the conventions similar in character to the Postal Union, there have been, in the course of the century before the First Hague Conference and since its adjournment, hundreds of arbitrations between different nations for the peaceful settlement of disputes.

If we look back upon the practical progress made by the Peace move-

ment during the twenty-five years ending with the Conference of 1899, we find that an astonishing change has taken place in the attitude of public men, as well as private citizens, throughout the world on the subject. Twenty years ago the Peace movement and its advocates were held in very light esteem, and were more frequently the object of ridicule than of any serious consideration, but they have certainly had a substantial effect upon public opinion, which, in the end, must govern all the great transactions of the world. We may safely compare its progress with that of other great moral reforms which have at first been received with contempt, but which in time have mastered the national conscience, and, if I may say so, the international conscience as well.

It was in 1789 that Wilberforce made his admirable speech in the House of Commons, introducing resolutions which were intended as a basis for the future abolition of the slave trade, that in 1807, was put an end to, so far as the British dominions were concerned. The Constitution of the United States had recognized and permitted this horrible traffic until January, 1808. At the Congress of Vienna, in 1814, the principle was acknowledged that the slave trade should be abolished as soon as possible, but it was left for separate negotiation between the Powers as to the limit of time within which this should take place. By the treaty of Ghent in 1814, the United States and England mutually bound themselves to do all in their power to extinguish the traffic, and by the Ashburton treaty in 1842, Great Britain and the United States actually made provision for the joint maintenance of squadrons on the west coast of Africa for its suppression, each Nation to maintain a squadron of at least eighty guns for that purpose, and the two Governments agreed to unite in an effort to persuade other Powers to close all slave markets within their territories.

Thus, in the short space of fifty years, that great moral reform, sustained by the universal public conscience, was brought about and the infamous traffic, which, at the beginning of that period, had been generally tolerated, was pronounced, by the common judgment of the world, in law, as it always had been in fact, a crime of the first magnitude.

So, as to domestic slavery, the life of a single man, William Lloyd Garrison, who died at the age of seventy-four, was long enough to bring about its complete and final abolition in the United States. It was not until January, 1831, that he started, without a dollar of capital and without a single subscriber, the publication of "The Liberator," bearing the motto: "Our country is the world; our countrymen are

mankind." Amid the almost universal execration which was showered upon him in the North as well as the South, he persisted in his demand for immediate emancipation. Even in Boston in 1835, he was dragged by the mob through the streets with a rope around his body, his life being saved with great difficulty by lodging him in jail. Only twenty-eight years later, President Lincoln issued his proclamation of emancipation, which is universally regarded as the greatest act in his wonderful career.

Now, everybody knows that war, for the settlement of international disputes which might be composed by arbitration, is as barbarous and cruel and wicked as the slave trade and slavery ever were, and, like them, it presses with the severest hardships upon the lowest ranks of the community, for, in every great war, it is the poor and the laboring classes that suffer most from its burdens and oppressions, and even in peace the crushing expense of the armies and navies falls most heavily upon them.

Thus, it seems to me that there is every reason for encouragement in the progress made for the prevention and abolition of war as measures essential to our complete civilization. We do not delude ourselves with the idea that there will be no more wars, or that talking or conferring or arbitrating will put an end to them. Righteous and necessary wars there may yet be, but only righteous and necessary on one side, like our own struggle for Independence in 1776, and the life and death contest of 1861 for the preservation of the Union and the extirpation of Slavery.

But the work for Peace is going on well, the conscience of the world is thoroughly aroused and determined, and perhaps thousands now living will see the day when war, as a means of settling international disputes, will be as generally condemned as the duel and slavery and the slave trade are to-day. Perhaps this also is another dream! But who can tell?

"Blind unbelief is sure to err,
And scan His work in vain.
God is his own interpreter
And He will make it plain."

THE SECOND HAGUE CONFERENCE

Scarcely had the ink dried on the pens of the delegates who signed the Final Act of the Conference of 1899, when the terrible war broke out between Great Britain and the Transvaal, which latter country had not been admitted to the Conference. We may not discuss here the

merits of that protracted and destructive conflict, which ended, so far as can now be discerned, in the accomplishment by Great Britain of the object of the war,—the establishment of her complete supremacy in South Africa.

Many things have since happened in that direction which may throw doubts upon the permanence of British supremacy there. It is true that on the 1st of September, 1900, the Transvaal was annexed to the British Empire and the Boers forced to accept British sovereignty; new letters patent instituting self-government in the Transvaal were issued on the 12th of September, 1906, in pursuance of a wise policy on the part of Great Britain. But history is not made in a day or a decade. The union of the South African Republics, a federation of practically free states under the sovereignty of Great Britain, appears to be working most satisfactorily to both sides, but it appears inevitable that, as time goes on, the predominance of the Dutch element in South Africa will become more and more marked and powerful, and, in view of the established policy of Great Britain not to attempt to hold her colonies by force against their will, the time may come when the South African Republics, like our American colonies, may set up for themselves and declare their independence. At any rate, permanent peace seems, for the present, established in that quarter of the world.

But the still more terrible war in 1904, between Russia and Japan, which seems, in its outcome, to have had for its ultimate result, if not for its original object, the division of a great province of China between those two powers, was even a more serious disappointment to the friends of peace throughout the world than the Transvaal war had been.

These two nations had been members of the First Hague Conference, and were fully committed to its peaceful policies of mediation and arbitration as a means of settling international disputes, beyond the power of diplomacy to adjust. But nevertheless, the exhausting and destructive progress of the conflict, which at last brought both parties, in a state of exhaustion and in despair of settling their dispute by war, to the treaty of peace at Portsmouth, had demonstrated the truth of the prophecies of the Czar Nicholas II himself in his famous rescript of August 24, 1898, as to the fatal effects of great and growing armaments upon the nations who indulged in them.

The treaty of Portsmouth was signed on the 5th of September, 1905, and although it did provide for the evacuation of Manchuria by the contracting parties, and for the restoration entirely and completely to

China of her exclusive administration of all portions of Manchuria then in the occupation or under the control of Japanese or Russian troops, except the leased territory, and although Japan and Russia engaged reciprocally not to obstruct any general measures common to all countries which China might take for the development of the commerce and industry of Manchuria, these promises were not self-executing, and since that day China seems to have had a very subordinate influence in that district, which was the seat of the conflict.

It will be remembered that the First Peace Conference had assumed the certainty of another Conference in the not distant future, and had referred to such a future Conference some of the most important questions, including the limitation of armaments, and the immunity of private property on the high seas, the rights and duties of neutrals, and the bombardments of ports, towns and villages by a naval force, but had not conferred upon any power the exclusive duty of calling such a Conference.

Accordingly, in October, 1904, by direction of President Roosevelt, who was inspired by the appeal of the Inter-Parliamentary Union held in St. Louis at the centennial celebration of the Louisiana Purchase, the Secretary of State, the late John Hay, addressed a circular note dated October 21, 1904, to all signatory Powers of 1899, suggesting the calling of the Second Conference at an early day. The President's overture was favorably received, but the reply of Russia deferred the participation of that Government until the cessation of hostilities in the far East, while Japan made the reservation that no action should be taken by the Conference relative to the war.

The war having happily ended, the Emperor of Russia, as the initiator of the First Conference, conveyed to the President the suggestion that Russia was ready to assume the responsibility of summoning the Second Conference, to which suggestion the President, in the true spirit of chivalry yielded.

In one respect, this courteous concession was unfortunate, because it resulted in continuing, through the Second Conference, the predominant influence which had naturally been conceded to Russia in the First. A true World's Conference ought not to be under the control or even the leadership of any one nation, but should reflect the common spirit of at least the principal nations of the world.

Through the sagacity and tact of Secretary Root, all the nations of Central and South America were included in the call for the Second Conference, instead of only the United States and Mexico, as had been before, and thus the Second Conference, consisting of the delegates

from forty-four independent nations, instead of twenty-six, was in reality the first World's Conference that had ever been held.

The letter of instructions of Secretary Root to us who were entrusted with the representation of the nation at this Conference, is one of the most remarkable state papers that has ever been issued, remarkable alike for its lofty spirit of patriotism and for its noble views of the spirit which should actuate all nations coming to such a conference. "In the discussion upon every question," he wrote, "it is important to remember that the object of the Conference is agreement, and not compulsion. If such conferences are to be made occasions for trying to force nations into positions which they consider against their interests, the powers cannot be expected to send representatives to them. It is important, also, that the agreements reached shall be genuine and not reluctant. Otherwise they will inevitably fail to receive approval when submitted for the ratification of the powers represented. Comparison of views and frank and considerate explanation and discussion may frequently resolve doubts, obviate difficulties, and lead to real agreement upon matters which at the outset have appeared insurmountable. It is not wise, however, to carry this process to the point of irritation. After reasonable discussion, if no agreement is reached, it is better to lay the subject aside, or refer it to some future conference in the hope that intermediate consideration may dispose of the objections."

"The immediate results of such a conference must always be limited to a small part of the field which the more sanguine have hoped to see covered; but each successive conference will make the positions reached in the preceding conference its point of departure, and will bring to the consideration of further advances towards international agreement, opinions affected by the acceptance and application of the previous agreements. Each conference will inevitably make further progress and, by successive steps, results may be accomplished which have formerly appeared impossible."

"You should keep always in mind," he further says, "the promotion of this continuous process through which the progressive development of international justice and peace may be carried on; and you should regard the work of the Second Conference, not merely with reference to the definite results to be reached in that Conference, but also with reference to the foundations which may be laid for further results in future conferences. It may well be that among the most valuable services rendered to civilization by this Second Conference will be found

the progress made in matters upon which the delegates reached no definite agreement."

It was in this spirit that we went to The Hague and pressed upon the attention of our colleagues from the other forty-three nations the highly constructive and advanced measures which we were instructed to propose. And it will be found, I think, that the results of our labors, indirect as well as direct, measured by the criterion laid down by Mr. Root, will prove to have been of very great value.

As before, the organization of the Conference was practically in the hands of Russia. Her First Delegate was made President of the Conference and it was he who, after consulting with the representatives of other nations, appointed the presidents of the several Commissions among which the business of the Conference was distributed, and it was he, a skilled and experienced diplomatist, who, as President of the Conference, was authorized to appear and take part in the proceedings of any committee or sub-committee, and who, on all critical and important occasions, availed himself of that privilege. Besides this, as before, the State of Montenegro made the delegates of Russia its own, and thus Russia had two votes on every question that came up, instead of the one of every other nation.

The composition of the Conference was very remarkable. It embraced some twenty-five of the members of the First Conference, who thus were thoroughly conversant with its history, and included many distinguished jurists from other nations, who greatly contributed to its composite force and influence, among whom the different states of South America made valuable contributions.

The Conference met at The Hague on the 15th of June, 1907, and continued in session, almost without intermission, until the 18th of October, when the Final Act was ready for signature.

As our numbers were too large to find convenient accommodation in the classical "House in the Woods" where the First Conference was held, our sessions took place in The Binnenhof, in the celebrated Hall of the Knights, where we found ample room. The Binnenhof was built in the 13th century by William the Second, Count of Holland, King of the Romans, and is at present used by the States General in joint session.

For some mysterious reason which I cannot explain, but which probably grew out of the then very recent political upheaval in Great Britain, by which the party that had been in power during the First Conference had become his Majesty's opposition, consisting of a powerless minority, the English press, particularly the conservative press,

was very much disinclined to favor the work of the Conference. The *London Times*, which continued at that time to be the great organ of British public opinion, especially on foreign affairs, was especially hostile to the whole performance, constantly uttering severe criticisms upon what was done or not done, and finally openly setting us down as largely composed of a group of second-class diplomatists, who were trying to see how we could best dupe each other. To take its own words, on the 7th of October, it said:

"They, the members, have negotiated and compromised and tried to dupe each other and resorted to all the little tricks and devices of second-class diplomacy;" and, again, on the 19th of October, at the close of our deliberations, it said, in plain English:

"The Conference was a sham and has brought forth a progeny of shams, because it was founded on a sham. We do not believe that any progress whatever in the cause of peace, or in the mitigation of the evils of war, can be accomplished by a repetition of the strange and humiliating performance which has just ended."

But, in truth, the Conference was composed of as able and earnest a body of public men as ever had assembled for any similar purpose. Its deliberations were conducted in the spirit of true conciliation, with uniform dignity, and without resort to any of the low arts suggested by the *Times*.

The work which it accomplished was of the greatest utility for the advancement of the cause of arbitration and peace, and the value of that work, like that of the First Conference, has, in the lapse of years, come to be regarded as greater and greater, in the estimation of all those who believe that some better means than war can be found for the settlement of international disputes. So that the comments of the *London Times* may be regarded as one of those flagrant political libels, of which even the greatest newspapers are sometimes guilty.

Not only were the Great Powers so-called well represented, but the small powers were represented in many cases by very able and interesting men. It met at a moment of profound and universal peace which was a good augury for its work, and it was the first time in the history of the world that there had been a conference of all the civilized nations that composed it. One would have expected, in such an assembly, gathered from all parts of the earth, composed of all nations with their various grades of civilization, to find more or less rough customers, but in truth it was not so. Even the smallest nations were represented by cultivated, educated, able men, who took their fair share in the earnest work of the Conference.

The development of international law only proceeds step by step very gradually. It has taken several hundred years to bring it to its present imperfect and really undeveloped condition, and it will probably take a good many more conferences, and perhaps a hundred years more, before a body of international law is developed, to which all the nations of the earth will give their assent.

But the only just way to measure the work that was done, is, as it seems to me, in regard to each question, to consider the position in which it stood when the Conference came together and the position which it occupied when the work of the Conference was finished. Measured by that standard, I do not hesitate to say that on several very important questions, there were advances made, and substantial progress which is not to be undone, and which will, by and by, secure for each of the propositions which were advocated, whether they were finally adopted or not, an assured place in future history.

To show this, I can do no better than to take up, one by one, the projects that were considered, those that were adopted, and three or four of those that were left for future and further consideration by the nations, either by diplomatic interchange of views or by future conference, the latter being of equal importance with the former, because, as Mr. Root well said, in the extract from his instructions already quoted, no single Conference can be expected to settle every question brought before it, but the discussion and the action taken may open the way for future conferences or diplomatic negotiations, to carry to a still further advance and perhaps finally to complete the work.

One most interesting proposition that was adopted, without a dissenting voice, after long discussion and deliberation, was worth all the trouble and cost of the Conference. I mean the American proposition which resulted in the convention by which the contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals, but that this agreement is not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer of arbitration, prevents any compromise from being agreed upon, or, after the arbitration, fails to submit to the award.

Here was a final treaty, by which the nations bound themselves, each to the other and to all the world, not to resort to force for the collection of contract debts due from one nation to the citizens of another nation, without first exhausting the resources of arbitration. Prior to this time, it had been deemed permissible, in international law, where

one nation espoused the claims of its citizens against a debtor nation, to resort to force if the claims, after the exhaustion of diplomatic efforts, were disavowed or repudiated, or even if only there was a refusal from inability to pay. Bombardments, seizure of revenues and occupation of territory had been employed to compel payment,—a most harsh and severe method of collection, which constantly imperiled the peace of the world. It will also be noted that although this was an American project, inspired, no doubt, by the desire to protect the weaker states of Central and South America, there is no specific reference to them or to any particular country in the convention as adopted. It can equally avail for the protection of every nation, great or small, but particularly of the smaller nations who are more often in the predicament of inability to respond promptly to their obligations to the citizens of other nations for money loaned or advanced.

Here was a case, and perhaps the first case on record, of a form of compulsory arbitration, agreed to by all the nations of the earth except five, who abstained from voting. The five states that abstained from voting were Belgium, Roumania, Sweden, Switzerland and Venezuela. Venezuela, which had given the world more trouble in this matter than all other states combined, was willing to accept the benefit of the renunciation of force provided by the first article of the convention, but was unwilling to bind itself to arbitrate, and as the vote was taken upon the whole article, it refused to sign the convention.

Certainly this convention did greatly advance the cause of arbitration, and actually committed the Nations of the world to resort to it before attempting force. The question had been a very serious source of controversy for many years. Sometimes nations had almost come to blows, and very bitter feelings had been excited by a resort to force by creditor nations, even in the case of inability to pay, and the first creditor nation that grabbed the customs or territory or other resources of a debtor nation, was deemed to have the preference in any solution or settlement that might ensue.

The proposition, it will be observed, as adopted, has no special or express bearing upon our Monroe Doctrine, but it is an approach to and recognition by the Nations of the law of "hands off" as to weak nations on the part of strong ones, until they have had a chance for the intervention of arbitration. The contrary rule had been the most threatening form of assault upon the Monroe Doctrine which had theretofore taken place.

The Monroe Doctrine is our peculiar, favored doctrine, that there shall be no occupation of American soil by foreign nations and no at-

tempt on their part to extend their system to any portion of this hemisphere. But it has never been assented to, that I know of, in a definite way, as by treaty, by any of the nations, great or small. It is treated with very great politeness, and more and more so as we advance in strength, and many wise jurists are of the opinion that its maintenance in the future, especially after the Panama Canal shall have been opened, will depend wholly upon the strength of our arms to maintain and enforce it. For one, I am decidedly of that opinion, and ardent as is my advocacy of peace, I believe that it would be the height of folly for us to expect to maintain peace without the maintenance of an adequate navy, ready and able, in any emergency, to resist any attack upon our cherished national doctrine.

President Roosevelt very justly said that the Monroe Doctrine will keep good as long as we are strong enough to make it good, and President Taft is wisely urging the steady increase in the number of our battleships, with the necessities of the immediate future in view. As our power grows and our navy grows, the Doctrine will be treated with greater politeness and deference by foreign nations, who, although they may not formally agree to it, will not disregard it.

I remember that even as long ago as when Lord Salisbury was Prime Minister and Foreign Secretary, he spoke of it with the greatest respect, and the representatives of other governments will regard it in like manner if only we do our duty, and manifest our power to maintain it.

It tends very much, of course, to keep the peace of the world, that in this proposition that I have now referred to, we have all the nations agreeing, by treaty, that in the case of contractual debts, claimed to be due by one nation to the citizens of another, force shall not be resorted to until arbitration has been tried, and that certainly was a great step forward towards the establishment of a fixed and universal rule of international law on a most important subject, and in itself is an important barrier in the defense of the Monroe Doctrine.

Our success under this head is mainly—and I might say almost exclusively—due to the earnestness, tact and skill of General Horace Porter, my fellow-ambassador and delegate at the Conference, to whom its conduct was committed by the Secretary of State with the full concurrence of the entire delegation. From the moment of its introduction until its final adoption, General Porter, by night and by day, in season and out of season, in public and in private, devoted his entire energies to carrying this important measure. It was a work of the greatest difficulty and delicacy, because it ran counter to the settled convictions and practices of many of the nations, and to the general ob-

jections to obligatory arbitration in any form, and also because the friends of the principle of the measure were much divided in their views. To reconcile these differences required all the ability of a most experienced diplomatist, and as every word in the convention, as finally adopted, was subjected to close criticism before the actual phraseology finally arrived at could be adopted, the wonder is that he was able to succeed at all.

This is one great and direct step forward, which I claim has resulted from the work of the Second Conference, in spite of all the efforts of its critics to belittle it.

Another and still more important one was the establishment of an International Court of Appeal in Prize Causes. This was another great measure which received the assent of the delegates of thirty-seven nations. Six nations abstained from voting and only one nation, Brazil, voted against it. This assent was subject, of course, to the ratification of the nations they represented. This question had been one of long standing dispute and controversy. When war broke out, it had always been the practice for each of the combatants to establish or resort to national prize courts of its own, which necessarily passed upon the validity of every capture made by its forces and brought in for adjudication. According to the weakness of human nature, from which even courts are not exempt, it generally happened that the validity of the capture, being adjudged only by one side, was sustained by the national court, and this was final, so far as the law controlled. If the decision involved the disposition of a vast amount of property, or was one which seemed to violate the rules of natural justice and equity, diplomacy went to work to obtain reparation for the neutral, whose property had been thus summarily disposed of. And sometimes, but only rarely, joint commissions appointed by the two nations had reversed the judgment of condemnation by the national court of the belligerent, but the latter was not bound to join in such a commission. The desideratum was to create a tribunal of international sanction, which should, in an independent spirit, unbiased by the national interests and passions of the contending parties, finally adjudge the case on the general principles of international law and in the light of established rules of justice and equity.

This was one of the most interesting subjects brought before us, and if our action upon it shall be ratified by the governments whose delegates voted for it, which is altogether probable, the result will be that we shall have, for the first time in history, an international court, before which the aggrieved party can bring its adversary compulsorily

for the final settlement of a certain class of disputed questions between them. The project was brought forward simultaneously by Germany and Great Britain, whose representatives were both very zealous for its accomplishment, but evidently from different motives and from opposite points of view. Great Britain, with her mighty navy riding on all the oceans, upon the outbreak of a war, might seize and condemn neutral property, and Germany, with its much smaller navy at that time, might find itself in the position of a neutral power whose property was seized by one or the other of the contestants.

We gave our general assent to the proposition at the outset, and waited to hear what would result from the differences that manifestly existed between the two nations that had brought the project forward. They both agreed that there ought to be an appeal from the prize adjudication of national courts, to an international tribunal of final authority, which should substitute the rules of international law or the general principles of justice for the selfish adjudication of the national courts, by whose decisions the owners of neutral property had suffered much from belligerents engaged in hot and active conflict, in which the neutral had no interest. I think that no nation at one time suffered more seriously than we did from this unhappy condition of the law as to neutral property. Nobody can ever forget the terrible depredations which were committed upon neutral commerce in the early part of the last century, when war existed between Great Britain and France, and we were the victims of very serious spoliation by the capture, by both sides, of our innocent and unoffending neutral ships and cargoes. Expecting, as we did, that the United States, in the future, as in the past, in the contests of nations, would generally be neutral, we advocated the Court from that point of view.

It appeared manifest from the outset that there were very serious differences between the German and the English delegations in their efforts to agree upon the scheme for the establishment of the Court which they both desired in principle. These differences reached, at one time, an impasse which threatened to defeat the measure altogether, as Sir Edward Fry, the chief delegate of Great Britain, announced that he could make no further argument; that argument on the part of Great Britain had done all that it could, and that there were three or four serious points between them unsettled.

It was at this point that our delegation was able, in the spirit of harmony and conciliation, to intervene successfully and save the measure from final defeat. Great Britain insisted that the court should be a permanent one, while Germany wished to have it called into ex-

istence at the outbreak of every war and for the purposes of that war only. Germany insisted that since an appeal to an international court was the object in view, such an appeal should be from the court of first instance in the national tribunals. England, priding herself so justly upon the great record which Lord Stowell and others of the Great Admiralty and Prize Judges of England had made, and which had largely settled the law of capture and prize, was very desirous that it should be from the court of last resort only. Again, one of the contestants was in favor of the appeal being taken not by the owner of the captured property, but by the nation to whom such owner belonged, and thus three serious points of difference had arisen between them which seemed for the time being incapable of solution, and there was still another which involved the composition of the proposed Court. England, with that natural instinct for law that the Anglo-Saxon races possess, insisted that the judges of the international court should all be pure jurists. Germany, on the other hand, stoutly contended that the court, having to do with purely naval matters, should be made up, in part, at any rate, of admirals, they believing that on a question of prizes, admirals would be the wisest and the safest judges.

On the first point of difference we sided with Great Britain and persuaded Germany to yield the matter and to establish the court as a permanent court. On the next question, from which national court an appeal to the international court should be taken, we suggested that it should be from the court not of first instance, but of second instance in the national tribunals. This would secure the action of our own Supreme Court, which we thought would probably be satisfactory without an appeal from either side, and would not hazard the possibility of what might prove to be very unpopular in America, an appeal on any terms or conditions which could dispense with a decision by the Supreme Court of the United States, and after very close and active discussion, our conciliatory proposition was adopted by both the contending parties.

Then, as to whether the owner of the property captured, or his government, should have the right to appeal, our suggestion was that the appeal should be taken by the owner of the property under general regulations established by his government, and that middle course was adopted by the contestants.

Finally, as to the composition of the Court, our prejudices, our judgment, our instructions, were all in favor of the British view, that any court which should be created should be a real court, composed of jurists learned in the law, and at the same time we recognized the Ger-

man prejudice in favor of admirals experienced in naval warfare as an element of great utility in the composition of the court. We therefore proposed that although admirals should not be made judges, although the judges should always be lawyers trained and educated in the principles of law and equity, nevertheless, somewhat after the fashion of the English Court of Admiralty, which brings in the Trinity Masters for advice, no case should be decided without a naval representative of each of the contending parties being present to advise the court, and although they should occupy seats a little lower than the justices, no cases should be decided until the naval representatives had been fully heard and their views completely understood and considered. On our insistence, the German representatives accepted this view, and Germany, Great Britain, the United States and France agreed jointly to be sponsors for the measure, and in this form it was adopted by the Conference and sent to the Nations for ratification.

It was well understood that eight great Nations were more interested in questions of war and prize than the other nations, and as there were forty-four Nations in all, and it was not possible for each to have a judge all the time, the matter was adjusted by creating a court of fifteen members, of whom nine should be a quorum; the eight Nations which were more interested in questions of war and prize than the others were each to have one judge all the time; and forming the court for a series of twelve years, each of the other Nations, according to the interest that it would probably have in the business of the court, its population, its wealth, its activity, its commerce, was to have a judge appointed by itself, but serving only for a graded number of years, from eleven years down to one year, as in the case of Panama.

And that I consider to be another accomplished fact, another great step forward towards the creation of a real international law binding upon all Nations, and to the practical advancement of international peace.

As was to be expected, a question arose with our own government as to the expediency, if not as to the constitutionality, of allowing an appeal to any foreign or international tribunal from any decision of the Supreme Court of the United States. This question Mr. Knox has very wisely met and adjusted by ratifying, with the reservation that the action of the International Prize Court, instead of taking the form of a direct appeal from the Supreme Court of the United States, should be limited to the determination of a claim for damages for the owner of the injured property against the United States or the captor. Other nations have also made reservations, England, for instance,

withholding her approval until the international maritime law which the court would administer should be settled by a conference of the maritime nations which she called in London, and which did establish definite rules of law. The rules are still a subject of contention between the two Houses of Parliament, the bill approving the declaration of London having been thrown out by the House of Lords, with the assurance that it is to be again introduced in the Commons during the present session of Parliament. While the subject of ratification of this very important convention is still pending, I think there is no doubt that the court will be established at no distant day, and will stand as a monument of the advancing progress of civilization and the cause of peace.

But the success of conferences is to be weighed and measured, not simply by their direct action, which commands the approval of all the Nations, but also, and perhaps even more, by the progress they make in questions still left undecided and subject to further action by diplomacy or by future conference. And here we claim for the Second Conference great distinction, and for the work of our delegation under the instructions of Secretary Root, a very leading part in the advocacy of all the most constructive and progressive measures that were brought forward for consideration. We could not, of course, as in the Parliament or Congress, carry questions by force of the majority. That would soon put an end to all conferences, which meet, as Franklin said in the Federal Convention when they began their discussions, "to confer and not to contend."

And so I wish to speak briefly of three or four other matters that were proposed and were not adopted by the Conference, but in which great progress was made.

We went instructed by our Government to maintain, to the best of our ability, our old claim for the immunity of private property at sea, that is, of private and unoffending property, not contraband, even in enemies' ships at sea in time of war. Franklin had endeavored to have this asserted as a substantial clause in the treaty of peace between us and Great Britain in 1783, placing private property at sea in the same position of immunity as private property on the land; that except in cases of contraband, it should not be liable to capture, which was a very important move in the direction of saving inoffensive and unoffending commerce from spoliation and destruction in case of war, and very much for the benefit of the world at large, to make commerce free always from interruption by war any further than was absolutely necessary.

Time and again our government had pressed it during the intervening hundred years between Franklin's death and the meeting of the Conference. They had proposed it at the First Conference, from which it was absolutely excluded, although Dr. White succeeded in putting on file a very powerful memorial in support of it, and made a most effective address in its behalf. The First Conference would not listen to it; they said it was not within the programme, but recommended the careful study of it for consideration of the next Conference, where it properly came up. We had it inserted, by Franklin himself, in the treaty of 1785 with Prussia, and once we had it in a treaty with Italy, and several times other nations, imitating that example, when war broke out between them, agreed, at the outbreak, that there should be such immunity, but no substantial progress had been made in the way of its recognition as an international doctrine when our Conference met.

Of course, most of the great nations opposed it. Germany was the only one of the great fighting nations that voted affirmatively with us, but it was very respectfully considered and fully discussed, and after several weeks, in which it came up from time to time, almost two-thirds of the nations voting, that is, by a vote of twenty-one to eleven, recorded their votes in favor of the establishment of such immunity. It was not found possible, however, in the face of great commercial nations that opposed it, and which were likely at any time to be engaged in war, to press it further. Our orders were not to press anything to the point of irritation, but if we found it impossible to carry a matter through at this Conference, to carry it as far as we could and then drop it, leaving it for further consideration, in the hope that by and by, with the growing sense of international justice, it would be accepted by the nations.

So there it stands for these twenty-one Nations who supported us to enter into such an agreement among themselves, or in case of war breaking out between any of them, to make a special agreement for the immunity, or for action by the next Conference to be held in 1915.

So there again, very positive progress was made. We stand no longer where we did at the beginning of the Conference, nobody assenting to it but ourselves, but twenty other nations of greater or less importance pledged to the proposition which would make so strongly for peace and for the limitation of armaments.

We labored also very earnestly for the establishment of a general court of arbitration, of a permanent court, meeting regularly and not to be called together for each specific case, as was provided by the

First Conference, which had merely established, under the name of a Permanent Court, a list of jurors or judges who might be selected by any nations that should choose so to do.

This was a question that interested all the nations alike, and a general agreement was reached first, that there ought to be such a court, and whereas, in the First Conference the idea that there could be such a court was abandoned as impracticable, and no action was taken beyond what I have already, in my former lecture, described, the Second Conference voted that such a court of arbitration ought to be established, and we framed by general consent a scheme for the functions, the organization and the procedure of the court, to which substantially all agreed.

The failure came when the subject of the method of appointing or creating judges of the court was reached. Almost all the larger nations considered that what had been agreed to in this respect, in the creation of the prize court, ought to be adopted, and that there should be a similar distribution of judges, according to the interest and business that the several nations would probably bring to the court. Well, there we hit upon an obstacle which there was no overcoming. We were forty-four nations assembled. Central and South America constituted twenty-one nations of all that took part in the Second Conference, and they claimed and asserted that sovereignty was sovereignty, and that all nations are absolutely equal, and although they had assented unanimously, with the exception of Brazil, to the formation of the international court of appeal in prize, on the terms I have mentioned, they took a stand on this subject and insisted that there should be nothing short of absolute equality in the appointment of judges.

As there could not be a court of forty-four judges, and as Russia and Germany, Great Britain and France and the United States could not agree that every nation was as big as every other, as was claimed by some of these small nations,—that Panama was in all respects the equal of Great Britain, and Luxemburg the equal of Germany,—no agreement could be reached. We proposed various schemes, being very earnest, in the hope of establishing this court.

We even declared our willingness to have an election of judges by all the nations, each voting for a limited number. We thought we could take our chances of being represented in that court, and were willing to consent to an election, even though we should be left out, because the whole scheme proceeded upon the idea that nobody was compelled to come before the proposed court. Any nations preferring it could resort to other means of settling their international differences,

and especially to the tribunal which is now in existence at The Hague, consisting of a list of referees from among whom the parties may select judges, two or three or five as they may agree, but not in reality a permanent court at all. This new tribunal, if created, was to continue to exist by the side of the existing Permanent Court.

This difference as to the mode of selecting judges could not be settled by the Conference. It was therefore voted that there ought to be such a court; that the scheme that we had established for its powers, procedure and organization, its sessions and the general theory of law that should be applied to it, was accepted; and it was referred to the nations to agree, in the best manner they could, upon the number of judges, and the mode of their selection, and that as soon as that was done, the court should be established with the constitution that we had framed for it. And this also is a proposition which, having advanced so far, is likely to be favorably settled by diplomatic intercourse, or not later than the meeting of the next Conference.

Our instructions had also been to press for a general arbitration agreement substantially in the form of those arbitration agreements which we made with eleven nations in 1904, but which came to an unhappy end by a difference between the President and Congress in respect of one of the terms of the treaty. Intense interest was taken in our proposition for such an agreement by all the nations, and it was the one question which became critical, if you believe that any question could be said to be critical, but in respect to which, at any rate, there were violent differences of opinion. It was hotly debated from the time of its introduction until a few days before the Conference came to an end, and finally, by vote of some thirty-two nations to nine, it was adopted in committee. We thought that this gave us a right to carry it before the Conference in plenary session for final decision, but it was intimated that one great nation, if this were done, would break up the Conference by its withdrawal.

We thought that it ought to be presented to the world in the Final Act as a doctrine favored by the votes of four nations to one, carried to an advanced position which had never been dreamed of. But, on the whole, it was deemed wiser that a somewhat colorless resolution should be adopted, to the effect that the Conference approved of the general principle of arbitration, and that there were subjects that ought always to be referred to arbitration, and leaving it so to the future consideration of the nations. We declined to agree to this and abstained from voting, because we considered it too much of a retreat from the advanced position which we had already secured for it in

Committee. We claimed that the thirty-two nations who had favored it should be permitted to enter into such an agreement between themselves under the ægis of the Conference leaving it for the others to stay out or come in afterwards, as they pleased, for, from the beginning, it was premised that no one should be compelled to come into it, but each should stay out as long as it pleased.

Now, if the doctrine of arbitration as a substitute for war is regarded as of value, have we not here made another very great advance by the work of this Conference? At least, I conclude so from the rapid and frequent resort to arbitration by all of the nations since that day. Even the failure of President Taft to carry through, unamended, his favorite treaties of arbitration with Great Britain and France, has not discouraged me at all.

There is no question under the Constitution as to the equal voice of the Senate as a part of the treaty-making power. The Senate can never be expected, and has no right, to abandon its position that it cannot abdicate its constitutional authority, to give or withhold its approval and consent from the actual and final agreement which submits to arbitration a difference with another nation.

It seemed to me that the Executive made a great mistake in 1904, when the Senate insisted upon this power, in withholding the eleven treaties as amended by the Senate from further submission to the other contracting Powers, and I hope that that mistake will not be repeated in this instance. Any step forward, however slight the gain may be, is not to be lost or thrown away, for each step leads always to another and further advance. And certain it is that President Taft, in this instance, took a step far in advance of any that had been taken by the head of any state in the world's history, in proposing that all questions without reservation should be settled by arbitration, rather than by a resort to war. And that is the ultimate goal which we hope, at some distant day, to reach, when his name will be forever remembered as its author.

Another important measure that we were instructed to press and did press, with all our might, was in respect to future conferences. We had hoped to see established some machinery by which automatic action should take place, and the conference be called without waiting for the action of any particular nation. We claimed that its organization and procedure should be in its own hands by means of an international executive committee, which should gather the views of the nations some two or three years beforehand, and form a tentative pro-

gramme for submission to the Conference, and that thus the predominance and control of any particular nation should be avoided. That, in a modified form, was finally passed, but with great difficulty and after infinite and detailed discussion, which involved almost every word of the resolution.

It is very difficult to get the representatives of forty-four nations to agree upon phraseology, as I might illustrate in respect to two single words in this last proposition. We proposed at first that there should be another Conference held on the 15th day of June, 1914, seven years from the time we came together, and we advocated it strongly upon the doctrine that seven years is a magical number, being a period during which each man absolutely changes his structure, and that the men who would come to it then, even if they were the same, would be absolutely new men. This amused the Conference, but did not convince them. It was objected that it was too definite to say the 15th day of June, 1914. Germany said it did not want it and would not have it before 1914, and so its representative proposed that it should be not earlier than 1914. Great Britain, anxious for such a meeting, made the counter proposition that it should be not later than 1914, and finally we proposed to settle the difference between them and make it about 1914. But when it was brought to the final test of the unanimous approval of all the forty-four First Delegates, even "about" was considered too definite, and so the recommendation was put and carried unanimously, as it stands, that another conference should be held at a period analogous to that which had elapsed since the last Conference.

This gives a little idea of the difficulties with which we had to contend in settling the phraseology of that as of every other important resolution. The result was that it stands resolved that two years before the date, or the probable date, of the meeting of the next conference, a preparatory committee—they would not agree to the word executive committee—but a preparatory committee, should be appointed by international action, which would gather the views of the nations, prepare a tentative programme, and recommend a scheme for the organization and procedure of the conference.

But even thus mutilated, I think the adoption of the measure which necessitates the calling of a third conference is a very great advance. Friends of peace, friends of arbitration may now depend upon it that every seven or eight years, there will be a similar conference, and that where the last conference left the work unfinished, the new conference will take it up. Thus progress from time to time will be steadily made,

and the great effort of the nations to avoid war by the establishment of arbitration and other peaceful methods will, in the end, be successful.

We cannot expect to succeed all at once, or to avoid war altogether, but great progress is being made, and if I have made a fair statement of the action of the Second Conference upon the principal questions which were brought before it, real advances were made towards the desired end, the London *Times* to the contrary notwithstanding.

Man is a fighting animal. He has fought his way to his present advanced position, which is the result of the survival of the fittest, but I am one of those who believe that by and by, by the general consensus of the public opinion of the world, he will be generally satisfied that fighting does not pay; that wars and the necessary preparation for war are, as the Emperor of Russia said in his first summons, a terrible burden, fatal to the prosperity of nations who indulge in them, and that wars will become less and less frequent as time goes on.

The deliberate judgment of Secretary Root upon the work of the Conference, I am happy to believe, expresses the general opinion of all who are qualified to judge of it. He says:

"The work of the Second Hague Conference presents the greatest advance ever made at any single time toward the reasonable and peaceful regulation of international conduct, unless it be the advance made at the Hague Conference of 1899."

"The most valuable result of the Conference of 1899 was that it made the work of the Conference of 1907 possible. The achievements of the Conferences justify the belief that the world has entered upon an orderly process, through which, step by step, in successive conferences, each taking the work of its predecessor as its point of departure, there may be continual progress toward making the practice of civilized nations conform to their peaceful professions."

I ought not to conclude these lectures without a word of appreciation of the happy choice made by the Nations, of the place for holding the Conferences, and of the more than cordial welcome and lavish hospitality with which the Delegates were received by the government and people of Holland.

The Hague had long been known as the place where contending nations could peacefully settle their differences, and many treaties had been negotiated in Holland. The peaceful atmosphere of the ancient city and of the country of which it is the ornament, was most favorable to the work which we had in hand.

The Dutch are a peculiar and most interesting people. Since the expulsion of their Spanish tyrants in the sixteenth century, they have

been for the most part quietly devoted to the arts of peace and to the cultivation of a prosperous commerce, from which, in the larger cities, many have realized liberal fortunes, which they peacefully enjoy, and which enable them to exercise a generous hospitality. They seem to be one of the most frugal and thrifty peoples on the face of the earth, and honesty is the prevailing trait. I often heard it said there that every man is bound not only to live within his income, but to save half of it. So habituated however are its leading citizens to a generous and royal exercise of hospitality, that they lost no occasion to entertain the Delegates in most delightful ways, sparing no expense to make them feel at home in their protracted and laborious residence there.

Her Majesty, the youthful Queen, received the entire body of delegates at the royal palace at The Hague on two occasions, and again she entertained at dinner the First Delegates of all the Nations at the royal palace at Amsterdam, and there most graciously distributed to them beautifully engraved silver medals struck in honor of the Conference, and she subsequently presented similar medals to all the other Delegates.

The Dutch Government entertained the whole body of Delegates by an excursion to Rotterdam, where we, for the first time, got an idea of the maritime and commercial possibilities of Holland. The Burgo-master and Council of The Hague gave a most interesting ball at Scheveningen, at which the ancient customs and country dances of Holland were exquisitely performed, carrying the spectators back to an insight of life at The Hague two hundred years before. And the public officials and leading citizens vied with each other in entertaining us to the full extent of our capacity.

Belgium, on a delightful summer day, extended an invitation to us all, with our wives and families, to visit the ancient city of Bruges, where, in sight of the beautiful Belfry celebrated by Longfellow, and in its quaint old medieval hall of state, we were entertained at luncheon, and afterwards witnessed a most artistic and beautiful production of the *toison d'or*, which, again, carried us back to a realization of the ancient sports of that nation.

The delegates, among themselves, exchanged civilities not always according to their wealth and ability, but ever in the same cordial and fraternal spirit, and it will not surprise you to hear that our delegation, although making the utmost of the modest allowance made to it by the State Department for that purpose, was left far in the rear by some of the younger South American nations, who seemed to place in

the hands of their delegates the means of most rich and brilliant entertainments.

The moment of our assembling was most propitious for our work, for, at that time, as hardly ever, for centuries before, absolute peace prevailed among all the nations of the earth.

"No war or battle sound
Was heard the world around."

It was a thrilling moment when, as the representatives of all the organized and civilized countries of the world, for the first time in human history, we assembled from all quarters of the globe, speaking all the languages, personating all the races, religions, creeds and customs, to work together for the cause of Peace, and however the results of our labors may come to be valued by posterity, they were honestly, earnestly and conscientiously performed, with the resolute purpose on all hands to advance the cause of civilization and of peace.

During the four months that we were together, the universal harmony that prevailed at the outset was never disturbed, however much our opinions and arguments conflicted.

It was toward the close of our deliberations that a single event occurred, made possible by the unstinted generosity of an American citizen whose name is indelibly associated with the cause for which we stood. I mean the laying of the corner-stone at The Hague of the International Palace of Peace, which by this time is almost completed, as a home for the international courts and a shelter for all future conferences, where, hereafter, it is hoped that the friends of peace may gather at stated intervals, from time to time, from all nations, tongues and climes, to aid in its promotion.

And so, at last, after the lapse of three centuries, will be realized the dream of Grotius, the founder of international law, that all the civilized nations of the earth will submit to its dictates, whether in war or in peace.

And now that we are about to celebrate the completion of a century of unbroken peace between ourselves and all the other great nations of the earth, and are also on the eve of preparing for a Third Conference at The Hague, we may join with them in wishing a hearty Godspeed to that Conference and to all its successors forever.

IV
POLITICAL SPEECHES

THE TWEED RING

SPEECH AT THE PUBLIC MEETING CALLED BY THE COMMITTEE OF SEVENTY, IN COOPER UNION, NEW YORK, NOVEMBER 3, 1871

STATEMENT

In 1870, the notorious William Marcy Tweed, born in 1823 in New York City, successively Alderman, Member of Congress, Supervisor, School Commissioner, Deputy Street Commissioner, Commissioner of Public Works, and State Senator, was in full control of New York City as leader of Tammany Hall. The City Charter, which went into effect on April 5, 1870, gave to him and his Ring the opportunity of looting the City Treasury. The Ring consisted of Tweed, who was then Commissioner of Public Works, Richard B. Connolly, Comptroller, A. Oakey Hall, Mayor, Judges Barnard, Cardozo, and McCunn, of the Supreme Court, and Peter B. Sweeney.

In January, 1871, the New York Times and Harper's Weekly, on information given by Ex-Sheriff James O'Brien, began to make disclosures of the happenings of the preceding two years. In the autumn, the Times, having analyzed the figures during the summer, made announcement of the theft by the Ring of many millions of dollars. Interrogated by a reporter concerning these statements, Tweed made no denial, but asked: "Well, what are you going to do about it?" An answer to this query was given by Mr. Choate at a public meeting of citizens in Cooper Union on September 4, 1871. As Chairman of the Committee on Resolutions he pointed to a scroll of paper that he carried and said: "This is what we are going to do about it." He then read twelve resolutions in which the whole situation was set forth, the members of the Ring condemned by name, and a plan of action proposed. The last resolution provided for an Executive Committee of Seventy. Concerning this meeting and the part which he played in it Mr. Choate wrote to his wife on September 5: "Our meeting last night was a success in every way. I had only to read the resolutions which were well received, but was somewhat embarrassed by the frequent calls for Choate! Choate! from all parts of the house whenever any speaker got through and before the next got up. I was surprised to find myself so popular."

On November 3, 1871, a mass meeting was held in Cooper Union to hear the report of the Committee of Seventy. It was at this meeting, as Chairman of the Subcommittee on Elections, that Mr. Choate made the address printed below.

Judicial proceedings were then brought against Tweed both by the city and the state. In 1873, he was found guilty of fraud and sentenced to twelve years' imprisonment, with a fine of \$12,550; but the New York Court of Appeals subsequently shortened the term to one year. While awaiting trial in the "Six Million Dollar" civil suit, he escaped from Ludlow Street Jail, on December 4, 1875, fled to Cuba and from there to Spain. Arrested by the Spanish authorities and delivered to the United States, he was again confined in Ludlow Street Jail, where he died on April 12, 1878.

At last, fellow-citizens, for the first time in many years, we can once more hold up our heads like men, and declare without any sense of shame that we are citizens of the great and glorious City of New York. Until within the last three months we exhibited to the world a truly

humiliating and disgusting spectacle. A City of a million free inhabitants, the metropolis of the Continent in every sense of the word, the centre of its wealth, its intelligence and its influence; the seat of its commerce, and the starting point from which all its greatest enterprises proceed, had, nevertheless, become by the apathy of its citizens, and their absolute desertion of all their civic duties, the victim and the prey of a gang of political miscreants whose villainies are without a parallel. Every avenue and department of the municipal service fairly reeked with corruption. Robbers sat without disguise in the chair of the Chief Magistrate, at the head of the Department of Public Works, in the City and County Treasury, in the administration of the Central Park, and their hirelings and dependents filled almost every office. From these points of power the band of conspirators exercised a gross and brutal tyranny over the people of the City, more grinding than civilized men had before submitted to.

Far worse than "taxation without representation," which all history has declared to be sufficient cause for revolution, it was highway robbery under the pretense of taxation, with no pretense of representation whatever, and before we knew it we had been literally plundered of twenty millions of the public money. At last the Press—or, rather, to do it justice, a single newspaper—true to its functions as the guardian of the public liberties, sounded the alarm. The people awoke from their long slumber, assembled in haste for mutual protection, and resolved, as the only remedy for the wrongs they had suffered, to take their own affairs into their own hands. And now two months of vigorous and united action have changed the whole aspect of affairs. The general scorn and contempt which rested upon us has, in all quarters, been changed to sympathy and fraternal encouragement, because we have shown a determination to take care of ourselves, and have resolved, at all hazards, and by whatever means may be necessary, peacefully if we can, but if not, then in some other way, to recover our mutilated liberties and vindicate our civil rights. It is true that we still wear the shackles, and our necks still show a fearful galling from the collars they have borne so long. But we no longer wear our fetters meekly, and are prepared for the struggle however desperate, that shall cast them off. We no longer kiss the rod of our oppressors, but now have snatched it from their grasp, and mean henceforward to give blow for blow. We no longer lie still with the bed-clothes over our heads, pretending to be asleep, while these burglars are rifling our pockets and our safes, but have raised the hue and cry, and joined in

full pursuit, and mean not to let go the chase until we have hunted the scoundrels down.

Realizing at last the deadly peril into which the body politic had been plunged by your own shameful neglect, and convinced that it could only be rescued and restored by the removal of the cause of the mischief, and the return of all good citizens to the performance of their public duties, you created the Executive Committee of Seventy to represent and to guide you in that great enterprise, to search out and ascertain the full extent of the mischief that had been done, to recover the moneys that had been stolen, to bring to justice the chief criminals, to summon to your aid the Legislative and Executive powers of the State, to obtain the repeal of the City Charter, to exterminate from office the Ring and all its minions, and finally, in the words of your resolution of Sept. 4, "To assist, sustain and direct a united effort by the citizens of New York, without reference to party, to obtain a good government, and honest officers to administer it." And it was the fulfillment of this latter duty, so far as it might be accomplished, that was intrusted to the Committee on Elections, whose proceedings your Chairman has requested me to report to you. It was obvious at the outset, in the conduct of this great movement of reform, that you had no idea of confiding your municipal affairs to either of the political parties to the exclusion of the other, and that both alike, so far as their past participation in those affairs was concerned, were the objects of your supreme distrust. You had no choice between a corrupt Democrat and a corrupt Republican, and were perfectly well aware that the Ring of malefactors who had usurped the powers of taxation and government, and were enriching themselves without labor at the public cost, was composed of political prostitutes from both the party organizations, and that they found the real secret of their power in the mutual betrayal of their trusts, and if better chance or greater cunning had given to the base men of one party the lion's share of the spoils, it was only the want of opportunity, and not of evil purpose, that had prevented their associates of the other party from perpetrating just as great iniquities, and carrying off just as much plunder.

With a view, therefore, to rally the good men of all parties, and of every creed, color and condition to a united effort for an honest Government, your Committee on Elections was composed of equal numbers of Democrats and Republicans, and they were instructed to forget their politics, to confer with all organizations, parties, societies and individuals who might desire to co-operate for the common good, and to bring about as nearly as possible a complete union of all citizens up-

on one reform ticket for all the City and County offices and for the Senate and Assembly. With the State tickets it was wisely concluded that we had nothing whatever to do, since the question of City reform united the support of the honest portion of both the great parties of the State. To these directions the Committee on Elections have faithfully adhered. They have preferred none because they were Republicans, they have rejected none because they were Democrats. They have counseled with all, and closed their doors upon none.

They claim credit for some forbearance, for much patience and an unfailing purpose to unite the entire opposition to Tammany, and they are happy to announce to you that that purpose has been substantially accomplished, and that with some few exceptions, of which I will presently speak, a substantial union of the friends of reform will speak with one voice and cast a consolidated vote upon election day. It was manifest from the first that the movement which you inaugurated at your first meeting had aroused a response as hearty as the call was loud, that all classes of society were profoundly agitated, and that a general determination pervaded the community to drive out the Ring and put honest men in their places. But there was a total want of organization; there was a countless number of associations, each with a distinct head and under a different name. There were all kinds of Democrats hailing from all sorts of halls, generally with harmonious and musical names, but not very harmonious spirits. There were Apollo Hall Democrats and Reform Democrats, German Democrats, Independent Democrats and Union Democrats, Lukewarm Democrats and Democrats fiery hot, but none, I believe, professedly cold-water Democrats. And even the Republicans were divided. We found that the Republican Party of this City had what it was pleased to call "Wings"; and although we Republicans when gathered in family council don't allow any criticism from outsiders, yet I, in this union meeting, as a Republican from the beginning to the end devoted to its general policy and proud of its record, may be permitted to say here that these two wings of the Republican Party in this City are the strangest and most uncomfortable pair of pinions with which any political bird was ever incumbered. They will neither fold together, spread together, nor flap together. Each goes in a different direction and on its own hook, and is more likely to hit the other and make the feathers fly from that than from any common enemy.

Besides, like the wings of the ostrich, they are very small compared with the general bulk of the bird, and seem designed for no better purpose than to make a great noise and flapping and frighten innocent

persons and young political children; and, as to locomotion and progress, why a bird with one wing would get along a great deal better. But, nevertheless, out of all this jarring discord and these many associations pulling in different ways, and each having purposes of its own to serve, second only to the great object of reform, and sometimes, I am sorry to say, not quite second to that, substantial harmony has grown at last, and, especially in regard to the County ticket, there has been a perfect union. So that, for once, we can show you all the different kinds of Democrats of whom I have spoken feeding at the same trough; and as to the Republicans, the lions of the Custom-house are actually lying in the same bed with Horace Greeley's lambs.

And here your Committee on Elections is bound to recognize and acknowledge with gratitude the very great service rendered to the cause of union and reform by a body of citizens assembled in a convention, which was, I believe, without a precedent in our political history. The Council of Political Reform, an organization created some time ago for the general purposes indicated by its name, composed of respectable citizens of all parties and organized in every ward of the City, invited a representation of men of every party, creed, nationality, color and class to meet in convention and to nominate a complete list of officers for the ensuing election; and, having called them together, the Council of Reform left them to take their own counsels and action uninfluenced by any policy or dictation of its own. The Convention so assembled at Chickering Hall embraced every interest in the whole City. There were gathered in harmonious action, Democrats and Republicans and men who had never voted with either, Christians and Israelites, Catholics and Protestants, Americans, Germans, Irishmen, Italians and Frenchmen, capitalists and working men, rich men and poor men—all under the one name of citizen and all in the single interest of reform.

They selected with infinite care, and after a broad survey of the whole field, a ticket which, with some inconsiderable changes, not only received our approval and indorsement, but that also of the united councils of both branches of Republicans and the Democratic Reform party, and that is the County ticket which we present for your suffrages. It consists of the nominees for Judges and for Register, and bears at its head the honored name of George C. Barrett for Justice of the Supreme Court. Of Judge Barrett I need not speak to this company at length. An Irishman by birth, but a loyal American by education and growth, thoroughly identified in spirit with his adopted country, he is young, talented, well qualified by professional education and experi-

ence for the office—is the spontaneous choice of the great body of the Reform party, and determined, if elected, to do honor to his high office. Of his only competitor for that high office it is, perhaps, enough to say that his name is Thomas A. Ledwith. I desire to speak only in kindness of Judge Ledwith, especially as you in your wisdom selected him to act with us in the cause of Reform. His most sanguine friends have not ventured to state that he has any qualifications for the station to which he aspires, and so I will waste no time in proving that he has none; but this, I think, we may justly say, that his nomination by Tammany Hall was intended as a deadly blow at the cause of Reform, and that he is supported by men inside of Tammany who hope to gain his local support for their own candidates; and by men outside of Tammany, who, indeed, at first joined the standard of Reform, and began to battle against the walls of that stronghold of corruption, intending, not to destroy it utterly, as we mean to do, but merely to make a breach and get inside themselves, and turn its guns against us. And so, as soon as the back door was opened to them, they glided swiftly in, and, abandoning the advancing column, joined the ranks of our enemies. Clearly, then, it is our first duty to defeat Ledwith, and we shall do it. Of the rest of the Judiciary ticket, which is approved and indorsed by everybody outside of Tammany, and of the gallant German who is our nominee for Register, I need not speak. In regard to the Aldermanic ticket, you will observe a discrepancy as to six out of fifteen names between the nominations approved by us and the names placed upon the combined tickets of Apollo Hall and the Republicans. We endeavored to make that union perfect, but the trouble lay with one wing of the Republicans, who offered us names, some of which we disapproved and rejected, but offered on our part to accept an equal number of unexceptionable names in their stead, which was declined. But if our united forces prevail we shall have a working majority of the Board of Aldermen, and as that body will come into existence only to expire, we must be content with that.

But now, gentlemen, suppose you have elected your County ticket, your Judges, your Register, your full Board of Aldermen, what good will it do you? How far will that triumph advance the cause of reform? And who of those, if elected, will have power to remedy the abuses whose frightful enormity has roused you to put forth your might? Will not A. Oakey Hall still disgrace the office of Mayor? Will Tweed be shorn of one feather's weight of his power? Will Sweeny be less cunning to decide and Connolly to do the dirty work of the Ring than now? Will this iniquitous charter, under which they

have planned to rob us of our rights and mortgage our houses, to tax the food we eat and the air we breathe, and all without our consent, be any the less the Government under which we live than it is today? And this brings us to the very pinch of the whole case, and to the account of the most critical and delicate of all the labors of your Committee. I mean the selection of candidates for the Senate and Assembly, upon whose action our fate, as citizens, must wholly depend. If we cannot carry the Legislature in the cause of Reform, if we cannot elect Senators and Assemblymen enough to repeal this infamous Charter, and wipe out with it all the crimes and criminals whom it has created to cover, then all our efforts will have gone for nothing. And, therefore, it is that you will have to bend all your efforts to these Senatorial and Assembly districts, and lend your whole aid to dissuade and suppress certain symptoms of faction which, in these imminent points of our great battle, threatens us with danger. In the Fourth Senatorial District the entire opposition has centered upon O'Donovan Rossa, to hold up our standard against Tweed himself, who, undaunted by the full exposure of his crimes, dares still to insult God and man by claiming the votes of the district for the great office of Senator. It is undoubtedly a most benighted and God-forsaken district, which will enlist the missionary labors of the Reform Party for years after the Tammany candidate shall have been stripped of his stolen treasures, and been consigned to that ignominious punishment which will sooner or later overtake him. When you consider the population of the district, and that for generations it has been the bloody arena of the most brutal politics which bred the race of politicians, of which Tweed is the fit example, we may be over-sanguine in hoping to carry it by one assault, but Rossa will push him to the wall, and make a most gallant fight for it, and we cordially invite all good citizens to rally to his support.

In the Fifth Senatorial District we have indorsed the nomination of Mr. Erastus C. Benedict, one of the most eminent and esteemed citizens of the district, and demand for him the universal support of all who are really in favor of reform. He can be elected, and the people of the district owe it to themselves and to their fellow-citizens to secure his return and the defeat of Michael Norton, one of the most reckless and audacious of the corrupt instruments of Tammany. But here come in again the double and distracted wings of the Republican Party to threaten us with destruction. Fellow-citizens, your Committee have carefully surveyed the whole field; they have listened with tireless patience to the advocates and claims of all the candidates; they

have studied the history and statistics of the district and have come to the unanimous conclusion that Mr. Benedict is more likely than any of the others to win the victory over Tammany, and that it is the solemn duty of every man who is not in league with Tammany to vote for him. Nay, more; that if that district is lost it will be the fault of the Republicans of the district, preferring their own frivolous and disgusting squabbles and jealousies to the great cause of reform, in whose sacred name they are pummeling each other. All parties admit Mr. Benedict to be unexceptionable, and his rivals are reduced to the most frivolous objections against him. They talk of his age, but in Court Mr. Benedict is young enough to cope with the ablest of the Bar, and we all have to be on our guard against his vigor and agility. And, good heavens! what are gentlemen thinking of who raise such an objection? Do they forget what we are fighting for? We don't want his services twenty-five or thirty years hence, when he and all of us will be under the sod. We want him now; we want him tomorrow; we want him on the 2d day of January next to stand in the Senate and vote in our behalf for the instant repeal of this wicked charter, and we want the benefit of his wisdom and experience in planning an honest representative Government and new securities against all future rings and conspiracies against the life of the City. No, gentlemen, we are satisfied that there is no objection whatever to Mr. Benedict. We have refused to listen to the stupid suggestion that Reform Democrats will not vote for a Republican, or that Reform Republicans will not vote for a Democrat, and we insist on throwing the whole risk and peril of the loss of that district where it justly belongs. But we have a confident hope that under the weighty pressure of your influence, every man in the Fifth District who is not ready to own himself an open adherent of Tammany will work and vote for Mr. Benedict. The Sixth District may safely be left to the patriotic care of our German fellow-citizens, who compose the bulk of its population. But we have to announce to you a most signal instance of the fortunate intervention of your influence to rescue the District from the fatal results of divided counsels among the friends of reform. There were four candidates in the field,—all Germans,—two of them adherents of the Ring, and two public-spirited Republicans, Messrs. Weissmann and Kircheis. Having satisfied ourselves from a careful review of the situation that Dr. Weissmann combined the greater element of strength, and was entitled to receive the unanimous support of all who are in sympathy with us, we addressed a letter to Mr. Kircheis, calling upon him for the sake of the cause to withdraw from the canvass in favor

of his competitor, to which he replied in the most manly and patriotic spirit, complying with our request, and so paving the way for a certain victory, so that we have every confidence in securing that vote in the Senate to the right side.

In the Seventh District, the contest lies between Messrs. John J. Bradley and James O'Brien. Mr. Bradley is one of the most dangerous and desperate instruments of the Ring. His vote and his influence have always been and will always continue to be at their ready service to advance all their most nefarious schemes, and he is the brother-in-law and the brother in crime of Mr. Peter B. Sweeny. Certainly, no citizen who does not desire to uphold and perpetuate the wicked conspiracy with which he is identified, can possibly vote for Mr. Bradley for Senator. Mr. James O'Brien is acting in direct and deadly hostility to Tammany Hall, and to all its schemes and leaders. He has unquestionably rendered signal services* to the cause of reform, and is fully committed to use his vote and his influence in the Senate to the repeal of the City Charter, and to carry the other measures of legislation intended by us. Under these circumstances, we cannot hesitate to choose between these two candidates, one or the other of whom must certainly be returned to the Senate. And we unqualifiedly advise all honest voters of the District who are friends of reform to use every honorable means to defeat Bradley, and to vote for O'Brien. Gentlemen, you must look the question in this district fairly in the face and decide in a manly fashion, and on practical and substantial grounds. We are aware that since this decision of your Committee was announced, a third candidate has been put in the field, but without the slightest idea on the part of any of his backers of electing him. Mr. Christopher Pullman is undoubtedly a most honest and estimable person, but he has no more chance of going to the Senate than William M. Tweed has of entering the kingdom of heaven. The vote and influence of each voter, however used, must tell directly for Bradley or for O'Brien, and any man who stays at home or throws away his ballot upon Pullman must be held responsible for the election of Bradley, if the canvass should result in that worst possible event. And so we sum up our advice as to this district in three words—vote for O'Brien. Mr. Daniel F. Tiemann, our venerable and respected Ex-Mayor, is certainly entitled to the support of all the friends of the cause in the Eighth District. He has no personal ends to gain by going to the Senate. His competitor will stick at nothing to secure his election, or if elected, to use his vote to carry out the most unscrupulous and monstrous schemes

against our rights and liberties. Let all dissensions and petty jealousies then be laid aside, and all join hands for Mr. Tiemann's election.

And now, not to weary you with any more details, we commend to your support the entire ticket of Assemblymen, from the First District to the Twenty-first who have received our indorsement. We have studied the whole island from Kingsbridge to the Battery. We have taken counsel from all sides in every district, and with no other object in view than to combine and concentrate the entire strength of the movement upon unexceptionable candidates—have made the selections which have been announced by the Press. We could choose but one in each district, and have doubtless disappointed the others. But now that the choice has been made, if it shall be ratified by you, a new aspect will be put upon the situation in each district. It will henceforth be certain that the Tammany candidates or your candidates must certainly be elected. There is no room in any district for any third man, and if any faction, party or organization in the name of reform shall insist on going to the polls with any other candidate than the one adopted by you, they can only do so in the interest of Tammany Hall. Honest motives will be no excuse—such votes must tell for Tammany and against the people—and we must all labor in our respective Assembly districts to concentrate the whole strength of the movement upon these candidates. Here in the Assembly districts we fight the fatal battle of this war. If we fail to carry the Legislature, this City will not be a safe place for honest men to dwell in, the reign of the Ring will be perpetuated, and under the disguise of a City Government, rapine and plunder will continue to destroy our rights and absorb our property, and life itself will be in peril.

There is but one subject more to which I am instructed by the Committee on Elections to invoke your attention, but that is so full of fearful peril and iniquity that I fairly shudder to enter upon it. Fellow-citizens! you have thoroughly alarmed your wicked enemies in the very heart of their stronghold; they tremble before your righteous wrath; they see the fatal halters dangling very near their necks, and have resolved upon a desperate and wicked resistance. Satisfied that upon a fair vote they will be outnumbered and driven from the field, they have resorted to a most damnable and deadly plot to circumvent and defeat you. They have determined by a false canvass of the votes to count their candidates in, and so to murder your majorities. To this end the Mayor, in whom the City Charter has vested the sole power of appointment, has given to the Ring the whole list of inspectors

and poll clerks throughout the City, and with them the exclusive power to count and declare the votes. And he has refused the formal request made to him by the opposition for a recognition of their rights under the law and their share of those appointments.* Here, then, is a crime before which all the other villainies of the Ring pale and dwindle. The theft even of twenty millions of dollars is nothing when compared with this high-handed and atrocious blow at the very life of the State.

"Who steals my purse steals trash: 'tis something, nothing—
'Twas mine, 'tis his, and has been slave to thousands."

But this wholesale filching and slaughter of the suffrage is a deadly thrust at the very source and fountain of our liberties. Let not him escape the responsibility of this matchless crime who alone had the power to prevent it and refused to do so. On this one outrage which involves all the rest let us appeal to our brethren of the State and the nation to come to the rescue of our liberties and their own, which it alike imperils!

But in the meantime what else can we do? Why, by attending to our duties on election day we can watch for and detect the crime, and, perhaps, in a great measure prevent it. It is with a view to this duty that our Committee have appealed to you to close all your places of business and to devote the entire day to your duties as citizens. Do you think that these inspectors and poll clerks will dare to cheat you before your very eyes, if they see by the numerous presence of courageous citizens at the polls that you are determined to defend your rights? Depend upon it, they will not. But you have everything at stake on that day, and I tell you that there is a great and crying need of the attendance and the services of just such men as compose this audience to aid our Committee on election day, to man the polls, to defend the boxes, and to watch the counting of the votes. Every substantial and courageous citizen who will volunteer is worth twenty hirelings in such a service. There are enough of you in this hall tonight to defend our rights in every election district, and effectually to prevent this meditated massacre of your dearest rights. Will you do it? Will you for once sacrifice business, ease and comfort to save so great a stake? We are in fearful earnest in demanding it, and we exhort you, if you would not have all your great efforts paralyzed, and be defrauded of all your votes, to enlist as soldiers for this one day's battle, and to enroll your names to-morrow morning at the headquarters of the Committee, No. 39 Union Square, to bear your part in this decisive contest.

BAD LAWS BADLY ADMINISTERED

ADDRESS AT A SPECIAL MEETING OF THE CHAMBER OF COMMERCE OF
THE STATE OF NEW YORK, STEINWAY HALL, NEW
YORK, MARCH 25, 1874

STATEMENT

The meeting was called to hear the report of the Special Committee of the Chamber of Commerce on Reform of the Revenue Laws. The Committee reported that, together with committees from Boston, Philadelphia, Baltimore and Washington, it had appeared before the Ways and Means Committee of the House of Representatives, from March 3 to 16, 1874, and had advocated the following changes in the revenue laws:

- (1) Repeal of the laws authorizing the seizure of books and papers (Stat. at L. March 2, 1867; July 18, 1866, § 39.)
- (2) Repeal of the law giving moieties to informers and others.
- (3) Enactment of a law to limit to two years actions on the part of the Government to recover penalties and forfeitures.
- (4) Limitation of forfeitures to the items of an invoice in which there is fraud. (Stat. at L. March 2, 1799, § 66; March 3, 1863; July 28, 1866, § 9.)
- (5) Render the payment of duties conclusive upon all parties in the absence of fraud.

Mr. Chairman and Gentlemen: It really does seem, when we see that the Chamber of Commerce, the organized representative of the great commercial interests of New York, has taken this matter in hand and volunteered their services and pledged themselves to carry through, as we have heard by the report that has just been read—it does seem that at last the reign of terror under which the merchants of New York have so long suffered, and to which some of the strongest and best of them have succumbed, was at last about to be broken. And, for one of another profession, I think that the merchants can be most warmly congratulated on the present aspect of affairs. One who has stood quietly by during the last ten or twelve years, since the passage of this noted law of 1863, and seen how it has been perverted into a weapon of offense and destruction to the honest importer and the unoffending merchant, cannot but express gratification and pride that at last they have been aroused to a sense of their own dangers, and have taken their own vindication in their own hands. For, gentlemen, after all you may say against the informers and the revenue officers, I contend that the merchants of this city, the importers of this country, have chiefly themselves to thank for the oppression with which they have been pursued, and the tyranny that in this matter has been exercised over them. [Applause.] You won't see any more of revenue

oppression, of extortion on the part of the Government and the Custom-house officers, when once it is understood that the merchants of New York know their rights, and, knowing them, dare to maintain them. [Applause.] Who that has looked into this matter does not know and realize that it is the quiet submission of the importers that has brought upon them the attacks of the informers and the extortioners. Why, gentlemen, every honest merchant who has paid tribute of \$1,000, or \$5,000, or \$10,000 to the Government to stifle and avoid inquiry has invited similar attacks, to be pressed with remorseless energy and the same results upon ten or twenty other merchants as honest as himself. "Who would be free"—it is an old maxim that "Who would be free themselves must strike the blow." And if the merchants and importers only understood that this matter is in their own hands, their grievances would vanish almost as soon as they are stated. Now, what is it that they demand of the Government? What is it that they ought to demand of the Government? Not certainly that any of the rights of the Government shall be given up and conceded to them; not that any of the necessary safeguards for the protection and collection of the revenue shall be abandoned; not that any due and adequate compensation even to informers, so far as shall be necessary to secure the detection of the guilty and the execution of the laws, shall not be allowed. No, none of these things have they sought and none of them will they seek. What they ask is that the revenue laws may be written plainly, so that every merchant and man of common sense can understand them. [Applause.] That is a right that has never been conceded to them for the last fifty years. [Applause.] Let me read you what one or two of the very highest authorities on that subject have said. The present Secretary of the Treasury, in a very late report to Congress, says this:

"There is often a direct conflict between different statutes, and occasionally between two or more provisions of the same statute, and single provisions are frequently held to embrace different meanings. These differences can be settled only by arbitrary interpretation or by adjudication in Congress."

One of the Judges of the Supreme Court of the United States says:

"It is a great grievance that the many laws that are passed by Congress become so numerous and complicated that there is very great difficulty to ascertain what is the state of the law on any particular subject."

I think that from a very considerable experience in these matters and the state of the laws, I can say with safety that there is not a single

importer in the City of New York, that there is not a single member of Congress now sitting in the Capitol at Washington, who has got an invoice of goods arrived off the Battery to be entered at the Custom-house, with the laws that are now in force from the beginning until now, who could make an entry of those goods at the Custom-house and run the gauntlet of the District Court. [Applause.]

Well, that is one thing they want. Another thing they want is this, that they shall be placed in such an attitude before the law that they can understand their rights and their duties, and be properly taken care of themselves; that these extraordinary motives for extortion and these still more extraordinary means of extortion that have been placed in the hands of corrupt revenue officers and more corrupt informers, shall be stricken out [applause]; that they shall have the right to their old fashioned trial by jury when charged with fraud [applause]; and that their homes and their counting-rooms shall not be invaded by a minion of the law or of the Custom-house for the purpose of searching their books and their papers, to see if therein can be found some cause for accusation against them. [Applause.]

Now, nobody can pretend that the complaints which have been made of late by the mercantile community are imaginary while the actual cases of oppression and extortion which have come to the knowledge of the whole community, which have startled the people from one end of the country to the other, and at last have reached, what it was almost impossible to expect it to have reached, the conscience of Congress itself, are so atrocious that no picture that imagination could draw of oppression in these enlightened days could equal them.

Now, what are the chief controlling vices of the revenue laws which the merchants seek to have corrected? There are two subjects to which I propose to devote the few moments which the partiality of the Committee has assigned to me, viz.: the vices in the laws themselves, and the still greater vices in the mode in which these laws are administered.

The first great evil lies, I won't say at the bottom of this thing for I think there is one that has hardly been touched on that lies behind it, namely, the adoption of ad valorem duties instead of specific duties; but the great evil at which the Chamber of Commerce has struck, and which it seems likely to strike down, is this mighty system, as it is called, by which these extraordinary inducements, too great for human virtue to resist, are held out for oppression and unjust attack upon them. You all know to what I refer: the law by which in every forfeiture only one-half of it goes to the defrauded government and the

other half is divided, one-half of it to the informer who brings forward the information of the other offense, and the other half among certain revenue officers who are supposed to be specially charged with the protection of the Government in the collection of duties. Well, now, it so happens that the amount of the distribution and the method of distribution reaches every officer, who ought to stand between the merchant and an attempt to wrong him under the disguise of an enforcement of the revenue laws. [Applause.] The informer, perhaps, should hardly be looked to for the protection of the merchant. All we can ask is that it should be an honest informer, if such a miracle can appear in this day. [Applause.] But when it comes to giving the Collector, the Naval Officer, and the Surveyor, each one-sixth of everything that is forfeited to the Government, so as to swell the aggregate incomes of those Gentlemen to an almost unknown amount—something like \$100,000 a year apiece—why the injustice of it, the enormity of it, does not need any argument to display. And then even the District Attorney, in whose judicial judgment I might say it rests to say whether the prosecution shall proceed or not, even he is to receive a percentage of the spoils. Well, if it went ~~no~~ further than this, it would not go further than the law allows; but recent investigations tend to show that even these percentages are subdivided, and under the form of counsel fees find their way into the pockets of influential members of Congress [applause], so that if an unhappy merchant, struck by an unjust informer, should think that he might seek relief at Washington in the office of the Secretary of the Treasury, he would find a busy member of Congress who was interested in his conviction there before him, and who was whispering his malicious insinuations into the ears of the chief officer of the revenue. [Applause.]

Well, then, what is the next thing? Why, the next thing is this complication of the laws of which I have spoken. Statute has been heaped upon statute, law upon law, regulation upon regulation, construction upon construction, until at last they have got a legal muddle which I say it would puzzle even a Philadelphia lawyer to investigate. [Cheers.]

And yet they expect a plain and honest merchant to be able to unravel all these intricacies which a whole century of legislatures have been at work in contriving. They expect a plain, honest merchant to unravel them all and make his entry in manner and form as all these complicated laws direct. Then there are other great evils. We have heard of them all in the great cases that have recently been made so public. If you have an invoice of \$25,000 or \$30,000, composed of 25 or 30 items, and there is an undervaluation in one, however little in-

tended, however accidentally occurring, why, the whole is forfeited, if one item of it is wrong. [Applause.] What an outrage that is, gentlemen, upon common sense, upon common justice! And finally, on the evils of the law, there is what I may call the theory—for it is a new theory—of technical forfeiture, the administration in court of a system of constructive fraud which never ought to have been thought of in the administration of revenue laws, [Cheers.] I mean to say that there are laws upon the statute-books which the courts feel bound to construe in such a manner as to condemn a merchant, who is confessedly honest, because of some accidental omission or some accidental inaccuracy in his invoice or his entry, or the complicated certificates and oaths which the law and the regulations require to be attached to the entry. Now about that there can be no mistake. There have been repeated instances of merchants' goods condemned for such technical forfeitures as they are called, such constructive frauds as the courts construe them, when the merchant stood ready with his witnesses to prove that it was purely accidental, a wholly innocent mistake, and he was not allowed to offer that evidence even when the jury stood upon the other side ready and anxious to acquit him. [Applause.]

Now these, gentlemen, are some of the evils of which merchants complain in the law itself. How they violate the first principles of justice! you all say. How they strike at the old-fashioned maxims of liberty as well as of justice, which have always been dear to everybody with Anglo-Saxon blood in his veins. [Applause.] Every man is presumed to be innocent until he is proved to be guilty. That is one of the foundations of the liberty of the citizen. But these revenue laws are practically administered upon the principle that every man—every merchant, at least—is presumed to be guilty until he has proved himself to be innocent. It is an old-fashioned maxim of law that it is better that ten guilty men should escape than that one innocent man should suffer. Recent modern-administered revenue laws go upon the principle that it is better that ten innocent men should suffer, even though once in a while a guilty man is allowed by corrupt influence to escape.

I will now come to that great engine of oppression which the law has placed—or which Congress has placed—in the hands of these revenue officers and informers. I mean the Act of 1863, which has provided so well for the seizure of books and papers. I believe that the merchants of New York, the Chamber of Commerce, and justice demand that that law should be stricken from the statute book, and nothing put in its place. You all remember what Lord Chatham said about another great maxim of English liberty. Said he, "Every man's

house is his castle." And why? Because it is surrounded by a moat or defended by a wall? No. It may be only a hut of straw; winds may whistle around it; rain may enter it, but the king cannot. Well, if that was good doctrine for Englishmen during our revolution is it not good doctrine for Americans under our Constitution? The only way to amend that law is to abolish it altogether. What is the great plea that is offered for it? Great necessity—the tyrant's only plea. Our skillful District Attorney went to Washington and told the Committee that he did not see how he could possibly dispense with it. Now the law of necessity was never thought of, or any law of the kind until 1863. If the American Government and people could get along in harmony from 1789, when the Government was founded, to 1863, why cannot they get along a little longer. The history of the passage of that law is well known. One of our leading journals only yesterday gave it, as I believe authentically, that the law never was passed in the interest of the people, or of the merchants, or of justice. It was what is vulgarly called a "put-up job," put upon the merchants by the informers and Custom-house officers. It was passed, you will observe, in 1863, when the great and glorious Secretary of the Treasury that we had at that day was perfectly overwhelmed with more important matters; when the life of the nation itself was at stake, and he was to devise ways and means for its successful rescue. Then it was that a leading depredator upon the private rights and books of the merchants got up that law, and got the aid of revenue officials; had it presented to the Secretary of the Treasury—it received his nominal if not his virtual assent—and it passed Congress almost before anybody knew that such a clause, incorporated in an important revenue bill, was actually being passed. Well, I will not detain you with any discussion of its constitutionality. The whole history of general warrants is familiar to you all. They had that matter all up in Boston more than 100 years ago—15 or 20 years before the Revolution. James Otis, in arguing against these warrants for the seizure of papers and books, uses this language, and one would think he was speaking in New York in 1874: "Custom-house officers may enter our houses when they please; we are commanded to permit their entry; their menial servants may enter, may break locks, bars, everything in their way—on bare suspicion—suspicion without oath is sufficient." Lord Chatham said on the other side of the water at about the same time that there was not a man to be found of sufficient profligacy to defend them upon the principle of legality. Well, I believe that Lord Chatham would not have been disappointed in his search if he had been with us to-day. He would not have had

far to go to find a man who would say to the Committee of Ways and Means of Congress that they are legal. But then percentages are a great distortion of legal minds. [Applause.] I doubt whether you will find a man who has not received a percentage of a percentage of a revenue officer or informer, who will coincide with me in that opinion; but no matter, gentlemen, whether it is constitutional or not, the way in which it is administered in this city makes it one of the most oppressive and outrageous instruments of tyranny that ever was invented in a free government. [Applause.] Practically, how does it operate? I have seen it a score of times. An honest merchant, if you please—for I insist that every man is to be presumed honest until he is proved to be a rascal—an honest merchant discharges a dishonest clerk, or a disagreeable porter, or other employé. Well, how should he have his revenge? That is the question; he hears about these moieties; he has been with his employer many years; he knows all the contents and the secrets of his books; he knows of little irregularities—these technical forfeitures as they are called; there has been some entry made when the consignee's oath was taken instead of the owner's, or the owner's oath instead of the consignee's, or there has been, if you please, an accidental omission of charges for cartage or insurance or freight, and he hears of Mr. Jayne, the great imperial informer, and he understands that Mr. Jayne has power to avenge his wrong. So this discarded clerk goes down to Mr. Jayne's office, and if not to Jayne's to some other special agent as worthy, and he says to him, "How much can I be allowed if I can give you some information that will lead to a large forfeiture?" Well, the special agent says that it depends on how large the forfeiture will be. The clerk replies, "You can make it as big as you please;" and so they arrange it for share and share alike. First of all they want to get at the merchant's books and papers in order to accuse him. The law says that whenever it shall appear to the satisfaction of the Judge of the District Court that a fraud has been committed, a warrant shall issue. That is the foundation of the whole proceeding. On that law he may issue a warrant to the Marshal to seize all the books and papers relating to the fraud, so they get up an affidavit in which he swears—not this clerk, oh, no! it wouldn't do for him to appear—but the clerk or hireling of the special agent swears. I think I may safely say that nine out of ten of these warrants have been issued on such affidavits. Well, what does he know about it? Absolutely nothing, except that it relates to certain importations, naming the vessels, and that there are books and papers in the counting-room of the said John Doe and Richard Roe, at number so-and-so, Pearl St..

which will contain entries in regard to fraud. Well, now, gentlemen, that is not what that law means, bad as it is—not at all. What the law means is that it shall be made by affidavit to appear, to the satisfaction of the District Judge, that a fraud has been committed. Well, does the District Judge know any more about it because Mr. Jayne's assistant swears that he has reason to believe that a fraud has been committed? No. Why, gentlemen, I couldn't go to the City Hall and get a warrant of attachment large enough to levy upon a pig on such an affidavit as that. [Laughter and applause.] I couldn't get an order of arrest for the meanest white man that ever walked the streets of New York on such an affidavit as that. [Applause.] What do such laws, that strike at the liberty and property of the citizen, mean? How are they always construed? Why, they mean that there shall be a judicial satisfaction upon the facts communicated to the judge under oath, by which the judge may say upon his conscience and his honor that he believes a fraud has been committed. [Applause.] That is to say, instead of putting into this affidavit, which shall be sworn to by somebody who knows the facts and circumstances which shall satisfy a judicial mind that a fraud has been committed. Its construction has been to leap the judicial mind, to leap one or two steps back of the mind that is to be satisfied, and leave it with the verdict of the sub-agent and informer; and he is satisfied by knowing nothing about it. [Applause.] Very well, out comes the warrant to the Marshal to seize the books and papers relating to those importations, and the Marshal makes his appearance at the merchant's store or counting-room. Now comes in the fatal terror of which so many of them have complained. I believe that any judge who sits in this district, on its being made known to him by a merchant that one of those warrants had been used for his oppression, and that books and papers had been taken from his possession that did not relate to the fraud, only that being made known to him, would give him instant justice. But no, I doubt if any merchant under those circumstances has ever gone and asked for relief at the hands of the court. That is the terrible engine and the secret of the power which it exercises over the merchant. "Why," he says, "if it is known abroad in the mercantile community that I am charged with a fraud, and that my books and papers are in the hands of the Marshal, it is ruin to my business and my credit to-morrow." [Applause.] Well, there is a great deal of truth in that; and as a merchant said to me the other day, "Why, it is a great deal cheaper for me to pay \$10,000, although I haven't committed the slightest offense, than to have two or three weeks spent in the Dis-

strict Court in determining whether I am an honest man or a knave." This is such a terrible and infernal weapon of offense, that no free-man, no citizen of a free country ought to be required to submit to it for a moment. [Applause.] Well, then the case proceeds. Now, where do these books go from the merchant's counting-room? Do they go into court? Does the Judge ever see them? Why, no; they go to a secret chamber in the Custom-house, known as the Seizure Bureau, or to the informer's private office, and there they are made the subject of laborious investigation, searching day and night, over years and years of unsuspected transactions, in the hope of finding irregularities and defects on which accusations undreamed of before may be made against the merchant from his books themselves.

TAMMANY RULE

SPEECH AT A REPUBLICAN MASS MEETING^{*} IN COOPER UNION, NEW YORK, UNDER THE AUSPICES OF THE COMMITTEE OF THIRTY, MARCH 28, 1894

Mr. Chairman and ladies, and gentlemen of the Republican party. I may as well say at the outset that I come here to-night wholly unprepared and there is great danger that I shall speak right out whatever comes into my head (laughter and cries of "go ahead.") So that if there are any nervous persons in the audience or any reporters in a delicate condition of health (laughter) they may as well retire now before I begin.

[Just at this point one of the reporters seated at the desks before the platform fell from his chair. The audience burst into a roar of laughter and Mr. Choate stood looking at the crestfallen reporter with a most quizzical expression. He continued:]

Well, gentlemen, I have been here before (laughter). Twenty-three years ago I stood on this very spot on this platform, before an audience not more enthusiastic than this, presenting the plan of a Committee of Seventy for the overthrow of Tammany Hall (great applause), and if you and the other honest people of this city will take up and follow out the plan of this Committee of Thirty as in those days they did that of the Committee of Seventy, and will act in the same spirit for the next six months, we will wipe up the floor of Tammany Hall with the bodies of its own Sachems so clean that they won't be heard of again for ten years (cheers and applause). But I remember the spirit of that committee and the solid Republicans who occupied this hall and this platform. Many of them, perhaps most of them, have gone to their last account. Others of them, like old Tom McGlynn (applause) and myself have grown gray in the service (laughter). Well, I am not going to explain the plan any more.

My brother Root has done it so thoroughly, it has all been laid before you so perfectly to read and digest, that you do not, as I believe, need any further explanation of it. It has, as I understand, two cardinal maxims which lie at the bottom of it—first, that in the Republican party of this city there shall be no more bosses. (Applause and cheers.) And second, that under the cover of organization there shall be no trade with Tammany Hall. (Loud and prolonged cheers and applause.) Now, in this great Republican household of ours we

are going to have a great party, and we must prepare for the party by a general housecleaning which the plan of the Committee of Thirty offers to you. We must wipe out everything that is suspicious in the household. (Applause.) We must clean out all the dead wood; we must pack up in the attic all the broken-down furniture. (Laughter.) We must make all the room possible by expanding the house so as to make it hold all of ourselves and all of those visitors and strangers that are knocking at the door to come in. (Applause and laughter.) I want to say a word about the independent voter, the great character of modern times (laughter), all of whom to a man are now turning their faces toward the Republican party. Now, these Mugwumps are strange creatures. (Laughter.) There is no more curious animal under the sun. (Laughter.) They are all of them the very best of men; they stand higher in their own estimation than any other class of men (laughter), but, gentlemen, they always know a good thing when they see it (laughter), and therefore their eyes are now fixed upon us. (Laughter.) We acknowledge that they hold the balance of power; they are infinitely powerful for mischief when they are led astray. (Laughter.) They are equally powerful for good when their faces are set in the right direction. Now, don't let's make any mistake about that; don't let's claim as a Republican triumph what are purely the triumphs of popular virtue and popular courage. (Applause.)

Does any man dare tell me that the hundred thousand ballots under which Maynard was snowed last fall were purely Republican votes? Does anybody undertake to say that that great Puritan outbreak in Brooklyn last fall was a purely Republican one? (Applause.) Why, no, gentlemen; it was the people coming to their senses and to the support of the Republican party. (Applause.) Let us take one or two other historical instances. Those twelve hundred votes by which the State of New York was carried for Cleveland over Blaine on his first election, do you think they were Democratic votes? Not one of them. They were run-away Republicans, and those 383,000 that constituted the feeble plurality of Cleveland over Harrison a year and a half ago, think you that they were Democrats? No, gentlemen, it is not worth while for us to discuss it. They were the independent voters, and how they long that to-morrow they might recast that vote! (Applause.)

Well, now, you see, we have got to have a clean house and a broad platform for all these repentant and independent Mugwumps to come into. Let me call your attention to some of the signs of the times which indicate to my mind an explanation of what I think

nobody will deny—that there is more earnest, more effective undercurrent, feeling and conviction against the Democratic party than there has ever been before since the fall of Sumter. (Great applause.) In the first place I would call your attention to the condition of things in this city. I propose to enter into no personal abuse of the managers of the Democratic party in this city or even of the Sachems or of the leader of Tammany Hall. I know Mr. Croker very well. (Cries of “So do we.”)

I know his merits and I know his faults. I give him the credit which belongs to him as a man of great nerve [laughter], great courage, great ability of managing the affairs that are committed to him for the purpose for which they are committed to him as well as any man could. [Laughter and applause.] I believe that he gives us to-day as good a government in this city as is consistent with the purposes and quality of Tammany Hall. [Laughter.]

I believe that an administration by Tammany of this city is as good a one as the people of this city deserve as long as they are willing to submit to it [applause], and we don't find any of these terrible internal outrages, frauds, thefts, plunderings that aroused us to superhuman activity in 1871 to overthrow them. But what do we find? We find here a city of 2,000,000 people, with an annual expenditure for their necessary expenses of somewhere from \$12,000,000 to \$20,000,000, and the whole used as patronage and party plunder. That is one thing we find.

What else do we find? We find that any man who wants office in this city must go to Mr. Richard Croker and take off his hat before he can have it. (Applause and laughter.) As Mr. Tekulsky says, “there is nowhere else to go.” (Laughter and applause.) We mean there shall be somewhere else to go. (Applause.) Well, my words are weighted; you can well ponder upon them. We are to have a constitutional convention next month, the month of May here, to review the constitution of the State, and my brother Root, and others like him, are expected to do the heavy work in it, and Mr. Tick (laughter)—Tekulsky, he is sent up there to assist the work of that convention, and he is not alone of the men sent there designated by Tammany Hall.

They would not let any Democrat go from this city who would fight Hill and fight Maynard and fight Tammany. Now, when they get up there and that great question comes that has got to be solved sooner or later, whether the public money of this State shall be diverted into sectarian issues [great applause], we are going to have

these appointees of Mr. Croker to deliberate upon and decide that question. [Ironical laughter.] Well, now, the State government is not so bad as it might be. If it is not so bad as it has been, what are we grumbling about?

I will tell you what I am grumbling about. As a citizen of the city of New York, I am fearfully tired, and I believe that a majority of the men of this city are equally tired of government being given to us by any one man or by any squad of men. [Applause.] We are tired of being submitted to the despotic control of a handful of foreigners who have no stake in the soil. [Great applause.]

And we are seeing the countless treasure of this city taken for political if not for personal aggrandizement, and should be just as tired of it if they were not foreigners, if they were Republicans, if they governed by the same name and for the same purposes. [Applause.] That is about the state of the case and the reason why I have thought if you carry out the plan of the Committee of Thirty in this city and show to the community of honest people who desire the overthrow of this despotism, the collar of which is upon every man's neck here; if we show them what our honest city was in 1871 to unite with our good citizens for the re-establishment of the will of the people, they will give us such numbers as will make up the countless majority. So much for the city. Now, what do you say about the State of New York? We are aiming for the people of the State of New York as much as we are for those of this city. What is the question at stake for the people of the State, and what has it been for the last two years? It is, as I understand it, whether a State government shall be administered by those who have stolen it or have tried to steal it?

You remember what happened a year and a half ago when the State Board of Canvassers stole one seat in the State Senate for the Democratic party to which they belonged and thereby gave the control of the Senate and of the State and the election of a United States Senator to corrupt that party?

These same State Canvassers are now under conviction before Judge Edwards, of Poughkeepsie, for contempt of the Supreme Court in casting the vote as they did. Well, now we have to submit to that tyranny, accomplished by fraud and theft, ever since that day. Do you know what occurred at our last election when the worthy disciple of that same State Board of Canvassers took possession of the ballots at Gravesend and stole the vote of that district for the Democratic party?

Does anybody doubt or dispute it? (Laughter.) Well, unlike the State Canvassers he has gone to his deserts. (Applause.) They have been discharged with a fine of \$250 apiece, but he has received his six years in the State's prison at Sing Sing. (Applause.) Well, now, what strange things happened in this city at the same election? Did you read the reports of the trial before Judge Barrett? Did you read the story of that Republican inspector who counted all the votes that were cast in the polls over which he presided as Democratic votes, giving to the Democratic party all the Republican votes? Well, he has gone to his account. (Laughter.)

I want to make an observation here. He committed the crime and he has been punished for it. I don't know whether he did it from pure love of Republican principles. I don't think it is possible.

My impression is that he either acted under the dictation of some local boss or he was bought by Tammany Hall. But this is what I wanted to observe. He, a Republican, counted all the votes in the precinct as Democratic. But if anybody ever heard in the history of the world of any Democratic inspector counting Democratic votes as Republican [laughter]; if you can find any such man, we will have him prosecuted and convicted just the same. [Laughter.] Well, speaking of State politics, what do you think of New Jersey? What is the cardinal principle of the Democratic party over there? They found a beautiful example for them to follow in that of the New York Senate, and so they tried to steal the Senate of New Jersey by expelling by force all the Republican majority that had been elected there. [Applause.] Thank God this corruption has not reached the judiciary. An honest Democratic court was found in New Jersey to punish. [Applause.]

Now, in that situation of affairs, don't you think that all the people in this city who want good government are looking to us. In the language of Tekulsky, "There is nowhere else for them to go." [Laughter.] No, this is a great State of ours. Seven millions of people, twice as many people as won their independence from the crown of Great Britain, forty times as rich and advanced in civilization as any community upon the face of the globe, and the question before them they have been considering and the question that has been ranking in the minds of these misguided independent voters is whether the people of the State of New York shall inform themselves or not. Well, so we think we are safe in the city, and we think we are safe in the State of New York, if you will stand by this plan of the Committee of Thirty, as in old times, when every person who wanted

good government was willing to co-operate with others who wanted the same. Whenever there has been a movement for reform, whenever there has been a reform achieved in this State or city, the Republican party has been at the bottom of it. They are so sure that we always will be there that they count upon our support even for honest Democrats whom they put in nomination.

Well, there are Republicans who can vote the Democratic ticket without turning their stomachs (laughter), but I have never been one of those. (Applause.) That's what I say. Now, I am not speaking for the Committee of Thirty, but for myself. The other twenty-nine may do so or not, just as they please; but whenever the candidates of our party are put in nomination for Federal offices and for State offices I propose to support them. (Applause.)

But I am willing to co-operate with any honest citizen of the city of New York, of whatever name, of whatever color, under whatever party banner, so that we will all unite for the rescue of the city from the unworthy hands by which it is held. [Applause.] Well, now, a word on national affairs. They are just as hopeful all over the country. We are going to be a great transcontinental party once more. You all know my great regard for Grover Cleveland, my honest respect.

He has done one thing since he has been elected which ought to hand down his name to a distant posterity, and that was the stand which he took to rescue the national credit and our name as a nation on the silver question. Well, how did he succeed in doing it? Who did it for him? Why, the majority of his supporters were the Republicans in the Senate, and without them all his courage and all his virtue could not have advanced that measure one step. But, to use a vulgar expression, Mr. Cleveland, when he undertook to run and serve his second term as President for the Democratic party, bit off more than he could chew. (Laughter.) He thought he could hitch up what they call the Democratic team, consisting of a combination or a conspiracy of the Solid South and Tammany Hall, and drive them tandem without getting spilled from the buck as he now has been. (Laughter.) That is more than mortal man, even with all his courage and all his virtue, can do. It is a remark imputed to a great departed Democratic statesman, that he dreaded the domination of the South, for if ever they got into power they would seek to wreak their revenge on the North. That is exactly what they are trying to do to-day. (A voice: "And they will get left.")

And now look at this four-footed wild beast which they call a tariff bill. [Laughter and cries of "What is it?"] Yes, what is it? The

Democratic what is it? It ought to have been personified in the procession of the Greatest Show on Earth. Well, all reputable legislation heretofore has treated the tariff by itself, and the income tax by itself, and succession by itself, and the excise by itself. And now they have combined them all. Who made that tariff, if it is made? Who made that income tax, if it is made? Who makes the succession tax, if that is made? Gentlemen, it is a strike of Southern retaliation against the result of the Lost Cause.

Now I don't think that the people of this country are going to stand that. They will submit to it if it is passed, of course, with grace, with law-abiding patience, as they always do, but the first opportunity they get they will redress that wrong. [Applause.] Now, those are my views, whether as representing the city or the State or the whole nation. We have every right to expect a return of the righteous men to our banners. We are going to clean up for them; we are going to have everything ready. And now, we want you to enroll to-morrow.

You can look into the newspapers and find out where to enroll, and after the enrollment you won't have to prove the existence of the places where the enrollment took place. (Laughter.) Well, this plan of the Committee of Thirty, this reorganization, this house cleaning, this sweeping out of rubbish, this making room for all the party that we expect to come in, this, gentlemen, is the regular express train for Albany and the West. The time has struck; the bell has rung. All hands aboard this car if they don't want to get left. She will arrive safely in Albany and sweep through the State of New York to Buffalo on November 4, 1894. She will make the trip to the Pacific coast, and she will return by way of Oregon, Dakota, Minnesota, Indiana and Ohio, and she will reach Washington November, 1896 [applause and cheers], and will there connect with extras from New York and New England that will there arrive at the same time.

PRESIDENTIAL ADDRESS

ADDRESS ON TAKING THE CHAIR AS PRESIDENT OF THE NEW YORK
STATE CONSTITUTIONAL CONVENTION, ALBANY, NEW
YORK, MAY 8, 1894 *

Gentlemen of the Convention: I should be false to every manly instinct if I were not overcome with emotions of gratitude at being called upon by such a generous vote by the combined delegates of the State of New York to preside over this Convention to perform the almost impossible duties of the office except as it shall be rendered possible by your confidence, aid and support. Gentlemen, it is a truly momentous event when the delegates of a State of many millions of people gather together after an interval of fifty years almost, for the purpose of revising and amending the fundamental law of the State. It is true that there was an intermediate Convention in 1867, most of whose work was rejected by the people; and so to this day, we have been living and prospering under the Constitution proposed by the Convention of 1846, and then adopted by a majority of the people. Great changes have taken place since that day; our population has multiplied over and over; the wealth of the State has magnified to an enormous degree; the habits and customs of the people have largely changed. And yet I call your attention to the fact that under this Constitution that we are now called upon to amend there has been a general, uniform, ever advancing prosperity, comfort and well-being of the people of this State. And so, although it may not be for me to indicate or suggest how far the work of this Convention shall be extended, I may, perhaps, be indulged in one or two suggestions that are pertinent to this moment. And, in the first place, as to the spirit in which our deliberations should from this moment be conducted; it is true we come here, sent by different parties, but after all elected only as the servants of the people and to perform their work. And if I am not mistaken, we have met with the purpose to act not as partisans, not as politicians, but only as citizens and servants of the people. And I believe that on the discussion, consideration and decision of the great

* Mr. Choate received 124 out of the 160 votes cast for President of the Convention. Concerning this address he wrote to Mrs. Choate as follows: "What little I had to say on taking the chair was very cordially received, and, as the Tribune and the Sun both sneer, it must have been just about right." Elihu Root was chairman of the Judiciary Committee and leader of the Republican majority. John M. Bowers was leader of the Democratic minority.

questions of policy and principle that shall come before us, we shall not be actuated by any partisan spirit whatever.

This Constitution we are not commissioned, as I understand it, to treat with any rude or sacrilegious hands. To its general features, the statutes, the judicial decisions, the habits of this great people have long been accustomed and adapted, and it seems to me that we should be false to our trust if we entered upon any attempt to tear asunder this structure which, for so many years, has satisfied, in the main, the wants of the people of the State of New York. (Applause.) And yet, gentlemen, there are certain great questions which we are to consider, which stare us in the face at the very outset of the proceedings and will continue to employ our minds until the day of our final adjournment. There is the great and important question of a reapportionment of the districts of the State. I am innocent enough to believe that even upon that question, which might naturally agitate and arouse party feeling, this Convention will be courageous and virtuous enough to unite upon an apportionment which shall be at once honest, fair and just to all the districts and all the people of the State. And then there is that second question, forced upon our attention by the changed condition of our municipal affairs, that is to say, what we can do, if we can do anything, to restore government which shall be Democratic government and truly Republican government to the people of the great cities of this vast commonwealth. It is not for me to suggest any possible measures, but it will be strange indeed if the assembled wisdom of the delegates of this great State shall fail in uniting upon some provisions that shall enable the people of the great cities of this State, each to conduct and govern its own affairs without the necessity of perpetually resorting to legislative interference and aid. (Applause.) The relief of the Court of Appeals is also a most important subject for us to consider. And then there is the great question of the protection of the purity of the suffrage. Strange indeed it will be if we shall meet and sit together for four or five months and separate without being able to throw some new safe-guards around the purity of the ballot and to rescue our people from those shocking scenes, almost amounting to anarchy, which have recently disgraced the polls in various sections of the State. It is very likely that our Committee on Suffrage will be called upon to deal with another very delicate question (laughter); in its nature the most delicate of which human nature admits. I have no doubt that the demands of those who call for an extension of the suffrage to all human beings without regard

to sex, will receive at least the respectful attention, and consideration of this Convention in its appropriate time.

And, then, gentlemen, there is one other subject of universal concern; I mean the great subject of education; the protection, the fostering and permanent establishment of our common schools, and the discussion and perhaps the decision of that other delicate and difficult question, whether its due protection requires, and how far it requires the retention of all public moneys from all rival sectarian institutions of learning. (Applause.)

And will it be a reflection upon that legislative body that usually meets here and in the adjoining hall if I suggest also that it will be possible to devise some methods for the regulation of legislation so that a breathing interval of at least one hour or one day for consideration shall be allowed to the members of the Legislature and the people who are watching their movements at every step in the progress of a bill, from its introduction to its final passage.

I think it would be beyond my province to make any other suggestions. We have but little time to perform the great duties which are imposed upon us. Would that we could subject ourselves to a self-denying ordinance, so that three-fourths or nine-tenths of that time should not be spent in idle talk. (Applause.) We come here to act, to think, and to vote. Let us put some restraint upon our tongues. I have no doubt that this Convention will be made the place of deposit of a vast number of crude and undigested schemes, projects, ideas, indicating every method of modern thought; all of which will have to be respectfully received. But will it be out of place for me to indulge the hope that no great part of our valuable time will be wasted in the consideration of projects which, at the outset, by the vast majority of the convention and the community, must be recognized as utterly impracticable.

And now, gentlemen, renewing the expression of my thanks for the confidence which you have shown me, invoking your aid and support at every step in the progress of this Convention, urging you as I promise myself, to lay aside all other occupations, all other engagements and to devote the time allotted to the business of this Convention absolutely to its pursuit and performance, let us proceed to the further business of the Convention with this common purpose only, not to act as partisans, but only as citizens and with one heart for the common welfare of the people of this State. (Applause.)

PENSIONS FOR JUDGES

REMARKS IN THE NEW YORK STATE CONSTITUTIONAL CONVENTION,
AUGUST 22, 1894, ON SECTION 12 OF THE JUDICIARY ARTICLE

STATEMENT

Section 12, Article 6, of the Constitution as finally adopted, provided that the compensation of judges should not be increased or diminished during their terms of office, but that the retiring age for Judges and Justices of the Court of Appeals and Supreme Court should be seventy, after which age they should receive no compensation. These provisions would have cut off from service and compensation before the end of their official terms certain judges elected prior to January 1, 1894. To provide against this injustice a clause was added stipulating that the compensation of such judges who had served ten years should be continued for the remainder of the terms for which they were elected. When this Section was under consideration in the Convention, amendments were offered which would have nullified this provision. To combat these amendments, Mr. Choate took the floor and made the following remarks:

Mr. Chairman, by whatever other name we may be known among men, when the results of our labors are disclosed, and handed down for posterity to forget, let us, above all things, avoid being known as the repudiating Convention of the State of New York, as we shall be, if either the whole amendment offered by the gentleman from Essex (Mr. McLaughlin), or the half-way amendment offered by the gentleman from Jefferson (Mr. Brown), should be adopted here to-night. I do not mean to say that either of those gentlemen, or any of the other gentlemen who have suggested that these earned payments, earned pensions, earned compensations, shall be cut off, have in their minds to sully the fair name of this State or of this Convention, but that that will be the inevitable effect of the measures which they propose. I have not exactly taken in the full purport of Mr. Brown's amendment, but as I understand it, he says to these judges who have entered upon office, upon a constitutional obligation, that their compensation should be so much under such circumstances and that it should never be reduced: "Yes, we recognize your right, but we, as a Constitutional Convention, have power to cut it off entirely; we will compromise the matter with you and give your agreed compensation, not for the term for which it was promised you, and in respect to which you have entered upon the service of the public, but we will give it to you in half measure, for a portion of that time." And the gentleman says that is the true spirit of his proposed amendment. "We do not know and we do not care whether you are entitled to it. We have

the power to cut it off and we will cut it off by our supreme power, speaking for the people of the State of New York."

Now, Mr. Chairman, one word on the history of this matter. Shortly before the adoption of the amendment, which created these pensions, the policy of pursuing which is abandoned by everybody, shortly before that the example was set by the federal government which never had given a civil pension before. Recognizing the arduous labors, the exalted station and the increasing age and the difficulty of bearing the responsibility which rested upon the judges of the Supreme Court, they enacted that if a man had been ten years in service on the bench and reached the age of seventy, he might retire, and should have his pension for the same salary for the residue of his life. In the federal service it had never been known that a judge once retired or relieved from service upon the bench returned after an interval to resume his place by appointment of the President. No such case, I believe, had ever occurred. And so, when the act of Congress said that if you have served ten years upon the bench and have reached the age of seventy, you may retire with this pension, it meant ten continuous years of service, prior to the arrival at seventy years of age. Inspired by that example, the people of this State adopted the constitutional amendment of 1880 in the same spirit and in language which admits of but one interpretation. Let me read it. It seems to have escaped the memory of the gentlemen who have introduced these amendments. The provision is: "The compensation of every judge of the Court of Appeals, and of every justice of the Supreme Court whose term of office shall be abridged pursuant to this provision, and who shall have served as such judge or justice, ten years or more, shall be continued during the remainder of the term for which he was elected"—imitating at a considerable distance, but in the same spirit, the policy that had been inaugurated at Washington. Now, it never had been known in this State, I believe it never will be known, that a judge serving a term of fourteen years, retired into private life, and after an interval was re-elected for another fourteen years. The perpetual, universal policy in this State was either when a judge's term was ended, to let him depart into private life, or, if his services were held so valuable that he must be continued in the service of the State, to re-elect him immediately, so that his one term should join right on upon the heels of that which preceded, and, therefore, in the only way in which this would apply, you would find a judge who had served fourteen years or more in the service of the State as an acceptable judge, and who had reached the age of seventy, and was thereby to be retired. Mr. Chairman, is

there any doubt, has anybody suggested a doubt, as to what that means? Nobody. The gentleman from Essex (Mr. McLaughlin) says the people did not realize what it meant. Who are the people who did not realize what it meant? It is upon its face capable of but one meaning, "Shall have served ten years or more," meaning ten or more continuous years up to the time of his reaching seventy and when this case came before the Court of Appeals, the only argument that was presented that was deemed worthy of consideration by Judge Peckham, who wrote the opinion of the court, was that it would be a very strange thing to apply, that if a man when he was twenty-five years old should serve a term in the Supreme Court, and then go out into private life, and pursue his profession until he was sixty-five, and then be elected for five years, it would be a hard thing for him to claim his pension of nine years after arriving at the age of seventy. Judge Peckham says that is not a supposable case, and when such a conundrum is presented to this court for solution, we will endeavor to solve it. Now, Mr. Chairman, has either of these gentlemen who have advocated the breaking down of the report of the committee on this point, said that the decision of the Court of Appeals was not right? Have they pointed out any other possible construction which this would bear? No. They have only said that Judge Earl, who was afterwards to benefit by it, took part in the decision. It seems to me, Mr. Chairman, that any reasonable lawyer, reading that decision and reading the constitutional provision upon which it is based, understanding the history of the whole matter, will say at once that the decision is right. And now what follows? They talk about \$400,000 being possibly involved in this. It is a possibility. Probably \$200,000 would be a more reasonable calculation upon the possibilities of life. But I call now the attention of the Convention to the presiding judge of the Court of Appeals. The case was submitted in the Court of Appeals on the 15th day of January, 1891. It was decided on the 24th of February, 1891, and the presiding justice of the Court of Appeals was elected in November, 1892, upon the face of that decision by the people of this State. Now, what is proposed? Why, sir, are we returning to barbarous times, or do we live here in the end of the nineteenth century, when public life and public policy are sought to be placed upon an exalted basis? What is proposed? That the distinguished judge, having served the State faithfully for twenty-eight years in this single Court of Appeals, having then done probably more than any other living man to make the law of this State, shall be what, when his term expires at the end of 1896? What do they say? Do they say: "You are en-

titled to this pension"? They know he is. But what do they say? "That you are entitled to it; get it; sue like any other suitor." And what a humiliating spectacle will this great State of New York present, meeting before the Supreme Court of the nation at Washington, this hoary-headed and respected servant who has given all his best years to its highest service, and compelling the State to perform its solemn obligations. Are we willing to drive the people of this State to that humiliating position? For one, I am not. In my judgment, take it for what it is worth, good or bad, as a lawyer, there is no answer to the legal claim. As a citizen, as a man, law or no law, there is no answer to the moral claim. (Applause.) Now, Mr. Chairman, do not let us debase ourselves. Do not let us take a position that we cannot afford to take before the people, or afford for the people of the State of New York to take before the world. This State never has repudiated its obligations, and by our aid it never shall. (Applause.)

SECTARIAN SCHOOLS

ADDRESS IN THE NEW YORK STATE CONSTITUTIONAL CONVENTION,
AUGUST 31, 1894, ON THE USE OF PUBLIC MONEY
FOR SECTARIAN INSTRUCTION

Mr. Choate having relinquished the chair, the Secretary read Section 4, Article 9, of the proposed Constitution in the language following:

"Sec. 4. Neither the State nor any subdivision thereof shall use its property or credit, or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection of any school or institution of learning, wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

"This section shall not apply to schools in institutions subject to the visitation and inspection of the State Board of Charities."

Mr. Choate: Mr. Chairman, I offer an amendment to this section.

The Secretary read: Mr. Choate moves to amend Section 4 by striking out the last two lines, namely: "This section shall not apply to schools in institutions subject to the visitation and inspection of the State Board of Charities."

Mr. Choate: Mr. Chairman, I move to strike out this proviso, this qualifying clause at the end of Section 4, upon the ground that it nullifies entirely the effect of the restraints of Section 4 as to charitable institutions in which sectarian or denominational tenets or doctrines are taught; upon the ground that it is a violation of an implied understanding had before this Convention when the discussions on the subject took place in our public hearings; on the ground that it defies the universal public sentiment of this State as it has been expressed in all quarters, and is in flagrant derogation of a sound and universal principle, that none but public schools shall receive the support of public moneys, and that the people of this State, or of any section of this State, shall not be taxed for the support of education of a sectarian nature in any schools whatever. Now, it is well to understand what the meaning of this section is, this final clause of this section, which has been most artfully contrived and is well calculated to deceive the unwary; and I beg the attention of gentlemen for a few minutes to it. "This section shall not apply to schools in institutions subject to the visitation and inspection of the State Board of Charities." What in-

stitutions are subject to the visitation and inspection of the State Board of Charities, it would not now be easy to say. Their powers of inspection and visitation as at present arranged by law are of a somewhat indefinite but yet limited description. I understand, however, that it is the purpose, if this section is adopted, to make it fit in with the proposed amendment offered by the Committee on Charities, which will fix and prescribe the exact limits of the supervision and inspection of the State Board of Charities; and in order that gentlemen may understand what that is, I call attention to the report of that committee, being Document No. 59, in the public documents, in which the supervision and inspection of the State Board of Charities is thus described as it is intended to be made. I read from page 8 of Document No. 59:

"The State Board of Charities would have supervision over seven reformatories, eight institutions for the deaf, two for the blind, one for epileptics, three for idiots, one for Indian children, one for soldiers and sailors, fifty-eight county poor-houses, one hundred and forty-one orphan asylums and homes for the friendless, one hundred and twelve hospitals, forty-five dispensaries, a population of sixty-two thousand one hundred and fifty-four, together with the supervision"—and this is the important part, Mr. Chairman—"together with the supervision of a number of charitable and benevolent societies not included in the above list."

That is to say, as to all those charitable and benevolent societies not in the above list which it is the contemplation of the report of the Committee on Charities to permit to continue to receive public money for the support of their inmates, under restrictions and restraints which will be very properly applied by the amendment offered by that committee, it is now proposed to make Section 4 in its main provision utterly inapplicable. What are those institutions? They are the sectarian institutions, Protestant and Catholic, Jewish and of every other description, every form of religious belief in this State; they are the institutions about which the dispute was when this Convention first came in session, when the public mind was agitated upon the subject whether they should not be cut off from every dollar of aid for any purpose, upon the broad doctrine that public moneys ought not to be applied to private charities. Now, then, here is not merely a relief from the restraints, but an implied enactment embodied in the Constitution that those institutions shall receive public money for the support of schools in them, although therein there may be taught, or shall be taught, denominational tenets or doctrines. For one, I am absolutely opposed to that. I do not think we can go before the people

and face the people of this State with these two lines in our proposed Constitution. It will sink the whole ship, if we go before them so defiant and regardless of the express views of the people in all parts of the State. Now, Mr. Chairman, it is not the first time this subject has been under consideration here. Almost all the members of this Convention were present at the meetings that were addressed by Mr. Coudert and Mr. Bliss, the authorized spokesmen for a very large portion of these charitable institutions, these institutions in which denominational tenets are taught and which now it is intended by this constitutional provision actually to authorize public moneys to be expended upon. Not for the support of the inmates; I do not mean that. We are all agreed, I believe, about that, that wherever they have public wards the public money may be used under proper inspection, accountability and restraint, for the shelter, the food, the clothing of these unfortunate children. The proposition now is, that if they are Roman Catholics, the State shall pay for teaching them Roman Catholic doctrines; if they are Methodists, the State shall pay for teaching them Methodist doctrines; if they are Swedenborgians, or Presbyterians, or Hebrews, and so on through the whole chapter. Now, what took place when this discussion was up before? They came forward and said they made no such claim. They repudiated any such claim. I read from a speech made by Mr. Coudert in this very presence, at the Secretary's desk. He said: "My friends on the other side unanimously speak of the common schools as the palladium of our liberties, as the corner-stone of our institutions, etc. This language is very fine, and I am quite willing to indorse it, and I shall not to-day say one word in opposition to this plan of amendment so far as it relates to the common schools. Let it be understood that this system shall remain intact—that public opinion will not tolerate a diversion of any public moneys from their lawful object to encourage denominational education. Put it, if you are so inclined, into our Constitution." And Colonel George Bliss, speaking on the same day, made an argument of great ability, and with which he was himself so well satisfied that he afterward printed a revised edition of it; and in that he says: "As to the schools, I do not care what action you take in this Convention with reference to an amendment bearing upon the common schools. Mr. Coudert has very largely anticipated what I had taken the pains, so that I might not be misunderstood, to write down, but I will take the liberty of reading it, so that there may be no mistake about it. I recognize that public opinion believes in using funds raised by taxation exclusively for the public schools, and that though these schools, as now conducted, do not meet

the requirements which Catholics deem essential to education, it is useless to oppose public opinion as it now exists. * * * So, go on with any form of amendment you think necessary to prevent the withdrawal of public moneys from the public to parochial schools; you will find no present opposition from me or those I represent. You will, I think, find practically no opposition from any Catholic."

Now, Mr. Chairman, what are these appropriations of public money that are being made? They are not for tuition in these sectarian institutions; they are not confined to one sect, to one denomination, to one city, or to any one portion of the State. They are stated as follows in a document submitted to this body, which has never yet found an answer as to these items: "New, York city—apportionment of funds by the Board of Education of the city of New York to corporate schools, for the year 1892," and then it goes on and specifies here, amounting in all to sixty-one thousand dollars. "Brooklyn—apportionment of funds by the Board of Education of the city of Brooklyn, to denominational schools, for the year 1893," amounting to some thirty-one thousand dollars. Similar reports are given from Rochester, Syracuse, Buffalo, West Troy and so on. Mr. Chairman, there is a law on our statute books now, at any rate relating to the city of New York, referred to by Mr. George Bliss in his argument, to which I wish to call attention. He says: "The report of the Board of Education in the city says expressly that in all cases of non-public schools receiving public moneys, the State law prohibiting sectarian instruction and the use of sectarian text-books appears to have been complied with." Tell me, sir, what will become of such a statute as that when this constitutional amendment, with this proviso, goes into operation? Why, the first thing they will claim, and will claim with confidence, and I believe will claim with success, will be, that the Legislature under this constitutional provision, has no right to pass such a law, because it is embodied in the Constitution that public moneys may be used for schools in institutions subject to the inspection of the State Board of Charities, although they are the centers of instruction in denominational doctrine. Now, are the people of the State ready for that? Are we ready, as members of this Constitutional Convention, to go before them? Have we the effrontery to propose such an amendment as that? In my judgment it would sink anything that we should propose in other parts of the Constitution, no matter how meritorious it was. What the people of this State mean as to their public schools, is not that the public schools only shall be maintained, but that no public money shall be applied for education, except in schools and educational institutions

that are under public control, and I wonder at the fact that a committee, even by a bare majority of one, has been led to propose to this Convention and to the people of the State such an amendment as that.

Now, I do not undervalue these charitable institutions, each one protected, maintained, established by some religious denomination. I believe that they are all worthy. Take the most important of them, those instituted by the Roman Catholic church, these charitable institutions that are found in such numbers in all our great cities, why, sir, the Catholic church has led the march in charities for centuries, and I believe that its work to-day in that direction is not inferior to that of any other sect; and so it may be said of all these institutions. Assume, now, for the purpose of this argument, that they are absolutely worthy as charitable institutions. But what of that? A departure was made from what I think to be well-settled principles of political economy twenty-five or thirty years ago, when the State, instead of taking care of its own wards in proper institutions provided by itself, started off on the new scheme of handing them over to these charitable institutions, where they have been so admirably maintained, as has here been said. Now, let the State provide for their support, provide for their maintenance, but let not one dollar of the public money be paid for teaching in those establishments any sectarian doctrines or ideas whatever. They are not taught in our public schools. The children that go to the public schools are protected from such tuition, and the State moneys ought not, and, in my judgment, never will be, permitted to be spent in any such manner. If the Roman Catholics want their priests and nuns to go as teachers into these corporate parochial schools of theirs, let them go, but let them be paid at their own expense, at the expense of that mighty church which draws upon the revenues of its adherents as almost no other institution does. If the Episcopal church wants its priests and deacons to indoctrinate the young inmates of the institutions which they have founded with the peculiar tenets of the Episcopal church, let that church pay for it. They can well afford to do so. But let it not be said that we, a Constitutional Convention of the year 1894, dared go before the people of New York proposing that henceforth any money should be raised by taxation for teaching any child any doctrine of religion as distinguished from any other doctrine whatever. (Applause.)*

*Mr. Choate's amendment was carried.

PRESIDENTIAL FAREWELL

ADDRESS OF FAREWELL AT THE CLOSE OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION, SEPTEMBER 29, 1894

Gentlemen, before the motion to adjourn is put, it may be proper for me to say a few words to you in the nature of a farewell. It is now nearly five months since we came together and mutually interchanged our oaths to perform with fidelity the duties intrusted to us as delegates to this Convention, and I think we may look back upon that long period of protracted and arduous labor, and, without any pride or boasting, with our hands upon our hearts, say that we have faithfully attempted to discharge the duties so assumed. We found great responsibility and difficult duties intrusted to us. We were to decide, in the first place, the great question whether we should devise a new Constitution for the State of New York or merely repair, enlarge and improve that ancient structure under which its people had prospered and lived in happiness so long. There could be but one answer to that question. We had only to go over this venerable structure to discover the defects which the ravages of time had made, the improvements and additions which the progress of civilization demanded, and to apply our wisdom, so far as we might, to the work of improvement and repair.

More than four hundred amendments were proposed to us from the teeming brains, not only of the delegates, but of large numbers of citizens, who thought that they could aid in the work. In my judgment, one of the greatest services that we have rendered, one of the greatest claims to the gratitude of the people of the State which we can put forth is that out of those more than four hundred we have adopted only thirty-three. We have demonstrated that this, at least, was a conservative Convention, mindful of the value of the experience of the past, of the precious value of the institutions which our fathers had handed down to us.

We found, at the outset, four or five great subjects upon which the public mind had been exercised, and in regard to which it seemed necessary that we should apply the improving hand. We have done it to the best of our ability. With one exception, all of these have received the joint support of the delegates, I may say, without regard to political or party consideration.

There was the renovation of our judicial system, the system upon which the happiness and welfare of the people more truly depends than

upon any other part of the Constitution of the State. We have endeavored to give to the people of the State a judicial system which shall answer their purposes, at least, for the next twenty years. We believe that if they will take up the judiciary article and examine it, they will find that the object of this Convention has been successfully accomplished, namely, by means of it to bring justice home to the doors of the people throughout the State more completely, more promptly, more efficiently than it has ever been before.

And then there was our common school system, that other foundation of civilization itself, of which the people of this State so proudly boast. We have done much for that. We have secured the establishment throughout the State of common schools in which all the children of the State may receive, at the public expense, an adequate education. We have guarded against that danger which had excited so much apprehension within the borders of this commonwealth, that, perhaps, there was already beginning, and likely to continue and to grow, a diversion of money raised by taxation for educational purposes into sectarian hands and control. All that we have successfully, and, as I believe, absolutely accomplished by our educational article.

There was another subject which deeply agitated the minds of the people of this State, and that was the application of public money in the way of private charity. By many who had not carefully examined the subject, it was believed to be inherently an evil which could only be cured by cutting it out by the roots. We have, through our Charities Committee, most carefully examined that question, and, I think, we came to the conclusion that the system which the State had deliberately adopted and carefully followed now for more than twenty years, of employing the aid of honest, faithful, devoted private charitable institutions for the care of certain wards of the State, that could not otherwise be as well cared for, ought not to be departed from; but, at the same time, there were abuses incident to the conduct of that mode of charity to which, at least, a stop should be put, and we have deprived the Legislature of all compulsory power in the matter. Hereafter, if this Constitution is adopted, no subordinate division of the State can be compelled, by the central power of the State, to devote a dollar of its money, against its will, to any particular form of charity. Besides that, we have secured the regulation of the State Board of Charities to this effect, that wherever any public money is devoted to a private charity for the public service, it shall continue under public control, and the vigilant eye and the strong arm of the people shall be able to

follow every dollar of the public money into every institution to which it is so devoted.

There is one subject of vast importance upon which we have not been able in like manner to agree without distinction of political preferences. But this, let me say: that while, as I believe, upon the one side, which happens to be the majority, the scheme of apportionment has been devised with a pure and patriotic eye for the public good, believing that the best welfare of all the people of this State demanded it; we give credit for equal good faith, equal honesty, equal patriotism to those in this Convention who cannot accept that view, and who believe, in other words, that it is unnecessary, unwise and infected with political and partisan spirit. Gentlemen, upon that subject we have agreed to disagree, and we lay this part of our work before the people separately, and, in my judgment, it was a most magnanimous and generous act on the part of the majority of this body to separate that political question from all the others that are non-political, and not to attempt, as it would not have been right or fair to attempt, to say to the voters of this State: if you wish to have these wise, and great, and useful reforms that this Constitution contains, you can only have them at the price of voting for this apportionment scheme, and, on the other hand, to say to them, you can only have this apportionment scheme by voting for these ten, twenty, thirty constitutional amendments, as to many of which you may have personal and honest objections.

In the remarks which I had the pleasure to address to you at the opening of this Convention, I referred to these subjects as those which were of great, pressing and special importance. Besides these, we have been able to contribute many other wise provisions of reform, which it is no time for me now to enumerate. I believe if they are adopted, they will contribute to the welfare of the people of this State, and it seems to me that it is the duty of the members of this Convention who have taken such an active, such an ardent, such a patriotic part in framing and passing them, to go their way among the people, explaining, instructing, advocating these various measures intended for the public good, so that when the sixth day of November comes our people throughout the length and breadth of the State will, at least, understand our work, and, if they like it, they will approve of it.

Gentlemen, I have to thank you for all your kindness and courtesy to me throughout all the trying days of this Convention. I was aware from the beginning to the end of my inadequacy for the duties that you had imposed upon me. The friendships that I have formed in this

body will last throughout my life. I thank you for your special kindness manifested an hour ago. It overwhelmed me with emotions of gratitude. And let me, in closing, express the fond hope that all the members of this Convention may look with pride and satisfaction, each upon his own labors in this Convention, that it will be to him, to the last moment of his life, a precious honor to have occupied a seat here and to have his name enrolled upon its list. I trust, gentlemen, you may go to your various homes and enjoy to the end of your days peace, prosperity and happiness. (Applause.)

THE NEW YORK STATE CONSTITUTION, 1894

SPEECH AT A MASS MEETING IN COOPER UNION, NEW YORK, ON OCTOBER 27, 1894, IN SUPPORT OF THE REVISED CONSTITUTION *

Mr. Chairman, Ladies and Gentlemen: I think you might spend your time a little better than that (referring to the long-continued applause). (Laughter and applause.) You will not be afraid of the document which I hold in my hand; it is nothing but a copy of the revised Constitution, under which, God willing, we expect to live for the next twenty years at least. (Applause.)

I am no stranger upon this subject. Almost exactly twenty-three years ago to-night I stood exactly where I now stand, backed by all there was of courage, of virtue, of intelligence and of honesty that there was in this city, presenting the nominees of the original Committee of Seventy, under whose lead it was proposed to overthrow the Tammany of that day. (Applause.) Then as now the Republicans led the van and were supported by all the best Democrats who could not stomach fraud and corruption. (Applause.) Well, on that day we won the victory. (Applause.) Tammany was crushed, and, as the people of this city had fondly hoped, was destroyed. Her leaders were refugees, exiles—disgraced, imprisoned or dying as strangers in a foreign land. Those men who formed that original Committee of Seventy, who stood here with us that night—almost all of them, I am sorry to say, have passed away. A few gray-haired veterans still linger, and I delight to recognize their presence here. (Applause.) But the cause which called them together, the spirit that animated them, is the same cause and the same spirit that have aroused the people of this city to-day. (Applause.) Generations arise and perish. Men may come and men may go, but Tammany flows on forever. (Applause and laughter.) Some people think that there was a greater crisis, a more startling series of crimes, in those days to arouse the indignation of the people than we have presented to you to-night. I, for one, do not think so. It is true that a great sum of money had been stolen out of the public treasury—the people's money; but it could be counted. That upright and veteran public servant, Samuel J. Tilden (applause), brought it down to the very dollar and cent that had been misappropriated. But the men who shared in that plunder could also be count-

* In the November election, the Constitution was adopted by a majority of nearly 100,000 votes.

ed. You can count them on the fingers of your two hands. Who can count the aggregate of the spoliation, the plundering, the robberies which have taken place under the guise of the Tammany organization since that day? Ah! ladies and gentlemen, that is a sum that not even Dr. Parkhurst could ever solve. (Cheers for Dr. Parkhurst.) So many dollars from every peanut vendor; so many dollars for every awning; so many dollars for the obstruction of every sidewalk that drives us out into the gutter as we wish to pass along; \$500 from every steamship company (applause and laughter), and \$1,000 from every house of ill-fame. (Hisses.)

Why, gentlemen, the \$12,000,000 that Tweed and Connolly and their associates made away with is nothing compared with the aggregate of these stealings, of these spoliations from our oppressed people, that these bandits have made. (Hisses and applause.) Remember that only one department has as yet been searched—only the small fry have yet been thrown into the kettle. (Laughter.) Who doubts that when the jab from Goff's piercing lance (applause) in each of the other departments of the city is felt it will disclose corruption, spoliation, blackmail, ill-gotten money in as large proportion? (Applause.)

What is this Tammany Hall organization, this Democratic government so miscalled, under which the people of this city have suffered so long? Is there anything democratic about it in the real sense of the word? (Cries of "No.") Is there anything republican about it in that sense which guarantees to us a republican form of government—or in either sense? Does any reputable Democrat in this city share in its influences and in its power? Why, no! To all these exceptions, no. A little gang of adventurers, political bandits, have fastened upon the vitals of this city a political organization by which and for which they live—one man only representative; and every applicant for office, for favor, for influence, bows the knee to him. If you intend to be a judge you go to him with your hat in one hand and your check in the other. (Derisive laughter.) Ten thousand dollars; but if you can pay any more or he wants more—\$20,000. (Hisses.) If you want a commissionership or a clerkship you bow the knee to him. If you aspire to join that army of decayed veterans who pretend to sweep our streets (laughter) you seek some avenue of influence and introduction to him. (Renewed laughter.) The wonder is, ladies and gentlemen, that the people of this city have submitted so long. As long as we are willing to submit, this state of things will be continued and not a moment longer. (Applause.)

As long as the taxpayers of this city are willing to pay \$35,000,000 a year for these men, who themselves pay no taxes and have no stake in our soil and who use the money not even for righteous political purposes, but as plunder and patronage, and to keep up the organization by which they maintain their power, so long it will be maintained. (Applause.) But it will not be maintained. After an interval of twenty years of apathy, of negligence, of indifference to their sacred duties of citizenship, the people have decided to take their own affairs once more into their own hands (applause), and you will see a week from next Tuesday all the honest voters of this city going up to vote down these miscreants. (Loud applause and cheers.) Before saying a word about the constitutional amendments, I would like to say a word to-night about our State officers. (Applause.) There is the political treachery and trickery and debauchery as represented in the person of Senator Hill (hisses), and honest government for which Levi P. Morton stands (cheers), and always has stood. (Renewed cheering.) Yes, Levi P. Morton stands to-day as he always has stood for honest government. (Applause.) And now Senator Hill says that he does not propose to thresh over any old straw. (Derisive laughter.) But, ladies and gentlemen, the people of this city do intend to thresh it over, and he is the very old straw that they mean to get at. (Immense cheering, again and again renewed.)

He says, with generous equanimity: "Let bygones be bygones." (Derisive laughter.) But he must remember that no crime can be considered a bygone until the criminals who committed it are also bygones. (Enthusiastic cheering.) The people of this city will never forget the theft of Dutchess County, until the master who dictated it has become as much of a back number as Maynard has already become. (More cheering.) Do you observe that all the patriotic Democrats have united against him? Some of those Democrats forget—and that's their only error—that the only way to beat Hill is to vote for Morton. (Applause.)

There are two other honest Democrats whom we all admire very much, who somehow have been captured by Hill. There is my friend Coudert (laughter), whom we all admire and respect and love. (Renewed laughter.) But the best of men lose their heads sometimes. (Laughter.) He said, as I read it in a report of his speech, that Governor Hill to-day represents all that the honest people of this State have been struggling for for the last ten years (uproarious laughter), and that all this talk about conducting municipal affairs without reference to party politics is all bosh. (Laughter.) Well, now, Mr. Coudert can

make a mistake once; he can presume upon his popularity to utter such sentiments as that once; but I advise him never to say so again (great applause, again and again renewed), because the people have long memories, and it might result in identifying his name with this bosh which he advertises so loudly. (Laughter and applause.)

There is my friend, Mr. Ellery Anderson, one of the best of men. He says, as I understand it, that these disclosures of the Lexow Committee are only the inevitable outcome of the infirmities of our human nature. (Laughter.) I think he has been mixed up with Democracy too long. (More laughter.) And he says in addition, that we shall have no better until the millenium has come. (Continued laughter.)

If he is so sleepy and unobservant as that, when Gabriel blows his trumpet and all the rest of us sinners arise, he will be still asleep (loud laughter), and get left. (Renewed laughter.)

There are, however, questions more important for the people of this city than the mere election of certain candidates to office in this city, and that is to the Constitution under which we shall live for the next twenty, or thirty, or forty, or fifty years. (Cheers.)

Now, without any volition of my own, I was elected a delegate to the recent Constitutional Convention (applause) and by the favor of my fellow-delegates, I was elected its president. (Renewed applause.) I attended all of the busy and protracted sessions of that senate, from May 8 until September 29—except during two days when a peremptory personal engagement called me out of the State—and I know whereof I speak when I say that the wicked charges of partisanship that have been made against that body by Governor Hill and the echoes of these charges since adjournment are absolutely without foundation, and have sprung only from a fevered and disordered imagination. (Applause.) There never was a more earnest, devoted, patriotic, unselfish set of men than those who were charged with the responsibility of that Convention; who left their families and their business and devoted five months of their time to that onerous and difficult work. (Applause.)

In the first place, the first great question that was presented to us was whether we should make a new Constitution or whether we should simply repair the ravages that time had made, and arrange for such changes as the onward march of human events might render necessary in the existing Constitution. We concluded that it would not be the best to lay aside altogether that venerable instrument under which the people of this State had prospered and flourished so long. Not how much change was necessary, but how little was necessary was the end and aim and guide of our actions from the beginning. (Applause.)

We were flooded with petitions and memorials from every class and condition of persons from all over the State. Every man, and, indeed, every woman, who had an idea in regard to government was heard from. Out of more than 400 amendments that were proposed, the Convention adopted and recommended to the people the adoption of only thirty-three. (Applause.) Of course there were many important projects that had to be postponed; but we considered that the adoption of these thirty-three would greatly advance the welfare of the people of this State; and I say to you now that it will be a calamity for the people of this State should these amendments be defeated. (Great applause.)

The judiciary article was prepared by a committee of ten Republicans and seven Democrats, who indorsed and approved it, and now Governor Hill says that, because he doesn't like the apportionment article, which is to be voted on separately, he wants the Democrats to vote down the judiciary article (hisses) and every other amendment. That is characteristic of Democratic statesmanship. (Laughter.)

The people of this State have been working for twenty-five years to strip the Common Council of all power, believing that they could not be entrusted with it, so that now all their functions reach little further than licenses for dogs and peanut stands, and other trivial franchises. (Laughter and applause.) The Democrats said: "Do not allow the Legislature to pass any law affecting the internal government of cities without giving the Mayor of the city the power to veto it." We thought and said that the people of this State are represented in Senate and Assembly and are responsible for the government of the State and of every division of it without giving the power to veto a law into the hands of a Mayor Gilroy (hisses) or a Mayor Grant (hisses.) That is not the kind of reform we were sent to Albany for. (Applause.)

Then we have passed another enactment, almost equally valuable, in respect to city matters, and that was that, in respect to the internal affairs of a city, no bill should become a law or be presented to the Governor for his signature until it had been sent down to that city, and a fair opportunity given the city authorities to examine and report on it, and the Legislature had provided for public hearings in the city upon such measures. (Applause.) That bill, too, was passed in the Convention by general consent, and yet Governor Hill says: "Veto that, because I do not like your apportionment." I am coming to the apportionment by and by.

You know that all the great legislative mischief comes from all the work being huddled into the last three days of the session, and from

bills being subjected to amendment on the third reading, and on the final reading, and in the engrossing-room, and on the way from the engrossing-room to the Governor. All sorts of iniquities are crowded into the last three days of the session. Nine-tenths of the bills that any Legislature passes are passed in those three days. Now, we have provided by another amendment that no bill shall be put upon its final passage until, in its final form, never to be amended after that, it has lain upon the desks of members of both houses for three consecutive calendar legislative days. (Applause.) Now, if that amendment is adopted, nine-tenths of the legislative corruption, of legislative blundering, of legislative crime, will be put a stop to. (Cheers.)

And then we have done something for the suffrage. One Judge has been watched and found to make 500 citizens a day. Well, that makes fifty an hour for ten hours a day. The law requires that the Judge shall ascertain an applicant's good moral character, the Judge shall ascertain his history as to nationality and ability, that the applicant shall be familiar with the Constitution of the United States. The failure to observe this law was a most outrageous evil; it is the seed of more illegal voting than almost any other upon which you can place your hands within the last twenty years. Now we have provided that no man shall be permitted to exercise suffrage in this State until he shall have been a citizen at least ninety days. Ninety days is to intervene between the naturalization and election day, thus giving time for the Police Department and the official committees of every honest political organization to search the records of naturalization and find out how far they are true and how far they are false. (Applause.) Governor Hill says that is not Democratic; he says every citizen, the moment he is created a citizen, has just as much right to vote as any other citizen. That is his specious argument.

The real reason why he, a Democrat, has issued orders to all other voters to vote against every amendment is this, that they distrust the intelligence of the average Democrat to distinguish between different amendments, either by number or by name. (Laughter.)

We found another subject that had long been disturbing the public mind, and that was that the school allowance, raised out of the toil of the people by taxation for the support of common public schools, was beginning to be diverted and misapplied to the support of sectarian schools; and we said—and here Democrats and Republicans in the Convention voted alike—that the people of this State would not be satisfied short of a provision that not a dollar of public money raised by taxation should be used for sectarian schools. (Applause.) Mr.

Hill says that is not Democratic, and he advises everybody to vote against it because he did not like the apportionment.

Now, I want to tell a little personal experience I had about the Charities amendment. I insisted with all my might upon that amendment, and the public newspapers, some of them of the Democratic guild, have set me down for that as an A. P. A. man; and then because I voted for the Charities amendment, about which I am going to tell you next, they got up a rumor that I was changing my religion and becoming a Roman Catholic. Don't you like that amendment, that not a dollar of public money raised by taxation shall be diverted from the public schools to the Roman Catholic, or Presbyterian, or Unitarian, or Methodist, or Baptist schools?

Then I come to the Charities amendment. It was reported throughout this State before the Convention met that great masses of public money were given to private charities for the support of children, wards of the State, for which the State had made no provision, but for twenty years had intrusted to the charge of these benevolent institutions, maintained by every kind of benevolent people in the State, for their proper care; that great masses of money were being diverted, under the guise of supporting dependent children, to the use of priests and the support of theological institutions. It was found those charges were not sustained, but that there were gross abuses, whereby the city and State undertaking the scheme of placing these children at so much a head in the care of these private institutions, these institutions admitted a great many children who ought not to be wards of the State, whose parents ought to support them, and kept them for years after they ought to have ceased to be a public charge. We considered that a reason for stopping the abuse, and so we laid down the rule that wherever \$1 of public money goes to a private institution for the purpose of public charity, the authority of the public shall follow it. (Applause.)

Now I want to tell you about the Apportionment article of the constitutional amendments. Governor Hill has been doing yeoman service in support of that article (laughter), like the original Democrat who wanted to torment Job in the earth, arguing up and down throughout this State, that if you pass the Apportionment article it will nip Democracy in the bud. If that were true, gentlemen, considering the temper of the people of this State toward Democracy as represented at this moment by Hill and Tammany Hall—what a stink it is in the nostrils of all good citizens—he could not make a stronger argument to compel everybody who does not like that kind of Democracy to vote for this amendment. (Loud applause.) But it so happens, it is not true.

There is nothing partisan about it. (Applause.) There never was a more fair, equal and honest measure proposed for the adoption of any people than that. (Applause.)

I will tell you what is the matter with Governor Hill. We had an apportionment law. In the first place, how did Governor Hill—for it was his work—how did he get power to make it? He stole the Senate of 1892, and so got command of the legislative power of this State. It was that theft of the XVth District Senatorial vote and seat which enabled him to accomplish that. Under an enumeration made in February, 1892, which I believe is generally conceded to have been fraudulent, taken in a way that exaggerated the population of the cities and minimized the population of the rural districts, that ignored the distinction between alien and citizen residents in the great cities, almost in midnight fashion, at a special session called for that purpose, by his management, without discussion, without a word said in its favor or an opportunity afforded to say a word against it, by a strict party vote, to which that stolen vote from Dutchess County was necessary, he passed this present apportionment law under which we are now suffering. The object of it was, as he is credited with declaring, that if that passed we should see no more Republican legislation. The inequalities existing in it are of the most gross and palpable nature. But he counted without his host. (Applause.) How little he foresaw that the very means which he was adopting to perpetrate that iniquity would be the means of his own ruin. (Cheers.) How little he realized that he was sowing the wind and would reap the whirlwind which he could not control. (Cheers.) How little he saw how the Bar Association would be aroused to pursue him and his satellites (applause); how the honest Democrats of Brooklyn, of Buffalo, of New York, would rise in solid array against him (loud applause), how the Lexow Investigating Committee would be the direct result of it; how a new Committee of Seventy would be appointed, and he would have to meet all of his adversaries at the polls Election Day. (Prolonged applause.)

And now let me tell you about that apportionment. We believed that it was the desire of the people of this State to cut up that apportionment by the roots by reason of its gross inequalities, and injustice, and by reason of the wicked means by which it had been accomplished. So, in pursuance of the precedents had by all former Constitutional Conventions, we proceeded to make an apportionment. Senator Hill says that it is partisan, and discriminates against the Democratic stronghold.

I say that it is not discriminating against any section or any party or thing. I believe there is no stronghold which an angry and aroused

people cannot storm, and capture from any party. (Applause.) Whether an apportionment is partisan or not depends on the principle on which it ought to be made. If as Governor Hill and his representatives in the Convention claimed, it ought to parcel out the Senate districts and Assembly districts between the two existing parties for the time being. Why, we lost sight of that principle altogether. We thought that a just, a fair and a nonpartisan apportionment ought to be a division of the political power of the State between its various political divisions, fairly divided, chiefly with a view to numbers, partly with a view to diversity of interest that could not possibly be well represented together, so as to give each section its fair share in the Senate and Assembly. (Applause.) And that is what we claim to have done, by increasing the number of the Senate from 32 to 50, and the Assembly to 150. Governor Hill says: "You have discriminated against these great Democratic strongholds," and I suppose he refers to New York and Brooklyn. I propose to demonstrate to you that his statement is false, that there is no discrimination against New York and Brooklyn. We have allotted a certain proportion of the Senators and of Assemblymen to New York County and to Kings County—seven to New York and five to Kings; and we increased the total number of Senators from 32 to 50, and have given such a proportion of the additional Senators to New York and to Kings as to preserve the exact percentage of the political power in the Senate and Assembly which had been given them under the Apportionment act of 1892.

ROOSEVELT FOR GOVERNOR

SPEECH AT CARNEGIE HALL, NEW YORK, IN SUPPORT OF THE CANDIDACY OF THEODORE ROOSEVELT FOR GOVERNOR OF NEW YORK STATE, OCTOBER 5, 1898 *

I could not stay away from this meeting because I have known Col. Roosevelt and loved Col. Roosevelt from his cradle (applause), and I know that there is not one drop of blood in his body or one fibre in his being that is not brave, honest and patriotic. (Applause.) He is just the man that in this emergency the State of New York wants for Governor, and it would be a great disgrace even to the Empire State if the people should fail to put him in the Governor's chair. (Applause.)

I see that my friend Dr. Parkhurst (laughter)—and with all his faults I love him still—("He's all right!")—yes, I think he is all right. (A man in the gallery proposed three cheers for Dr. Parkhurst.) I see that Dr. Parkhurst, using strong language in that ardent spirit to which he is so much addicted (laughter), has expressed his fears that Col. Roosevelt will be damned if he has seen "the old man" (laughter). That is Dr. Parkhurst's language, "the old man," I should have said, if he had seen the presiding genius of the Republicans of New York. (Laughter and applause.) See how polite I have grown. I still read the Evening Post every night before I go to bed, but for all that I can defer to the proprieties of the occasion. (Laughter.) Well, now, Dr. Parkhurst need not be afraid. I know perfectly well that it does not make any difference whether Col. Roosevelt saw Senator Platt. The Colonel's neck is too stiff to receive any collar but his own. (Applause and cheers.) And you may strip him before this audience and you will find no man's monogram stamped upon his manly chest. (Applause.)

Now, this is a very different meeting from that which I addressed about a year ago to-night in this very hall. (Laughter.) Circumstances alter cases, you know, and Roosevelt is the circumstance that has altered the case. (Laughter and applause.) We witnessed then what, as I look back upon it, was a somewhat mortifying spectacle. The Republican party was all out in full force, but it was in two divisions—one commanded by that gallant military chieftain, Gen.

* Augustus Van Wyck was the Democratic candidate, and Robert Van Wyck, his brother, was already Mayor of New York.

Tracy (applause and cheers) and the other by the equally gallant civilian, President Seth Low. (Applause and cheers.) Of course, Gen. Tracy's followers were the regulars (applause), but Mr. Low's followers were the volunteers (applause), and, as usually happens when great crises occur and all the forces of the state or the nation are called out, the volunteers outnumbered the regulars, and it seemed as though in a country that acknowledges the rule of the majority that the majority should have prevailed. Well, now, what did we do? We had an immense army in battle array against us ready for the storming of the city, and we thought—yes, we all thought—that the best way of beating the common enemy was first to have a pitched battle with each other, and while we were engaged in that the terrible enemy overran and trampled upon us both, taking possession of the city, and giving no quarter to any of us. (Applause.)

Well, now, since last year we have learned something (great applause), and I think it is one of the most promising signs of the regeneration and redemption of the Republican party that the managers of that party this year have seen fit to call the people into their counsels. (Applause.) It did seem as though there was a breach that never could be healed only twelve months ago, and now it is healed already, and how has it been done? We have made a great discovery. We have discovered in Col. Roosevelt the missing link. (Applause, mingled with laughter.) Time has been in search of it for ages. Darwin, Spencer, Huxley, all the scientists, have spent their lives in vain in its discovery, and here in New York, in the person of this hero, we have found it—at least, for the Republican party. (Applause.)

Now, pretty much everything has been said by the speakers, who have occupied so much of my time. (Laughter. Cries of "Go on! Go on!") I will say one or two things more. I have come here to-night upon the invitation of the County Committee. They have done me this unusual honor, which I most gladly accepted. Now, I do not propose to address my remarks to anybody in this audience. I do not propose to address the district leaders, the captains of hundreds, nor the captains of thousands, the organization men or the machine men, because they are all right. (Laughter and applause.) But I would like my words to reach not the bad men of the party, but the good men; the better element as they consider themselves, and as they are generally described. (Laughter.) I would like to reach the ears of the independent men of this state, who, when they go to the polls, know that their vote will tell for good government and nothing else. (Applause.) I think that the managers of this campaign and of the Re-

publican party, have learned that our triumph at the polls depends upon the votes of those very men, whether in the city or in the state, and now, there are certain points of view which, as it seems to me, constrain every intelligent and honest man in the state who is not hide-bound in the Democratic party, to cast his vote for Col. Roosevelt. (Applause.)

In the first place, I want to call your attention to the way in which the two gentlemen now presented for the suffrages of the people of the State of New York were placed in nomination. Have you read the account of the convention at Syracuse? Is not that a most extraordinary example of government of the people, by the people and for the people? (Laughter.) Why, just see what happened there. The convention met; not one word was said about candidates, not a single word of consideration or discussion as to who there was in the Democratic party that would make a good Governor. But three—it seems they have in that party three, instead of one—presiding geniuses of the Democracy—got together in a private room, and, from what can be learned, they almost came to blows. Which prevailed over the other nobody knows. But at last they handed up to the chairman of the convention for him to announce as the candidate for the Democratic party the name of a man whom nobody had ever thought of as a possibility for Governor, and all that they could say of him is that he is a respectable citizen of Brooklyn. (Laughter.) Well, Brooklyn was once like Nineveh and Babylon and Thebes—a great city. (Laughter.) But now it is the dormitory of Greater New York, and in the nightshade of that suburb they discovered this man who had been reposing quietly on the bench for fourteen years, and they said he is the best man in New York to present to the people for their suffrages for Governor. Well, now, I do not call that Democracy or Republicanism—it is pure despotism. It is a corrupt trinity from which no man is safe or to which he should be willing to submit.

Well, how was the other nomination made? The convention was held at Saratoga, I believe, Mr. President. (Laughter.) Well, it don't make any difference where it was held. The place meant nothing; the people that attended it meant nothing; the people that supervised it meant nothing. Now, what did happen? I tell you that the presiding genius of our party put his honored ears to the ground to catch the rumble of the people's voice, and he heard it, and all his associates heard it, all of us who are now following under his banner. (Applause.) Was there any reluctance on the part of the managers of the Republican party to obey that voice? For the first time, they

have before us declared vox populi, vox dei; the voice of the people is the voice of liberty. Do you suppose if all authority of party was vested in one man and he heard the response that came from the people in all parts of the state from Montauk to Erie, there could have been the least hesitation on his part? I imagine he heard it as it came from the lips of the people with infinite delight, for it is his business to look out for a strong man who shall lead the party. With infinite delight he heard it, and he said to himself as he heard: "What, Roosevelt, Theodore Roosevelt, Roosevelt the reformer, Roosevelt the Civil Service Commissioner, who extended the boundaries of the Civil Service as no other man ever has—Roosevelt, the Commissioner who has sworn to see the law faithfully executed, and executed it although it was a law prepared by his Democratic enemies; Roosevelt, the Assistant Secretary of the Navy, the man who for a whole year before this war broke out, while the navy was being prepared and the officers and the men of the navy were being prepared, was the man who stood behind the gunners all the time; and Roosevelt, the Rough Rider, he who stormed the heights of San Juan as with a consuming fire; who took more than his share of the peril, more than his followers, exposing himself to death, ever willing to lead them." (Great applause.)

And he heard all this and he said: "Why, yes; that is the man; that is the very man that we have been looking for all this while. Is it possible that such a man as that will be willing to take the office of Governor of New York? If so, we will put him there at once." (Applause.)

Well, now I want to call your attention to one or two other considerations, and I must be very brief. (Cries of "Never mind; go ahead!") Mr. Low has referred to the fact that they propose to put two Van Wycks upon us. Well, there may be such a thing as having too much of a good thing. (Laughter.) I am sure I do not know what we should do with two Roosevelts, let alone two Van Wycks. Now, what is the position? In the first place we know nothing of their description except from the point of view from which they are presented. There never was a more perfectly capable Tammany Mayor than Robert Van Wyck is now making, and there will never be a more perfect Tammany Governor than Augustus will make, if, under the tuition and leadership of Croker, Hill and McLaughlin, he is ushered into the Governor's chair. I am not sure, but I understand they are as like as two Dromios. Whether Augustus is possessed of the same divine sweetness of temper, I do not know. (Laughter.) But what I want to call your attention to

is the peril that is threatening the interests of the people of this city and state if you have one of those gentlemen for three years more in the Mayor's chair of New York, and the other for two years more in the Governor's chair at Albany. Every bill affecting the interests of this city before it is submitted to the Governor has to be submitted to the Mayor for his signature or his veto. It must come from his hands approved or disapproved before it shall be presented to the Governor for his consideration. Now, how often do you think Augustus, finding that Robert has vetoed a bill affecting the city, will give it any further consideration, or will for a moment think of giving it his approval?

Well, then, there are great interests of the city of New York to be affected every year by the Legislature, and the managers of Tammany Hall are always seeking what they call relief there. Do you suppose that anything that is sent up there with the approval of the Mayor beforehand will fail to receive the support and encouragement of his brother Augustus, after it gets there? Now, that is a very serious consideration. It is one never intended by the Constitution. It certainly was intended that there should be independent administration in the city by the magistrate there of the city and in the Governor's chair at Albany. But you give us this second Van Wyck and you have got practically only one magistrate for the city and one magistrate for the country; the two are one and the one are two. (Laughter and applause.)

Now, another thing I would like to say to these people whose votes are going to decide this, as they will every other election in New York State for a long time to come in the direction of good government. These who hold the balance of power and ought to be with us because we are presenting the only candidate that stands for good government. What has this man Roosevelt done? What sort of a man is he? He is courageous, aggressive, honest, intelligent, patriotic, and, above all, a true American to the very centre of his soul. (Applause.) He is a first-rate public servant, exhibited on many stages, and when you are going to compare these two men for the consideration of the people, one who has been an acceptable judge, never interested in public affairs, and the other who since he became a man has been fully with all his life and all his energy inquiring into and participating in public affairs, how can you hesitate?

Now, Mr. Roosevelt was for three terms a member of the Legislature. He was a very young man, but nobody owned him and nobody controlled him. That is very certain. It would not be possible for any

man to dictate his vote to him in that Assembly. What was the consequence? He commanded the confidence of everybody there, even of the Governor, who was of another style of politics, Governor Cleveland. He framed and procured legislation for this city which actually received the approval of a Democratic Governor, and made no enemies while he was doing it. The character of the man is a wonderful feature.

Well, then, for six years he was one of the Commissioners and for a time the Chief Commissioner of the National Civil Service. In that he was aggressive, as he always has been, and always will be. He went for extending the bounds of the list. He knew, as we know perfectly well, that in the full development of civil service and in its final triumphs lie the salvation of politics and the purity of this country. (Applause.) And he devoted himself to it with immense ardor and immense success. And what is more, let me tell you that when the Republican Senators and Republican Representatives flocked to his office, as they did week after week and day after day, beseeching him to make exceptions in their favor, he steadily and constantly refused.

Now, will you bear with me one moment while I read what President Cleveland said to him when he allowed him to leave that office? Here is a disinterested witness; here is something that the friends of good government might lend a moment's ear to.

The President said: "My dear Mr. Roosevelt, I desire to assure you that I accept your resignation as Civil Service Commissioner with great regret. Permit me also to thank you for the service you have rendered good government during your incumbency of the office you have just relinquished. You are certainly to be congratulated upon the extent and permanency of civil service reform methods, which you have so substantially aided in bringing about. 'The struggle for a firm establishment and recognition of the law is now passed.'" (Applause.)

That is the man who saw how he conducted the affairs intrusted to him, first in the interest of the people of the state and then in the interest of the people of the nation.

He was made a Police Commissioner of the City of New York, and he was informed that he would be expected to promote and take care of the interests of the Republican party in that office. What was his reply? "In my office I know no parties, but outside of it I shall remain as I have ever been—a strong Republican." (Ap-

plause.) And what was his offense? A great many people are going to vote for him for that offense. He had sworn to see the law executed. He had nothing to do with the passage of the law. His party had opposed its passage. But he was sworn to execute the law, and he executed it to the great disturbance of many of the people of this city. I must say that I personally was a good deal inconvenienced, for when I know that everybody else is safe in church I like to wander up and down and to and fro anywhere on this island. Well, it never occurred to me that anything was at fault but the law, and the maker of the law; but Col. Roosevelt would have been false to his honor and his trust if he had violated his oath and disobeyed the law. So I say to these independent men, to whom I am appealing, these men to whom the honor of the state and the good of its people and the safety of its families and the welfare of its children are and ought to be so dear, I say to them I believe that for those acts we shall gain far more votes for our gubernatorial ticket this fall than will be lost by anything Roosevelt did in his office.

And then you know—it is so recent that it is not worth while for me to recall it to you, as it has been repeated to you so often—what he did as Assistant Secretary of the Navy. You don't want to hear what Mr. Roosevelt did then. You don't care to know what I think about that. But I believe that you will be interested to hear—because probably most of you have forgotten it—the prophetic words of President McKinley and the noble words of Secretary Long, Mr. Roosevelt's superior in the navy, when against their protest, against the protest of his friends, of his wife, of his children, of everybody that surrounded him, he concluded to resign his office, and as he had done, as he said, as much as any one to bring on the war, he would go and imperil his life to see it safely through. (Applause and cheers.) Now, I shall dismiss you after I have read this—and this is a good benediction. First, I will read what Secretary Long said on the 7th day of May last. Bear in mind that all of Mr. Roosevelt's glory as a soldier has been won since then:

“I have often expressed, perhaps too emphatically and harshly, my conviction that you ought not to leave the post of Assistant Secretary of the Navy, where your services have not only been of such great value, but of so much inspiration to me and to the whole service. But now that you have determined to go to the front I feel bound to say that while I do not approve of the change, I do most heartily appreciate the patriotism and the sincere fidelity to your conviction which actuate you. Let me assure you how profoundly I feel the loss I sus-

tain in your going. Your energy, industry and great knowledge of naval interests, and especially your inspiring influence in stimulating and lifting the whole force of the personnel of the navy have been invaluable." (Applause.)

And now listen to the equally fervent and still more prophetic language of President McKinley on that same occasion. He knew the kind of man he was dealing with. He knew into what service he was going. He knew what his aspirations were to be a soldier, and he prophesied the illustrious success that Roosevelt would achieve:

"Although the President was obliged to accept your resignation"—and this is written by the President's direction by the hand of his private secretary, Mr. Porter—"of recent date, I can assure you that he has done so with great regret. Only the circumstances mentioned in your letter and your decided and unchangeable preference for your new patriotic work have induced the President to consent to your severing your connection with the Administration. Your services here during your entire term of office have been faithful, able and successful in the highest degree, and no one appreciates the fact more keenly than the President himself. Without doubt your connection with the navy will be beneficially felt in several of its departments for many years to come. In the President's behalf, therefore, I wish at this time to thank you most heartily, and to wish you all success in your new and important undertaking, for which I hope and predict a brilliantly victorious result." (Applause.)

I wish to repeat one sentiment that every speaker has uttered already before me, and that is the duty of the people of the United States and of the State of New York, who put President McKinley in the chair at Washington and imposed upon him more terrible responsibilities than have been borne by any President since Lincoln, to hold up his arm now in this trying hour. (Applause.) History will tell in a few words the great things that have been done under him. It will tell that an army of 265,000 men expelled the Spanish power which had lingered here for two centuries from every inch of American soil, and that they did it with a loss all told of only about 1 per cent. of the whole number of the forces engaged, including all those who died on the field of battle, all those who subsequently died of their wounds, and all those who have since died in hospitals, in transports, in camps, wherever they have suffered. And then history will also tell that under his direction the navy of the United States, with the loss, I believe, of only one man for each achievement, completely destroyed each of the two Spanish fleets. And then it will also tell that with the

loss of the few hundred men they not only conquered one valuable city and island in Manila Bay, but that they also conquered more islands in that archipelago than anybody will ever know what to do with. (Applause and cheers.)

CROKER, HILL AND VAN WYCK

SPEECH AT CHICKERING HALL, NEW YORK, UNDER THE AUSPICES OF
THE BLAINE CLUB, OCTOBER 26, 1898 *

This cordial reception that you have given to me is almost as great a compliment as I received last week from the unctuous lips of Mr. Croker himself, for I must say that I regard it as the highest compliment for any respectable citizen to be abused by him. (Laughter.) And there is a great deal that hangs on the fact that Mr. Croker for the first time in this campaign has opened his lips. The dumb has spoken. (Laughter.) He never speaks when things are going in a way that suits him. He has never been known to, and I ask you why it is that this shrewd and calculating politician, at this late hour in the campaign, has found it necessary to open his lips? Well, this audience looks to me like a good, old-fashioned audience, who remember things they have read in the Bible. Croker's speech and why he spoke recall to my mind the familiar story of Balaam's ass (laughter), and in two or three points Mr. Croker reminds us of that very celebrated beast of burden. In the first place, until the ass spoke, nobody in the world imagined what a perfect ass he was. (Roars of laughter.) If he had not spoken he would have passed into history as an average, ordinary, silent ass, who carried Balaam on his way, but when he spoke he was distinguished over all other asses in the land. (Renewed laughter.)

But that is not the only way in which Mr. Croker recalls that story. Why did the ass speak? Do you remember the story? It was because he was frightened. It was because he got, as the Bible says, into a tight place, where he could neither turn to the right or to the left, and in that situation, when he saw him who bore a flaming sword confronting him at last the ass spoke; and it was in the same tight place that Croker spoke, when at last he was afraid of him who bore the sword before him. And you can tell who the young man is that bore the sword. (Cheers.)

I think that Mr. Croker has done more to promote the success of the Republicans in this campaign than even our own speakers. For what was it he said? It is the most important utterance that has been made in this land, at any rate in the last twelve months. He said: "Have you an honest judge on the Bench? Let me test him." And he called upon that judge to do his bidding by removing an honest

* A newspaper account of this speech was headed "Choate Riddles Croker."

official, and appointing his own nominee, and to remove the place of the public sales of real estate into a place where it would bring money to his own pocket. The honest judge refused (cheers), and Croker therefore said: "We will have no more honest judges in New York as long as I rule in Tammany Hall, and I am here for life." (Laughter and cheers.) Now if the citizens of New York, Democrats, Republicans, Independents, black, white or foreign can stand that, they can stand anything. And so it is no wonder that from the time Mr. Croker began to speak a new and unexpected impetus was given to our campaign, and the more and the oftener he spoke the more the enthusiasm arose. (Laughter.) The people of this city will not submit to such an outrage as that with which he threatens us, and I calculate that to him we shall owe the tremendous vote which the registration which followed upon that utterance demonstrates will be given to the Republican candidates in this city. (Cheers.)

Now, there is another distinguished friend whose services to our cause I wish to acknowledge, for they are very great, and that is no less a person than David Bennett Hill. You would not think he would turn stump orator for the Republicans, but so it is. In his great career he has made some memorable speeches. The most memorable are the most brief. (Laughter.) Do you remember that first great speech of his which has taken its place with those of Demosthenes and Cicero? (Laughter.) It was summed up in four brief words. It was when he uttered that great maxim, "I am a Democrat." (Loud laughter.) But he said something better than that this time. You have heard Assemblyman Weekes describe the bill for the prevention of fraud at the elections in this city. It had but one object—to prevent fraud at the polls, to protect your suffrages and mine, so that each man might cast his one vote and have it counted as it was cast.

Now, Mr. Hill, ex-Senator, and ex-Governor of New York, comes before a great assemblage of his followers and says, what?—that "if any of those emissaries of the law undertake to interfere with you as you vote at the polls on Election Day, knock him down." (Hisses.) Now, that, I think, shows the spirit of the leaders of the party, who suffer those led by them to resort to force and to violence at the polls for the purpose of oppressing and overawing the honest suffrages of the people. (Cheers.)

I hope that Croker and Hill will go on talking until Election Day. We cannot have two more effective advocates, and if Croker will confine himself to Tammany Hall, where every word he utters is given by the press to every man, woman and child; if he will keep on talk-

ing he will do us almost as much good as Colonel Roosevelt is doing by his travels up and down the State. (Cheers and laughter.)

It seems to me that I have got through my speech. There will be fair play to-night, and every one who comes after me will get an opportunity to be heard. (Cries of "Go on!") I'm going on. I am limited to thirty minutes, and I have already taken up ten minutes. The remaining twenty minutes are very short to discuss the State, National and municipal issues in which we are so much interested. I should like to spend some of the time in reading this fine speech of Mr. Mitchell's at Washington, which has been printed and distributed in the hall. But you know how much time it takes to read anything. But I would advise you to take one home and read it before you go to bed, or even after you have gone to bed. (Laughter.)

Now as to our State issues. I am a little confused as to what are the State issues. I have been reading Judge Van Wyck's speeches. (Laughter.) Well, he says, if I recollect aright, that the first great issue is the canal question. I agree with him, and I think we have got a man who can take care of the canal question when—(The rest of the sentence was lost in the cheers which followed Mr. Choate's allusion to Colonel Roosevelt.) What is the suspicion regarding these canals? What is it the Democrats charge? That the nine millions of dollars appropriated by the Legislature for the supposed completion of the enlarged canals had been largely—not misapplied, they don't say that—but had been lavishly and negligently expended, and that not every dollar of it had gone to the object which the people meant it to go to. Now, that is a serious question, and it is a question which our Republican Governor regarded as serious, and he himself appointed a commission, of whose character nobody can breathe a question, to examine into the matter and report. That is not the end of the matter. It is not the end of the matter at all. If there is any wrong it has got to be righted, and if any fraud has been committed it has got to be punished; and there is no doubt that if you elect Theodore Roosevelt he will see that an investigation is prosecuted, and if anybody is in the wrong he will be brought to the punishment which he deserves. (Cheers.) I know Theodore Roosevelt pretty well. Man and boy I have known him for the last twenty-five years. He has courage all the way through from top to toe. He is just as honest as he is courageous, and he will deem it his first duty, if I know the man, to see to it that if there has been any wrong it shall be righted. (Cheers.) And I know this about Colonel Roosevelt—he would take greater pride in carrying

a Republican scalp at his belt, if a Republican has been wicked in this matter, than one of his political opponents. (Cheers.)

That is one of the reasons why I support Colonel Roosevelt. Make him Governor and he will be the people's man, and there is no man or clique or organization in the State that can draw him away from his duty to the people. (Renewed cheers.) Think of Mr. Van Wyck's next utterance about State issues. He says Civil Service reform is the next great State issue to the canals, and you ought to elect him for the purpose of carrying through and perfecting the uncompleted Civil Service reform of the State of New York. We do not know a great deal about Mr. Van Wyck, except that he has been a judge in Brooklyn and a very respectable citizen. But like our busy judges and lawyers, who are so much taken up by the law that they have not time enough to study this question, he will have to lean on somebody if he goes to Albany. Now whom do you think he will lean on? (Cries of "Croker.") Well, he won't lean on Platt. (Loud laughter.) No, he will draw his inspiration from Tammany Hall and Croker, and it will be just as impossible for him to resist that seductive influence as it would be if he were on the brink of Niagara to save himself from being carried over. (Laughter and applause.) Theodore Roosevelt has had something to do with Civil Service reform. On a great State issue like that, I would rather take a man who had been six years in the service of his country in the National Civil Service Commission, and who had done more work than any other man in aggressively pushing forward that reform work, which demanded the approval of a Democratic and Republican President alike, and satisfied even the Republican members of the Senate, who thought that, being a Republican, they could get him to relax his rule, but who realized that they could not make him budge one inch, and who learned to respect him as an honest man. (Loud cheers.)

There was one State issue which Mr. Van Wyck did not mention, and that was the relation of the Governor to the Mayor of New York. (Loud laughter.) That important question should never be forgotten when the people are considering whom they will vote for. The Van Wycks are colorless men. When you look at them you can see through them and behind them to Richard Croker. (Laughter.) The Governor has one great function in respect to the city of New York. If he finds the Mayor untrue to the interests of the people of the city, he is to remove him. (Loud laughter.) Now, these two Van Wycks are as alike as peas in a pod, and I would like to know if the interests of the people of New York were not properly considered and upheld by the Mayor if the Governor at Albany would remove him. (Renewed

laughter.) There is another thing that Van Wyck forgot to mention, and that is that we have got partial home rule here. A bill relating to New York which passes the Legislature must first be submitted to the Mayor for approval before it goes to the Governor. Now, how many bills that Robert approves do you think Augustus would veto, or how many bills that Augustus would veto do you think would be approved by Robert? (Laughter and cheers.)

I want now to say a word on the great necessity of the Republicans carrying the next Congress. Have you read the proceedings of the Peace Commission in Paris? Well, they have been there about six weeks, and as yet apparently they have not accomplished much; and why is that? One side is laboring for delay. It is not our side. I am sure of that. No, Spain, through her representatives in that Commission, is asking for delay. How long does she want to wait? She wants to wait until Nov. 9, because she knows that if it goes forth to America and Europe that a Democratic House of Representatives has been elected, and thereby the arm of President McKinley has been stricken down, Spain will hope for a great outcome of benefit to herself. I say vote for every one of those Republican Congressmen; vote to sustain the great work accomplished by Dewey and Schley and Sampson. (Loud cheers.) It is not only to secure to ourselves whatever fruits ought to be secured as a result of the blood and treasure shed by our people in the last six months. It is to determine and satisfy America and Europe whether the people of the United States are ashamed or proud of this war in which we have been engaged. Just as sure as the sun rises on the day after election on a Democratic majority, it will go forth to the world that we are ashamed of our own work and just as sure as we strengthen the Republican majority the world will be satisfied that we are proud of what we have done and that we are determined to stand by it for the good of America and of the world. (Loud and continued cheering.)

And now let me say a word about my friend Mr. Mitchell. (Cheers.) Are you going to stand by the good and faithful service he has rendered to his electors for two terms? It was a desperate fight the first time, but he carried his district. It was an easier fight the second time. Let it be still easier this time. (Cheers.) What is your choice between him and whom? (Cries of "Mitchell!") Mr. Riordan—"Dan" Riordan—is his opponent. Do you know Mr. Riordan? Have any of you ever heard of him? Do you know what his views are? He says, I believe, that he has no views, but that he is ready to learn whatever Tammany Hall will teach him. (Laughter.) It seems that

he is a discovery of the celebrated Divver, Mr. Justice Divver, of flagrant memory. (Renewed laughter.) What does he represent by his silence, ignorance and unfitness? What does he represent to the voters of this district? He represents the Chicago platform, behind which the Democrats in this State are now skulking without saying so. It was the last authoritative pronunciamiento of the National Democratic party. What did it go for? It went for the free coinage of silver; it went for the demolition of the Supreme Court; attacks all property, and a striking down of the banking system.

Now, do you know what will be the consequence if on November 9 it goes out that Mr. Mitchell has been defeated and "Dan" Riordan sits in his place? It will mean a sad calamity to this country. I think this issue swallows up all the municipal and State issues for the time being. The credit of this country thus far, thank God, has been saved from those partisan and mercenary attacks. Are you willing to open the floodgates of Bryanism, of Socialism, of anarchy, and strike down the prosperity which has now come to this country? I trust you will give consideration to what this all means—the destruction of our National credit, the confusion that shall come upon our currency, the threat hurled at all property in the land; if such reversals as these shall take place. No; let us stand by the Representative we have here. He has been one of the marked men in Congress upon the question of the National currency and banking system. He it was who had charge of the bill from the Committee of Banking and Currency that was introduced in the House of Representatives, and he is a man, if you have any regard for the wealth, prosperity and well-being of your country, that you ought to return to Congress for the third time.

RICHARD CROKER AND AN UNSULLIED
ERMINE

SPEECH AT A MASS MEETING IN THE GRAND CENTRAL PALACE, NEW
YORK, IN SUPPORT OF THE NOMINATION OF JUSTICES DALY AND
COHEN FOR RE-ELECTION TO THE NEW YORK SUPREME
COURT, NOVEMBER 3, 1898

STATEMENT

On September 20, 1898, at a special meeting of the Association of the Bar of the City of New York, a resolution was adopted favoring the nomination of Justices Joseph F. Daly and William N. Cohen for re-election to the New York Supreme Court bench. A petition to the same effect, signed by 3,500 members of the New York Bar, was sent to Republican and Democratic Judiciary Conventions in New York County. When the Democratic Convention, at the behest of Richard Croker, refused to nominate them, the Bar Association in October, 1898, resolved that the "refusal to nominate Judge Daly is a direct attack upon the independence of the bench, because he was rejected for the reason that he would not permit his official action as a judge to be controlled by the personal direction of a political manager." A committee was appointed to conduct a judicial campaign, and mass meetings were held in Carnegie Hall and in the Grand Central Palace. At the latter meeting, Mr. Choate made the speech printed below. In this speech he made it known that Croker had once been his client. An amusing commentary on this fact is found in a letter to Mrs. Choate, written from New York on January 24, 1890 (Martin, *Life of Choate*, vol. 2, p. 407), in which Mr. Choate said: "Today I have not been near Wall St., having taken up all day until a late hour with the examination of Mr. and Mrs. Croker. The Tammany hordes fairly swarmed about us, and when it was over I had to go home and take a bath, wash off the fumes of Democracy with which I was reeking, put on clean clothes and come down to the Club."

The election of November, 1898, resulted in the defeat of both Daly and Cohen.

Mr. Chairman, Ladies and Gentlemen: I am not here to-night to argue the important question which has aroused such a tremendous sensation in this city and called you together to-night. After arguing all day, by night I love to muse and to meditate (laughter and applause), and besides, the case has been argued through and through. It was opened last week at Carnegie Hall in that magnificent oration of Bourke Cockran (applause), a speech that never will be forgotten by this generation. (Applause.) It has been summed up to-night in the learned and logical arguments of my friends Mr. Kernan and Mr. Carter. I can add nothing to what they have so ably said. They have opened a wide breach in the stronghold of our common enemy, and I hope therefore that you will let me rather try to lead the charge of the Light Brigade through that breach. Perhaps by illustration, by ex-

pressing things in the concrete form, we may drive home and strengthen the splendid argument that has been presented. Now, what means this vast assemblage? What is this that has called you from your homes in such immense numbers? I believe it is the conviction that the people of the city of New York are no longer willing to submit to the brutal and vulgar tyranny of Richard Croker. (Great applause.) That at last he has gone too far—further than this people will submit to, when he has laid his foul hand upon the shrine of our liberties in the temple of justice and has sought, so far as in his power lies, to corrupt the fountain of justice at its source.

Now I have read with delight, as I have no doubt you all have read, those written interviews which he has recently given out to the press. (Laughter.) Mind you, I do not charge or credit him with writing them himself. (Laughter.) He can write. (Laughter.) He can write—with difficulty. But the language, the grammar, the idioms of those compositions are not in his peculiar style. (Laughter.) But the thoughts, the sentiment, the venom, could have proceeded from no other possible source. Now, from those striking productions one thing is very certain, that in the panic that has seized him he has for once lost his head. (Applause.) He never speaks unless he scents danger in the air. (Applause.) It is a familiar saying—I read it in “The Evening Post” to-night (laughter) that “Whom the gods wish to destroy they first make mad.” (Laughter.) Justice Daly has never uttered a nobler sentiment than that. Now, from these wild utterances of Mr. Croker I think you can not only form the opinion that he is insane, but you can diagnose the particular form of insanity which has seized him.

He seems to me to have all the symptoms in a marked degree of political paresis. If you know anything about that fatal disorder, you know how paresis always begins. It begins uniformly with a swelled head. (Laughter.) The head is altogether too big for the man. He is overcome with an overwhelming sense of his own grandeur, greatness and power. He forgets the ordinary relation of things. He believes that the world is all his own, and that all things in heaven and earth must do him homage. He is full of wild delusions and full of the most startling failures of memory.

Now, let us consider some of these delusions and these failures of memory, for they are very instructive about these times.

He boasts that he is king in Tammany Hall, not only to-day, but as long as he shall live. Not so, Richard. (Laughter.) Not quite so. We admit that for the moment you are cock of the walk upon that

dunghill. But not for all time—not for life. There never was a cock of the walk for life. It is only until a new and younger cock appears, with longer spurs and harder beak and redder gill, that shall mount him and cut his comb and pluck out his tail feathers and remit him to the back benches. (Laughter.) The leadership of Tammany Hall does not come by accident. It comes by force—by sheer brute force. It was by the fist and the shillalah that he attained his leadership there, and it is by the fist and the shillalah that he will disappear when a stronger and more courageous and a more nervy champion appears. (Applause.)

That is one of his delusions. Now, what is the next? He claims that he owns the whole city of New York. That is one of his arguments on this great judicial question. Well, I believe it is pretty nearly true. Certainly he owns its Chief Magistrate. (Applause.) Certainly he owns every subordinate officer from top to bottom. I challenge you to go into any executive or administrative office in this city and find one man that will defy his will. He will disappear to-morrow if you find him. He forgets, however, that that is the very reason why his hands should be held off from the judicial power. If there is one principle that lies at the foundation of our American form of government it is that there shall be a complete separation between the executive and legislative and judicial powers, and that each of the three shall be absolutely independent of the other two; and if one man is to make our laws, our ordinances, the same man to execute them and the same man to appoint the judges to pass between right and wrong, between suitor and suitor, between the people and the person charged with crime, why, all vestige of republicanism is forever gone. (Applause.)

He forgot also, I think, how it happened that he came to be the owner of New York. He has forgotten that it was because of a foolish division of the friends of law and order, which might have been prevented, and he does not take notice that every day and every hour he is doing his best to bring those forces together and to bind them once more together with links of steel. (Applause.)

Well, then, he has another delusion. He says that, having himself come out unscathed from our courts of justice, the keys of all courts, of all judgments, of all prisons must be carried in his pocket. That is what he is aiming at apparently, and he goes further. He says—now, I don't believe everything that he says—he says that Tammany Hall has created and expects proper consideration from all the judges upon the bench but two. For Heaven's sake re-elect those two before I go any further with the argument. (Applause.)

Well, now, there never was a grosser libel uttered by any man than this upon the great number of the judicial officers who preside in our courts to-day. He forgets that the chief among them are those of longest service, have already been re-elected by overwhelming majorities, in some cases by the unanimous vote of all their fellow-citizens, because of their good behavior. (Applause.) There may be some deference to him in the minds of a small minority of our judges. It could hardly be otherwise so long as judicial patronage continues to be the curse of our judicial system; but I want to know how it would be if, after next Tuesday, it goes out to the world and goes down to those judges at the City Hall that the people of New York are with Mr. Croker on this great question. Let them assert by a great majority of the people of this city that those who are honest, who are independent, who are no respecters of persons, who will refuse to obey his will and grant his requests in the performance of their judicial duty, shall be turned down and punished and their places be taken by those who he has reason to believe will give him proper consideration. Judge, then, what the condition of affairs at our City Hall will be. Now, Mr. Croker is entirely mistaken in that. The great majority of those judges would turn the same deaf ear to his commands as did Judge Daly. (Applause.) If you would strengthen their arms, their virtue and their courage, cast your votes on Tuesday so that Mr. Croker shall come out condemned on this great question.

There are many delusions of his. Did you read his attack upon Harper's Weekly? One of the basest and most villainous attacks that ever emanated from the brain of man. He took occasion to recall that some insignificant person, a scion of that great and noble house, had been found in bad company at an unseemly dinner, but he forgot the banquet of corruption and plunder to which he daily invites his followers throughout the year, and over which he daily presides, and next Tuesday night he proposes, if he can, to serve up upon that table the cold remains of the body of Justice herself for them to gloat their talons upon. I think that he forgot the splendid record and great history of that great journal. He forgot that for more than thirty years it has been the great vehicle of independent thought in this country, and has carried life and sweetness into every decent home in the land. He forgot that by its manly and courageous course during all these three or four decades it has well earned the proud name which it bears at its heading, "A Journal of Civilization." I think he also forgot the compliment which his great prototype and exemplar, William M. Tweed, paid to it. Do you remember that? He said: "I don't care

anything about your newspaper articles, for my constituents cannot read; but they never can help seeing them d——n pictures!"

He forgot also the splendid services that that journal rendered in bringing his great predecessor and his associates, on the bench and in the administrative offices, to justice; how it made it impossible for any one of them to escape; making their faces known in every continent and on all the isles of the sea, so that when his great exemplar had absconded and thought himself safe it was Harper's Weekly that brought him back to the punishment that his crimes deserved, and it is Harper's Weekly that will be ready to do the same service for his successor if occasion requires. (Prolonged applause.)

Ah! but ladies and gentlemen, there is a more serious word to be said about that. I call upon you to notice the low and base motive and spirit which actuated that attack, and how it was really a blow below the belt, which even his education in the prize ring ought to have taught him to avoid. It had no connection with the subject of which he treated. He sought to reach the head of that paper, to strike at the heart of the father by recalling the peccadillos of the son. That is the same spirit that has actuated this Tammany government in the treatment of our reputable citizens in all the past. And if—which I do not believe— if Croker and his associates are by and by to have control of our courts, beginning on Tuesday next, you may judge what measure of injustice will be meted out, and how the old system that prevailed in our former police court arrangement worked when they were used for the punishment and defamation of the innocent and the screening of the guilty who had a pull upon a leader or the boss.

Well, then there is another thing—another delusion of his. He beat around the bush about Judge Daly for several weeks; he didn't dare to give the real reason until a few days ago—the real reason why he turned him down. But a few days ago he put on all the panoply of his courage and told the reason why. He declared that Judge Daly "is not an upright Judge." (Applause.) Well, now, he forgot that the people of this city have been watching Judge Daly for the last twenty-eight years; that they have watched him in the performance of his judicial duty, and they know him through and through, and they know that he is not only an upright Judge, but a downright Judge, and that is the very reason why they mean to re-elect him if they can on Tuesday next. (Applause and cheers.)

Well, then he attacks the Bar Association. That is another of his delusions—that we are a very bad set of men, engaged apparently in filling the pockets of the rich at the expense of the poor; defenders

of monopolies and trusts, and I believe he has coupled my name in that connection more than once. Well, I have known of other trusts and other monopolies, and I will say that the one trust of the most odious and most offensive form that exists in this city, or in this country, is Richard Croker himself. (Laughter.) What is it? What is the monopoly that he exercises? Think of it, and judge for yourself. A monopoly of all the political power of the city to turn against the citizens. (Applause.)

Well, then he says that we rarely appear for poor men. I believe that he aims this chiefly at my brother Root and myself, Mr. Chairman. Where has Croker been? Where has he been for the last five years? He must have been in Europe. (Laughter.) He must have been in pursuit of royalty. He must have been on the turf in England or underneath, and I don't care which. (Laughter.) Rarely appear for poor men? Why, if he had not been out of the way wouldn't he observe how faithfully I have tried to dispel the gloom of every Lenten season in the last five years by playing the role of counsel for a poor man? No; he does not know what he is talking about when he makes such accusations. I will say this, however, that he was here once, and this is a thing which he ought to remember: I have not forgotten it—that there was one individual for whom I appeared whose chief defense was his poverty.

And now what other delusions are thronging in his brain? Why he marches along with erect and lofty head, imagining that all the men who have ever followed him are still marching behind. (Laughter.) He is so much absorbed in self-contemplation, as these paretics always are, that he has not observed what battalions, what great divisions have already deployed over the opposing forces. (Applause.) He hugs to his bosom the delusion that the great Roman Catholic Church is on his side. He forgets that Judge Daly is a favorite son of that Church, and that when he undertakes to trample upon him he rallies to his rescue thousands and tens of thousands. (Great applause.) He has the insane imagination also that the Irish-Americans will stick to a man to Tammany. Where are his eyes? Where are his ears? Does he not observe that by thousands they have marched off and have declared for Daly? And why? Because they know that the ancestors of Judge Daly fled from the Emerald Isle to escape oppression; that from his birth he has been one of the most loyal Americans in this city, and those hereditary lovers of liberty will not see him badly used. (Applause.)

But then he says: "Well, I am sure of the German-Americans. Despite the Raines law, they will stand by me through thick and thin." He forgets that the first instinct, away down deep in the heart of every honest German, is the love of justice and they will never see its image defiled by their means if they can help it. (Applause.)

And then, lastly, he hugs the delusion that the poor men and the laboring men will all be on his side. Now, this is a question which we are presenting here to-night, in which the poor men and the laboring men are chiefly concerned. Who are the suitors in those fourteen thousand or fifteen thousand cases that are awaiting trial before jury in our Supreme Court? They are poor men, chiefly, and poor women, and the laboring men and the laboring women of this city by a vast majority. Now, they know one thing when we put it to them as a concrete case, a supposed case. Suppose that the Metropolitan Traction Company had sent its check for \$50,000 to Mr. Croker—a supposed case (laughter)—and Mr. Croker succeeds next Tuesday in inaugurating three judges who will be subservient to him and give him "proper consideration." (Laughter.) What do you think will be the chances of pure and unadulterated administration of justice before those judges if a poor woman with a broken leg or a man with a broken head that has been run over by the negligence of one of their conductors brings the great corporation to trial before such judges?

Now, that is the question that the laboring men and the poor men have to bear in mind, and that is an example that they can well put in their pockets and study. Oh, Mr. Croker forgets when he thinks that the laboring men and the poor men will all stand by him. He forgets that the one security, the only security, that the poor men and the laboring men have for the little that they enjoy is a free and independent judiciary, before whom the poor men can stand with equal regard with the rich men or the rich corporations, and where the judge will be no respecter of persons, but stand by the poorest and neediest against all the might and power that can be brought against them. (Applause.)

So, I say that looking over all these delusions and failures of memory it is perfectly manifest that Mr. Croker has lost his head, and there is nothing that I know for the people to do but to pick it up and throw it in a basket, as our English and our French friends did in great crises with the heads of their decapitated bosses. You have all heard of St. Denis, I suppose, who, after his head was cut off, picked it up himself and walked about with it under his arm (laughter), and it served all his purposes equally well as it had upon his

shoulders. You can see him petrified, with the head under his arm, on the sculptured front of Notre Dame. He, however, was a saint (laughter and applause), but Croker has not yet been canonized. I don't think he will be until his apotheosis takes place and death divorces him from Tammany Hall; and there is nothing I think to do with his poor lost head, there is nothing remains in store for it but the sawdust in the basket, and there let it lie.

Now, there are a few more thoughts—shall I call these thoughts—that I wish to present to you before I take my seat. I was rather disturbed by the brevity of all the previous speeches. The speakers said so much in every compact sentence that they got the whole story out. I want to say a word about his present power of appointing judges, for that is a very interesting question, and one which these people have got to take in hand sooner or later and rectify, or their liberties will indeed be gone. (Applause.)

In this State in the old days, when such men as John Jay and Samuel Nelson and James Kent rose to judicial office, they never had to ask the consent of any political leader. The Governor by executive appointment, appointed them to hold during good behavior; and we had a grand array of judges and chancellors of whom the people of the State of New York will ever be proud. But in 1846 the people of this State changed their policy. They thought that the creation of judges belongs to the people and they decreed and the question was then settled once for all in this State, never to be reopened, that all judges should be elected by the people in the districts in which they were to serve. And it is under that constitution and under that theory that we live to this day. And now I would like to have you tell me what the people have to do with the nomination or the election of our judges. (Applause.)

Who is it that selected Mr. Leventritt and his two associates to be presented to the suffrage of the people in the hope that in the overwhelming tide of Democratic victory they would go in with the rest? Did the people have anything to do with it? Did the Democracy of the districts in which those judges are to preside have anything to do with it? Did the delegates to any convention have anything to do with it—elected by the Democracy in their respective precincts? Never once. Not a man, not an association, not a machine, even, had a word to say upon the subject. They are named in the stillness of the night, after a secret convention which Mr. Croker held with himself. They are named by him alone, and if they hold office it will indeed be as he says—they will go in as his creatures. (Applause.)

I need not tell you that all the rights we have depend upon an honest and independent judiciary—those great inalienable rights that belong to every man and every woman, the right to life, to liberty, and the pursuit of happiness declared for us in the Declaration of Independence in 1776, all these other great and fundamental rights that every man's house is his castle, the winds may blow through it, the rains may beat through, but the minions of the boss can never enter it except by his permission. So, too, the cardinal maxim that no man shall be deprived of life, liberty or property except after a trial by his peers, and that no man charged with crime shall forfeit his liberty or his life until it has been proved to the satisfaction of all the twelve beyond a reasonable doubt, that he is guilty.

These, and such as these, are the great powers that are exercised by our courts, and if we lose them, if we impair them, if we put them in jeopardy, if we put them under suspicion, our liberties so far begin to be undermined. Why, justice and liberty are one and inseparable. They are interchangeable names for one and the same thing because justice is liberty regulated by law, and it is for the protection and cherishing of that great right that our courts are constituted. Now, I have said that a concrete example sometimes shows more than even logical argument what we are tending to come to the moment we lay down the independence of the judiciary, as it is proposed in this election to do. What becomes of a free and republican people? What becomes of a great republic, I would like to know, when its judges and its courts cease to be independent? Have any of you in your minds one great example that tells the whole story? Cast your eyes over the distant waters at the Isle Diable, a Devil's Isle indeed, where the devil's work has been done and nothing else for the last four years. Unhappy Dreyfus, innocent as he is, unhappy, the victim of a demoralized, corrupt judicial system. Independent? No, never a bit, but dependent upon the strength of the army and the military power and condemning an innocent at the command of unscrupulous military chiefs. It doesn't make any difference what kind of a chief it is, whether it is a military chief, or a civil chief, or an uncivil chief, or a Tammany Hall chief. It makes no difference. The principle is what I have been pointing out to you there. France has been laboring to establish her republic for one hundred years. Since 1870 her people have dreamed that they were free, and now when it turns out that any citizen can be brought before a military court and condemned without evidence at the command of military authority, where has their freedom gone?

It is never to be bounded. It will not be governed even by its own leaders. When you attempt to bind it and to crystallize it and put it into a machine, you open the machine and it flies out and escapes. That is the principle that we invoke, and to which we appeal on this occasion, in behalf of justice, in behalf of the integrity of our courts. We are no longer here as Republicans, no longer as Democrats, no longer as third party men. I believe there is a third party. (Laughter.) I am not sure. But we are here as lawyers, clients, citizens, independents all the time. (Applause.) Now, I have never made any bones about being independent on all judicial questions, and I believe that is true of the great majority of the lawyers at our Bar. They will vote for the best man up, whether he belongs to that party or to any other party, and that is what we appeal to here now. It will be the salvation of the State. It won't be due to the Republican party, although they have acted such a conspicuous and commendable part in what they have done. They put their ears to the ground and listened for the voice of the people. They found out what the people want, that the people want honest judges who had served their country well, to be continued in office.

Now, I think I ought not to detain you any longer. (Cries of "Go on!") I have told you about all I have to say. I have spoken of this great independent vote. And now what is the question that has gathered you here to-night? Not whether Judge Daly is the greatest judge that ever lived, not whether his associates on the ticket are the peers of Marshall, of Story and Kent. That is not the question. It is not even the question this time which are the better men: although I believe they are infinitely better than those that are offered to the suffrages of the people by Mr. Croker. But the question is, Shall honest judges be punished for doing their duty, and be punished by a man who has at his back all the wicked elements of society? (Great applause.) The only question is whether the people will stand by their courts and keep them free and clean. It is the third time that the Bar Association has appealed to the people of this city: once at the time of its creation. Why, it came into being for the purpose of punishing corrupt and dishonest judges. (Applause.) And it did its work nobly and well, and the people of this city by a vast and accomplished majority stood by it. It is too late now to recall the fearful havoc that was made by wicked judges in those frightful days. It appeals once more to the independent vote of the people in 1898.

What happened then? Why, then it was sought by another political magnate to foist on the people, to palm off as a party candidate a man

who had already betrayed them once, who had stolen their suffrages in the election of legislative officers. No boss was more strongly entrenched than he was then—hardly even Croker to-day. And his idea was nominate him, stick him in with the rest; he is a good Democrat; he will pass muster on the Democratic tidal wave. Well, the Bar Association appealed to the people. The people discovered what was going on, and there was a tidal wave, but it came from the wrong side of the State. (Laughter and applause.) And that unworthy judge was swept under by one hundred thousand majority. I think the Bar Association this time has done its full duty. I think the Republicans, in uniting with it, have done their full duty. Now, the question is whether the people of the city of New York care enough about this great question to do theirs. Care enough about it, if you are Democrats, to throw away your ticket and select a better one. If you are Democrats, vote for every Democrat you please, but mark the names of these three judges who ought, as you believe, to be re-elected.

If the people don't care enough about it and Croker's nominees go in, they will go in with the declaration, not to them only, but to every member of the court, every one of them as the day of the expiration of his term draws nigh, that you have not got to give an account of your stewardship and say whether you have been an honest and faithful judge, but you have got to settle your accounts with the chieftain and lord of Tammany Hall, and find out whether you have given him referees enough and patronage and orders and judgments enough to satisfy his maw. Otherwise you will be remitted to the shades of private life.

And then in that same connection let me point to you heroic Zola—that real hero who will yet march through the streets of Paris triumphant, with Dreyfus regenerated, by his side. (Prolonged applause.) There was a civil court. Did you ever read the proceedings in that court? Why, it would take Mark Twain himself, with all his capital powers, to describe it. The man was presumed guilty until he could prove himself innocent. He was never allowed to prove himself innocent, or to prove anything at all. There was no right of cross-examination. There was no law of evidence. Witnesses harangued the Court. Officers harangued the jury. The counsel of course, harangued and intimidated each other. (Laughter.) And poor Zola was sent off into exile—banished, but set free—the only way a Frenchman can find freedom to-day—by a civil court that had lost its independence and had to obey the same great power of the State.

Now, that is what it means for a judiciary of a nation to lose its in-

tegrity and independence, and I know of nothing that can save the people of New York and the people of America from falling into just such misery as this except that they resolve first, last, and always to keep their judges pure and the hands of the politicians off from them every time. (Applause.) If any of you begin to get sleepy I hope you will manifest it in the usual way. (Laughter and cries of "Go on! Go on!") I have a few more words I would like to say. (Cries of "Go on! Go on; keep it up all night!")

The President has issued his Thanksgiving proclamation, and there is one thing specially that we in the city of New York have cause to thank God for, and that is that in the midst of all this political turmoil, in all this partisan strife, there is such a thing as a public conscience. (Applause.) It is the voice of God whispering to the soul of man, so that the *vox populi* becomes really the *vox Dei*. All history shows, and our history in particular shows, how variously it works. Sometimes it whispers in the ear of one solitary individual man as the still small voice came to Elijah when he dwelt in the cave. So was it with Sam Adams twenty years before the Declaration of Independence, when it came to him as an abiding and never-failing conviction that America must be free from all foreign dominion. (Applause.) It glowed and burned there in his heart like a living coal. But few went with him; nobody dared express himself for that. And Franklin, who had apparently forgotten Sam Adams, said only a month before the battle of Lexington, that he had wandered far and wide in America and had never seen one man yet in favor of independence. But at last, when the electric spark was lighted at Lexington, it communicated that glowing heat from that burning soul through the souls of the whole people, and America arose and declared itself free, and maintained its independence. (Applause.)

We have another case like that in Mr. Garrison when he conceived the idea that whatever might become of him the shackles must be broken from the arms of the slaves. They took him with a rope—the gentlemen of Boston did—about his neck and dragged him through the streets, and that burning coal of conscience glowed in his bosom, and from that day the electric spark shot forth year after year, decade after decade, to other minds and other cities and other States, and at last that conscience which rested first only in his breast triumphed at last when Abraham Lincoln signed the Emancipation Proclamation. (Applause.)

Sometimes this public conscience animates and seizes a whole nation at once, as when it goes to war, and every decent citizen rallies to the

support of the Government and the flag. (Applause.) Sometimes it busies itself only with one question, as is the case now, and then this public conscience, this public opinion, takes the shape of the independent vote. And for one I say, thank God for the independent vote. (Applause.) Partisan as I am and always have been, I know that the independent vote is the salvation of the Nation. (Applause.) See what it has done in our time. Twice within the memory of almost the youngest here it has dictated the election of a President of the United States—once for the benefit of one great political party, and once again for the benefit of the other great political party.

Now, I believe, ladies and gentlemen, you all understand this question. If you all had a vote, if these women had a vote, there would not be any doubt about it. They are more interested in the preservation of an upright and honest judiciary, they for themselves, their husbands and their children, than any of us are. But if you will go home and think upon this subject and see where your steps are leading as you walk one way or the other, I believe we shall be safe on Tuesday, and on Wednesday we shall find that Judge Daly and his associates have been returned. (Great applause.)

*

V

ADDRESSES ON OCCASIONS

THE AMERICAN UNITARIAN ASSOCIATION

ADDRESS DELIVERED AT A MEETING OF THE ASSOCIATION IN
BOSTON, MAY 29, 1869

I know of nothing so well calculated to provoke a genuine change of heart as to be snatched from the turmoil of Wall Street, where the love of money, it must be confessed, is the root of some evil, and from the dust of the New York forum, where "even-handed justice" can hardly be said to "commend the ingredients of our poisoned chalice to our own lips," and to be transported in a single day into the heart of this Festival of Christian hospitality and fellowship in this far-famed temple of the modern muse. But you will pardon me at the outset for saying one word about that great city from which the misguided favor of your Committee of Arrangements had summoned me to preside over your board to-night. To "see ourselves as others see us" is a privilege rarely accorded to mankind, but it is one which all New Yorkers who subscribe to New England newspapers and periodicals enjoy to their heart's content, and to judge from the general tone of the New England press, in its comments upon our metropolitan infirmities, we should be forced to conclude that the only redeeming feature about us, the only thing that saves New York from succumbing to-morrow under the fate of Sodom itself, is the continued presence of the handful of righteous men who have strayed thither from this side of the Connecticut river, and still linger within her walls, and that to-night, when so much of that saving grace has been withdrawn from her, as I see scattered here and there about these tables, there is imminent danger of her being already visited with the same destruction that overwhelmed the Cities of the Plain.

But, after all, significant as is the name which you have given us, we are not half so black as we are painted; and in spite of your notes of warning so often repeated, it is hardly time yet for the "Lot" of Unitarians and New Englanders who tarry there to escape to the mountains lest they be consumed with the iniquity of the city. New York has her faults which show upon the surface, and the world knows them all by heart; but I wish I could find words to tell you of her great virtues, of her charities, boundless as the sea, of her grand system of education not second to your own; of her dauntless enterprise which takes the wings of every morning and flies to the uttermost parts of the earth, of the zeal of her churches, of the ardor of her public spirit and the glow of her private hospitality, and of her exhaustless pow-

er and ready will to join in every great and good work of the age. For just now it happens that we wish to dress her in her brightest garments, and to turn toward Boston her most alluring charms, because we are struggling and hoping to induce a certain young and eloquent divine, whose name I need not mention, to leave Boston and New England out in the cold, and to light and warm our hearths and homes with the fires of his glowing spirit. But, as everybody knows, he is very young, and very timid, and very self-distrustful, and so we beg you to say a good word for us, or at least to suspend, for the time being, the usual tone of your criticism upon us, lest his heart may fail him and he turn away from our embraces.

To one who by birth, by education and conviction is a Unitarian, in the original and historical sense of the name, the recurrence of this anniversary is full of meaning, and abounds in causes for congratulation and rejoicing. For who can recall, without a thrill of honest pride, the steady progress of this body from its first feeble and despised beginnings to its present recognized and equal position as one of the great branches and powers of the Protestant world, or remember, without enthusiasm, the great names that mark its history, the signal reforms it has accomplished in the general spirit of the Christian churches—its uniform alliance with the best culture of the age, the equal part which it has taken in every work of genuine reform, and its recent marvellous growth as well in numbers as in the power and the will to promote the best welfare of every community in which it has taken root? For who among us is so young as to have forgotten that bright morning of our history, when streaming from these Eastern skies, the light of the genius of Channing shone forth to enlighten and arouse America to the duty and dignity of free inquiry in matters of religion? And while Walker, and Dewey, and Gannett survive to link us to that golden era, why should we shrink from any comparison to which the generous rivalry of other sects may challenge us?

And then consider how the spirit of freedom in religion which those glorious pioneers invoked has already invaded the entire Protestant church, and has put to flight those horrid dogmas which once made up the staple of American theology. So that, to-day, you might search in vain throughout the so-called Orthodox congregations of the land for a single Calvinist whom old John Calvin himself would lift a finger to save from the stake to which he consigned Servetus. In fact, theology among us has gone through the same experience which medicine, in the same time, has suffered at the hands of the disciples of Hahneman. In both the old schools have been compelled to mitigate their doses and omit altogether their most noxious drugs, and the pa-

tient and parishioner alike refuse to accept those detestable prescriptions and articles which their grandfathers once swallowed without a grimace. So that this great work of reform already accomplished, at least, is secured to us, and if the doors of the last Unitarian church should be closed to-morrow, never to be opened, we should have the satisfaction of believing that it had not lived and labored in vain.

Nor is it from any local or sectarian vanity that we claim that the best culture of the age is with us, and that in the short period of our history as a distinct religious body, the growth of our noblest literature has gone, hand in hand, with the development of free religious thought. It is just a half century this very month, I believe, since Dr. Channing preached at Baltimore, at the ordination of Mr. Sparks, that greatest sermon of the century, which struck off the shackles which time and prejudice and superstition had forged on many an earnest soul. And it so happened that in the same year a great dignitary of the English Church, in reviewing the condition of America, was putting to the world that famous question, which has now been so triumphantly answered, "In all the quarters of the globe, who reads an American book?" And now, if you look at the results of that great awakening of intellect and of thought, which that prophetic period ushered in on this side of the Atlantic, and ask what share in the glory has fairly sprung from the heart of this denomination, what Unitarian will have cause to blush at the reply; or if you strike from the long and brilliant roll of our historians and poets, our essayists and philosophers, our men of science and men of letters, the names of those who have lived and died in earnest sympathy with the principles which we profess, would it be safe or prudent for any American to attempt an answer yet to the invidious question of the *Edinburgh Review*?

And, again, this church can fairly claim that to every work of genuine reform that has changed the face of American society in these fifty years it has lent a ready and a powerful hand. In the great cause of free education, in the promotion of true temperance, in the enfranchisement of women, in the relief of the outcast poor, we can point with pride to as many and as ardent champions and leaders in proportion to our numbers as the most evangelical of the rival sects. But who will deny us pre-eminence even in that great agitation and struggle for the overthrow of slavery, which at last in tears and blood was consummated as the crowning glory of our country? Thirty years ago our same great champion announced what was accepted, with but few exceptions, as the creed of his followers in these words, "We of the North sustain intimate relations to slavery, which make us partakers of

its guilt, and which, of course, bind us to use every lawful means for its subversion." And when the great death struggle with the monster came at last, our churches, decimated of all their youth, proved how fruitful was the ground in which that sacred seed was planted, and high upon the roll of the martyrs for liberty are the names of thousands which here and in the presence of these, their kindred, would be the most familiar and most tenderly cherished of all household words!

But no glance at the Unitarian world, however hasty, would be quite complete without a reference to the new and enlarged life and activity which has in these last years inspired its movements. It would be but a poor vanity for us to meet in these festive gatherings, year after year, if we had no better purpose than to boast of past achievements. Our past is after all but a beginning, and the great works which we have in hand and before us are to demonstrate whether the best part of this organization is under ground or above it. Happily for us, the days of religious controversy are over. We have buried the dead carcass of theology, and mean to leave not even a headstone to mark its grave, and henceforth the sum and substance of our creed, our ritual and our catechism are "to go about doing good." United and earnest work for humanity is beginning to be recognized as the true end and aim of church organization, and in this view the impulse which has of late been given to the life of the American Unitarian Association is worthy of special observation. It is a very little thing that in the last five years its income has increased ten-fold, that twenty-five per cent. has been added to the number of its churches, that the ranks of its clergy have been reinforced by large accessions; but it is a very great thing that all this has been done and is still doing, not for the purpose of propagating any peculiar views on disputed points of doctrine, but only and altogether, to aid in those great works of charity and philanthropy, in which all Christian churches and people can engage together, and which constitute the chief duties enjoined by him whose name they all alike profess.

Thus, then, we stand; proud of the past, busy in the present, hopeful of the future. And if we sometimes hear, as now and then we do, some discontented and despondent brother in our own family bewailing the failure of Unitarianism, we can only sympathize with him as with a conspicuous representative of an older sect, who has recently discovered and bemoaned the failure of Protestantism in general, so far as to admit the failure of individual Protestants and of individual Unitarians; but it seems to us that they both commit the same blunder

of taking what the philosophers call the subjective instead of the objective view of the situation, and confound the shortcomings of their own experience with the general decrepitude of the whole body.

But I must not forget that we have met to-night not merely to glorify ourselves and admire each other—delightful as the pursuit may be—but with the special purpose of bidding welcome and paying homage to the clergy of our faith, who have come up here in such vast numbers from every quarter of the country, leading each by the hand his better—the strong staff and the beautiful rod that sustain his faltering footsteps in the whole progress of his pilgrimage. It is so seldom that a mere layman gets a chance to speak his mind to the clergy, that I almost hesitate to utter in their reverend presence the sentiments that the situation excites in my mind, and especially when my eyes rest upon the commanding form of that stern disciplinarian, the renowned pastor of the Church of All Souls, by the drippings of whose sanctuary my spirit has so long been watered. I shrink from the responsibility which has been forced upon me. I do not know who is responsible for having placed me in this position and juxtaposition. You might just as well ask a school-boy to reveal to you the deficiency of the system of the schools, and then, when you stood him on the platform to explain it, have his uplifted eye catch the still more uplifted arm and threatening rod of the master under whom he has so long sat. The fact is that all the year round, on all the other three hundred and sixty-four days, they have us at their mercy, and work their own sweet wills upon us and ours; but when they enter these walls to-night their priestly robes have fallen from their shoulders, and here and now the pulpit and the pews alike are razed to the ground, and the sheep and the shepherds, in one confused and indistinguishable flock, are feeding at the same tables, and drinking from the same fountains, or at any rate from the same Cochituate. I will not, then, disturb this beautiful equality and harmony by lavishing upon them those honeyed compliments and that tireless praise which their ears are doubtless wide open to receive, lest they might too soon be tempted to resume that wonted mastery over our souls and hearts which for this one hour they have consented to relinquish, but leave it to their fertile fancies to imagine the love we bear them, and to read upon your sympathizing faces that glowing gratitude which words would turn to ashes in the vain attempt to utter it.

It will now be my duty, in virtue of the brief authority with which I have been clothed, to introduce to you some of these objects of our ardent devotion, and I wish that I might call upon them all in turn, in

the order of the alphabet, to throw each his crumb of comfort on these your emptied tables; but as they are five hundred in number, unless they were cramped into narrower limits than the clerical nature would meekly submit to, or has learned by habit to undergo, I fear that, before we began to reach the end, the opening chorus of the Peace Jubilee would drown their faltering accents; for what would the united voices of even five hundred clergymen avail in conflict with the swelling throats of twenty thousand songsters, backed by the tumultuous and brazen uproar of all the drums and the trumpets, the organs and the stringed instruments of the land, in the first ecstasy of their triumphant union? And so I shall be forced to content you with a passing glance at a few of the lions of the exhibition; and I believe that the moment is timely, and that the lions of the pulpit, like those of the forest, are seen and heard to best advantage, and with greatest safety to the spectator, immediately after a hearty meal, such as this of which they have now partaken. But we have the authority of Shakespeare, to be sure, for saying, that a lion among ladies is a most dreadful thing:

"They will roar you as gently as any sucking dove;
They will roar you an't were so many nightingales."

You will find them all in their sweetest humors, and you would hardly suspect that beneath the velvet softness of the touch with which they will approach you, they carry concealed those sharp and dangerous weapons of attack with which in hungrier moments, when driven by the raging torrents of ecclesiastical wrath, they have sometimes struck at the infirmities of their own congregations, or blasted the hapless enemies of our liberal faith.

Let me mention but one or two of them, as I find I have already transgressed beyond the limits that have been prescribed me.

There is one lion who has endeavored to give me some reasons why sentence should not be passed upon him according to law, but I cannot recognize their force. He wears upon his hale and hairy front a garland of universal praise, which out of his own head he has woven from three idle and incongruous words, "If, Yes, and Perhaps," and who from his mischievous glances is even now studying some plan by which he may undo me as his "Double" undid him. He has whispered to me in confidence that, if he comes before you at all, he is armed with one new possibility, with two additional exaggerations, and some bits of fancy which to-night will be better than any sober faces. My own pastor, too, the particular lion with whose roar I am most familiar, but which nevertheless has for me more terrors than all the rest to-

gether, unwilling that one of his own subjects should have the last word upon him, is already whetting his tusks and shaking his mane, and I have great fears for my personal safety when he shall be ready for his fatal spring upon this platform.

The eloquent pastor of the Church of the Divine Unity, in his recent letter of farewell to his people, has intimated, as I understand it, that to Boston he has said all at present he has to say, which I suppose is the reason why he has made me promise that to-night he shall be excused from saying anything, although I could have wished for nothing better than that he should have given you one finishing touch before he took the train for that larger field where I can assure him he will find an abundance of raw material to work upon, which even ten years more of his herculean labors we can hardly expect will bring to the same state of unqualified perfection to which he has brought his congregation.

And here you see all about you many others of the lions of the exhibitions, but as I am less familiar with their personal habits, and know not where it is quite safe to approach them, I shall hardly venture to tread upon their toes. I need not bespeak for them your most earnest attention, for you will remember that as they do not speak to-night from their accustomed pulpits, so you are not reposing in your familiar pews, and therefore no nodding will be in order, except the wakeful nod of approval and applause. And so I will close this introduction with the closing words of the prologue to the old comedies—*Ore favete et aures erigite, et animus attendite omnes*—which for the benefit of the ladies, and of those clergymen, if any there be who have forgotten Terence, I will freely translate:—

“With smiling favors grace our stage to-night,
Prick up your ears and hear with all your might.”

WOMEN IN MEDICINE

ADDRESS DELIVERED AT THE COMMENCEMENT EXERCISES OF THE
WOMAN'S MEDICAL COLLEGE OF THE NEW YORK INFIRMARY
FOR WOMEN AND CHILDREN, 1873

The general subject of woman's appropriate sphere in the various employments of civilized life is by no means a new one, or peculiar to the present age, or to the activity of modern society. It is probable that no marked progress in civilization or in the moral or social advancement of the race has ever been accomplished in any age or country in which woman has not borne an important, though generally a silent, part. What could she do and how much might she be allowed to undertake were already questions of practical interest when our first parents came together as partners for life in the Garden and will doubtless continue to enlist earnest attention as long as their posterity shall increase and multiply and replenish the earth—and the answer will constantly be more and more pronounced, and at last universally accepted, that whatever woman can do well she should be allowed to do with her might, and that whatever occupation she has the will and the courage to undertake she shall at least be permitted to try.

Even the political aspect of the subject, which has of late occupied the attention of many learned and thoughtful persons and many vulgar and idle tongues, presents no new features and has called forth but few new arguments in our times. In the golden age of Grecian civilization and literature, it was the theme of serious discussion as well as of dramatic entertainment in the capital of Attica. Aristophanes, whose plays exhibit, with startling reality, the daily life and the habits of thought of the citizens of Athens, four or five hundred years before the Christian era, weaves out of it the plot of one of his most popular comedies. He represents the Athenian women leaving their husbands and families in the dead of night,

"While yet the Heavens by the Sun's team untrod
Had took no print of the approaching light,
And all the spangled host kept watch in squadrons bright,"

and repairing together in crowds, and in the borrowed garments of their sleeping lords, to the usual scene of the General Assembly, inspired by a common purpose to seize and hold in their own hands the reins of Government, and to gratify their long repressed ambition, not

merely for equal suffrage, but even for exclusive and despotic sovereignty. Protected by the friendly darkness, they assemble and organize in safety, and by a single vote absorb for themselves the entire powers and functions of the fierce democracy and overthrow at one blow the liberties of the torpid mankind. Their *coup d'état* is embodied in this brief decree "that henceforth Athens shall be governed by women alone" and they then proceed to the Election of Archons from their own number and fill all the minor offices of state with incumbents of their own tender sex. So far the scheme works to perfection, but unhappily, once launched upon the boundless sea of discussion and debate, the tide of speech overwhelms them, and when they come to the practical administration of affairs, they are wholly unable to hold their tongues, now set in resistless motion, and the assembly breaks up in a confusion compared with which that of Babel was quiet and peaceful.

So, too, the ultra conservatives on the woman question had their representatives in the age of Pericles, for when that matchless orator and statesman came to deliver his masterpiece of eloquence, the funeral oration over those of his countrymen who had fallen in the first Peloponnesian war, he concludes it by a few words of advice to his female hearers, in which he declares that female perfection may be summed up in a single sentence, that she is the best woman of whom the least either for praise or for blame is heard among the men. Of course, Pericles was only indulging in poetical license when he said that, and that he had no practical faith in that unmanly sentiment is clear from the fact that when the renowned Aspasia, the most learned and distinguished woman of that age, came from Miletus to Athens, leading in her train wherever she appeared philosophers, warriors and statesmen, the great master and ruler of Athens surrendered to her charms without discretion, and yielded to her control his own imperious will, and with it too much of the conduct of the States, and fifty years afterwards Plato, in discoursing upon eloquence, indulges in the keenest of satires upon Pericles and upon oratory itself, by declaring that that very funeral oration, which has come down to us as the one illustrious monument of the genius of Pericles, was in fact written by Aspasia herself—truly a terrible answer to his criticism upon her sex which it contained. So then, when we read in the newspapers of to-day, that the ladies of Utah, whose numerical strength, I suppose, entitles them to lead their sisters in the other States to the polls, have rallied in force at the ballot-box and elected a Mormon delegate to Congress, to the complete discomfiture of all the Gentiles; that a jury in Nevada of

whom six out of the twelve were women, have actually rendered a verdict of guilty against a man who had murdered another in cold blood for merely speaking to his wife; that three women have been admitted to the Bar in Iowa; and that a female justice of the Peace in Wisconsin has officiated at the marriage of an effeminate gentleman of Milwaukee to a strong-minded woman—we do but observe signal instances and illustrations of a tendency towards complete development which the sex has manifested for many a thousand years.

But it is time to dismiss this branch of the subject, however fascinating it might promise to be. This is not a woman's rights convention in any general acceptance of the term, and in coming together to bid these young ladies a welcome and a Godspeed on this their entrance into their noble professional life, you and they may well claim to be spared anything more than a passing glance at such glittering generalities of womanhood.

There is one peculiar feature of modern society that introduces us directly to the appropriate topic of the hour. Doubtless the normal and natural condition of civilized life is that where the relative numbers of the sexes are equally balanced, and where that balance is held even through every period from infancy to old age, when the slight excess of males, which the watchful providence that governs the world sends into it, suffices only to compensate for the greater hazards and exposures to which they are subject, and which inevitably in the workings of the same providence reduce their number as life advances, to equality, again, when there is a man for every woman and a woman for every man, and no odd ones of either sex demanding a separate or peculiar provision in the social scheme. But so long as new worlds remain to be conquered by the resistless energies of the race and the boundless resources of a new Continent invite us to develop them, so long as the restless ambition of mankind propels them to follow the Star of Empire westward, to take possession of the vast estates that there await them, it is idle to hope that this natural balance of power and of numbers between the two sexes can be present in the older and more settled portions of the world. The natural laws of emigration take the men first and almost alone, and while they are hewing their way to the Pacific, levelling the forests and opening the roads, building the bridges and founding the new settlements for the future homes of the people, their gentler sisters, who can take but little part in those rugged enterprises, are inevitably left behind, and now for two or three generations, so impetuous and well sustained has been this onward march of tireless men across the continent, that here in

the older States, we present the wholly anomalous and unnatural condition of a great excess and preponderance of women, and this chiefly of women in the very prime of life, whose natural partners have thus unconsciously abandoned them. Even before the late war the census of 1860 showed that in the New England States and New York alone, there were seventy-five thousand more women than men between the ages of twenty and thirty alone. The full details of the new census of 1870 have not yet been published so as to enable us to state the exact disproportion at the present day; but when you consider with what marvelous rapidity and fullness the tide of emigration has flowed on in the last twelve years, how many new territories have been opened, and what vast works have been projected and prosecuted in the new States of the West, and how many thousands of young men, in the very flower of their age, have in the same period been devoured by the ruthless ravages of the great war, it is safe, I think, to estimate that to-day in New York and New England there are at least one hundred and fifty thousand more women than men in that active and efficient age between twenty and thirty, in which the whole destiny of their individual lives is planned and decided. And it is to be noted that this extravagant preponderance arises not among the lower and less educated classes of society, not among the foreign immigrants, who seem generally to take their women with them wherever they go, nor yet among the wealthy and most luxurious citizens, whose young men even share but little in the enterprise and ambition of the nation, but in the great middle class of our native population which represents the very brain and muscle of the State, and whose young women are the fit and fair counterparts of the enterprising and courageous youth who have gone forth to battle with unsubdued nature, and to achieve the true glory which is promised to the founders of States.

Now the problem which this interesting situation presents is what we propose to do with this great array of young women, this great array of the unprotected females of society, whose natural guardians and companions have deserted them—or rather what shall they be permitted and encouraged to do for themselves, for it is perfectly obvious that, in the main, and this makes the problem easier to solve, they have got to take care of themselves. One thing is clear. They do not follow and don't propose to follow the men. Although a hundred and fifty thousand young men of glorious stature and promise on the Pacific slope are waiting and hoping for them with arms extended wide, they won't go to them. Now and then, at long intervals, a ship-load of them has been made up and carried to what would seem to be their

natural destiny, but ninety-nine in every hundred refuse to budge an inch, and insist, with the true obstinacy of woman, in staying here, where they have been born and bred, and taking here their chances and their rights; and the question remains, what shall those chances and those rights be? Those who frown upon woman's doing or trying to do anything say: "Oh, let them marry!" But they cannot marry unless they marry each other. Husbands for a hundred and fifty thousand of them are absolutely out of the question. But once more Mr. Noodle exclaims, "The nursery is woman's true sphere!" But these unfortunates have no nurseries of their own, and cannot get any, and they are altogether too independent and aspiring to be the drudges and the slaves of other people's nurslings. In other days they would have been generally condemned to the drudgery of the needle, and have wasted their hearts' blood and their lives in the struggle for the sickly and precarious existence which that might afford; but now the sewing machine enables one woman to do what was once the work of a dozen, and so they have escaped that wretched fate. But work they must, as the sole and indispensable condition of life and honor, and the very situation shows that society stands in need of their labor, to make up for that which it has lost in losing an equal number of young men. What those would have done, had they remained among us, must be done by these sisters of theirs, who are left in their stead, or else it must remain undone.

Fortunately, these social problems solve themselves as the times demand their solution, and will not wait upon the speculations of philosophers or the tardy progress of legislation. The young women have settled the matter for themselves and driven by necessity which has sharpened their wits, guided by their sensitive perception of the fitness of things, and sustained by their natural energy and patience, they have made their way, with a courage which would have done credit to their brothers, into many an honest occupation which until recently was closed against them. To-day in a thousand stores where twenty years ago the presence of a woman behind the counter would have been regarded as more than questionable, you find the whole business of the establishment conducted successfully by well-bred and intelligent women. In telegraph offices and designing rooms, publishing houses and skilled workshops, thousands of them find appropriate and lucrative employment. In the lighter mechanical arts their delicate and cunning fingers, their superior taste and skill, are even, in many cases, displacing the rival hands of under men. In the cultivation of the fine arts they are developing undoubted genius, and it is no unusual thing

in the schools of art and the academies of design for young women dependent solely upon their own exertions, and educated almost by themselves, to win the gold medals and the first prizes against the most vigorous masculine competition, and American literature would forfeit some of its brightest laurels if deprived of the rich treasures which it has drawn from feminine brains. And yet society owes woman far more than it has thus far even thought of paying. There is no doubt that the standard and thoroughness of female education in this country are infinitely below what they should be, although better than in any other quarter of the globe. Not only their own good and happiness but the general welfare of the whole people demand that our women shall be more liberally and largely educated than they have ever yet been. For two hundred years and more the whole wealth of learning and science among us has been lavished, exclusively almost, upon the boys and men, and the girls have got along as they could, or been put off even when better might have been afforded them, with the empty husks of superficial studies and idle accomplishments.

This one-sided experiment has been tried long enough, and we cannot fairly hope for any general and decided advance in the standard of the American character, until the truth comes to be not only understood, but acted upon, that women must be as well educated and as richly endowed with all mental culture as men. You cannot hope to elevate the men of the nation above their present plane of mind or of morals unless you elevate the women along with them.

Let me read to you on this point what Sidney Smith wrote in the *Edinburgh Review* more than sixty years ago—for it is just as true and pertinent in New York to-day as it was in Great Britain in 1810:

"If the education of women were improved," said he, "the education of men would improve also. Let any one consider (in order to bring the matter more home by an individual instance) of what immense importance to society it is whether a man of first rate fortune and distinction is well or ill brought up, what a taste and fashion he may inspire for private and for political vice—and what misery and mischief he may produce to the thousand human beings who are dependent on him. A country contains no such curse within its bosom—youth, wealth, high rank and vice form a combination which baffles all remonstrance and beats down all opposition. A man of high rank who combines these qualifications for corruption is almost the master of the manners of the age and has the public happiness within his grasp. But the most beautiful possession which a country can have is a noble and rich man who loves virtue and knowledge, who without being feeble

and fanatical is pious and who without being factious is firm and independent, who is a firm promoter of all which can shed a lustre upon his country or promote the peace and order of the world. But if these objects are of the importance which we attribute to them, the education of women must be important, for the first seven or eight years of life seem to depend almost entirely upon them. It is certainly in the power of a sensible and well educated mother, to inspire within that period such tastes and propensities as shall nearly decide the destiny of the future man; and this is done not only by the intentional exertions of the mother, but by the gradual and insensible imitation of the child, for there is something extremely contagious in greatness and rectitude of thinking, even at that age, and the character of the mother, with whom he passes his early infancy, is always an event of the utmost importance to the child. A merely accomplished woman cannot infuse her tastes into the minds of her sons, and, if she could, nothing could be more unfortunate than her success. Besides, when her accomplishments have been given up, she has nothing left for it but to amuse herself the best way she can, and, becoming entirely frivolous, either declines altogether the fatigue of attending to her children, or, attending to them, has neither talents nor knowledge to succeed, and therefore here is a plain and fair answer to the question: Why should a woman dedicate herself to this branch of knowledge, or why should she be attached to such a science? Because by having gained information on these points she may inspire her son with valuable tastes, which may abide by him through life and carry him up to all the sublimest of knowledge, because she cannot lay the foundation of a great character, if she is absorbed in frivolous amusements, nor inspire her child with noble desires, when a long course of trifling has destroyed the little talents which were left by a bad education."

Never did that great man utter nobler truth than this. So, then, for the sake of all men we demand a better chance and larger opportunities for all women, and, even if every woman might still hope to fulfill her natural destiny to marry and become the mother of many children, they should not as a rule be sacrificed, as they have been to their brothers, but receive as broad and deep a culture as we can give to anybody. And so we hail with earnest hope the fact that Harvard, our best and oldest seat of learning, has already opened the door for women a very little—hardly more than a crack as yet—and received them under certain restrictions to its University Lectures. Of course they are very conservative and timid at first, even at Harvard—following closely, to begin with, the counsel of St. Paul to Timothy, "Let the

woman learn in silence, with all subjection." But the door, once open, cannot be shut, and by-and-by it will open wider and wider. Recently, too, the most advanced and liberal of the English Press have been advocating the project of a University of the very first class for women and that is what the women of America must strike for and must have, so that by-and-by, when our boys go to Harvard and Yale, their sisters will no longer have to leave off at the point where they begin, but will keep pace with them and meet them when they come out on an equal footing.

But again we must come back to these anomalous young ladies to whom the State refuses husbands, and who must each be her own staff and stay through the pilgrimage of life. If for others a superior education is of such profound importance, how much more so for these. If they are to fight the battle of life single handed, shall they not go forth armed with the best weapons, and bucklered with the impenetrable shield of a sound and thorough education?

And now among the whole round of human employments, what shall they do, or rather what shall they not do, if so disposed? Can we deny to them the right to try all things and to hold fast to whatever is best for them? The Declaration of Independence, I know, has generally been considered, in a political sense, as of the masculine gender, but socially, have not women the same inalienable rights to life, to liberty, and the pursuit of happiness as the most pronounced male among us? and what does it mean but that these women have a perfect right to live according to their light, and unlimited liberty to pursue happiness by the best use of the noblest faculties with which God has endued them? And if any of them have the heroic courage and self-denial, as these before us seem to have, to devote their lives to the noble calling of the study and practice of medicine, for the relief of their fellow mortals in the misery of disease and the agony of death, who shall say them nay? The eternal fitness of things is on their side in this matter. The first woman who came into the world was a nurse by nature, and the last lady who came from Paris, and who speaks to you this evening, is a learned and skilled physician, and all who have lived between them have had the care of the sick and of the dying as their peculiar and most sacred duty. I do not understand that they propose to force their medical attendance upon unwilling men, though worse things might happen to some of us than to be treated and tended by some of them. But they mean to devote themselves to the treatment and cure of the diseases of women and children, and as long as nine-tenths of every doctor's bill we are called on to pay is for the infirmi-

ties of women and the disorders of little children, I do not see how any respectable argument can be suggested against their project. Indelicacy has been heedlessly imputed to them, but that argument is like the boomerang which always recoils to plague the inventor, for if there is any indelicacy about it, it is that to which the conventional usage of centuries has made us callous, of subjecting our women and all the most sacred mysteries of their being to the mercy of medical treatment by any of the other sex who happened to have a diploma. To the honor of medical men generally be it said that this implicit confidence has rarely been abused, but when the medical schools of Edinburgh and Philadelphia have exhibited to the world the shocking spectacle of the male students mobbing a few innocent and unprotected women who had committed no other offense than that of desiring to sit with them at the feet of science, even the faculty must admit that the danger of an abuse of it is at least possible.

But after all, this question must be decided by the women of the land and not by the doctors for them. The medical men argue, fairly enough, that the old system has worked well, that their fair patients have made no complaints and have cheerfully accepted their services in all the trying emergencies of life. This is true enough, but then it must be remembered that hitherto the ladies have had only Hobson's choice in the matter. They have accepted men for their physicians because there was nobody else to choose, and they had either to take them or go without. In order to have the issue fairly tested and determined we should have an adequate number of equally skilled and educated female physicians within reach of the community, such for instance as this Institution promises to send forth, and then submit the question. The whole sex must pronounce the verdict, and all must be impanelled without any of that close challenging which would exclude intelligence, and shut out those who have formed or expressed an opinion. Could this be brought about, the gentlemen of the faculty would have to look well to their laurels, and would stand a chance of losing some of their richest spoils.

Again, it is urged that woman's own weakness and natural infirmities are a hopeless obstacle to her steady and lifelong pursuit of so arduous and exacting a profession as medicine, and that her physical powers will not stand the strain. But this, too, is their look-out and not ours. Possibly it may so turn out, but nobody can tell until they have had a fair trial. When, however, we consider what women have endured ever since the flood—that no toil has been deemed too severe and no occupation too exhausting for them, provided only they were

only serving the caprice of man and ministering to his wants and passions, and that their patience and endurance have in the long run survived every test—it is probable that this objection has no foundation, and arises from too tender a consideration for them on the part of those who would prefer to exclude them from the professional contest.

There is one other suggestion that the subject presents, too obvious not to be noticed. I refer to the infinite service which a body of women, of high culture and thoroughly versed in the art of medicine, may render to their non-professional sisters throughout the country in instructing them in the laws and mysteries of their own natures, and the offices and duties which are certain to fall to their lot in the course of nature, as they take their places as wives and mothers in the land. The ignorance even of our best educated young women in these respects, as everybody knows, is absolute and universal, and they may not receive the knowledge from men. For the want of a little professional advice, thousands of sensitive women have suffered years of hopeless and unnecessary agony, and would go down in silence to their graves even, rather than unseal their lips to an adviser of the sterner sex, when the opportunity for consultation with one of their own would have saved them. And then, too, what invaluable aid and support might they not render to our young mothers as to the care and treatment of the helpless infants that are entrusted to them. One would think that there would be a traditional or hereditary transmission of this knowledge from mother to daughter, but the universal experience is that little of the kind takes place, and every young mother has to learn it for herself by desperate experiments upon her earliest offspring, so that the wonder is that our first children live to grow up, or come to man's estate with constitutions unimpaired by the trying ordeal to which their infancy was subjected. "The Lord smote all the first born in the land of Egypt, from the first born of Pharaoh that sat on his throne unto the first born of the captive that was in the dungeon;" and if we would save our first born from slaughter, we cannot do better than encourage their mothers to take instruction from these learned and skillful persons of their own sex, who proffer their services to that beneficial end.

The great struggle on the part of women who aspire to practice medicine as a profession has been to overcome the difficulty of acquiring the necessary instruction and education to qualify them for its pursuit. While as yet there were no colleges like this for their exclusive training, the obstinate prejudices of medical men and boys

threatened to shut them out altogether from every possible avenue to the requisite knowledge. The wards of hospitals were closed against them, the door of the dissecting room was rudely slammed in their faces, and the benches of the medical school were made too hot for them by the undisguised hostility of the male students. But science is sexless, and wisdom knows no such distinction in distributing her rewards among her votaries. And it is well to forget, if we may, the rude and indecent assaults that men who dishonored their degrees have sometimes committed against these vestals at the shrine of science, and to contemplate the more cheering signs of the times that warrant the belief that the best men among the faculty are determined no longer to tolerate the injustice and the scandal of any attempt to close the gates of knowledge upon women.

Even in Edinburgh, where the hostility to the movement on the part of the students was most passionate and violent, in which they were encouraged too by some of the most renowned names in the Faculty, we learn that at the recent annual meeting of the Proprietors of the Royal Infirmary, from which women had previously been excluded with contempt, a closely contested election for managers turned wholly on the question of admitting ladies to the wards of the Infirmary for the purpose of clinical instruction. The old Board had been guilty of shutting them out, and went into the canvass on the platform of continued exclusion. But after an animated discussion, a division was taken and the Reform nominees, the friends of the women, were declared duly elected by a vote of 177 to 168. At the same meeting it was proposed to consider the advisability of enacting that henceforward all registered students of medicine shall have full admission to all the educational advantages of the Infirmary without reference to sex. The defeated minority made objection to this Resolution, that they had not received the statutory month's notice of the intention to introduce it. The friends of the women, however, persisted in moving the resolution which was unanimously adopted, their opponents having previously left the room.

In the great continental schools and hospitals women seem to be treated with as much courtesy and liberality as men. In August last it was announced by authority that the Emperor of all the Russias, who had already emancipated the serfs of his mighty Empire, and seems disposed now to turn his august attention to the enfranchisement of women, has intimated to the University of Helsingfors his pleasure to permit women to attend the medical lectures at that Institution. And in Moscow, ladies are now to be admitted to the lectures

on Medicine and to graduate, provided they can pass the usual examinations. It has been found impossible as at first intended to institute separate lectures and class rooms, so that both sexes will meet in the general class rooms. The council of the University have fully confirmed the action of the School of Medicine in this matter, and the women may therefore expect to enjoy their privileges undisturbed by doubts or fears.

At Zurich, several women have already graduated with distinction at the School of Medicine, and have taken honorable places in the Faculty in actual practice in the cities of Europe. At Vienna and Milan, they share freely in the privileges of medical education, and at Paris the Minister of Public Instruction by a positive Governmental order secured the privileges of a perfect professional education for our countrywoman, Miss Putnam, whose recent accession to the Faculty of this College for women promises to add largely to its usefulness and authority.

In England and America alone, the finest and most enlightened countries of the world, women are still practically excluded from the possibility of a medical education in any of the great schools, although in some places the rudeness of this exclusion is aggravated by a concession of their legal title to enjoy it. The stubborn and deep-rooted prejudice of the Anglo-Saxon race seems always to be the last to yield, and skulks behind the mask of a false conservatism. But even there the light is creeping in. The most advanced of the English and American faculty already disavow all sympathy with the narrow professional bigotry which insists upon clapping the padlock on the mind of woman. At the conclusion of his inaugural address in November last, the Professor of Chemistry at Newcastle in England, Mr. Marreco, stated on behalf of himself and Professor Herschell that they were prepared to receive lady students on exactly the same terms as other students, and in London, in February, 1872, Prof. Acland gave notice that at the next meeting of the general Medical Council he would bring forward a motion for the appointment of a committee to consider the expediency of admitting women to medical education and to report upon the most desirable means of educating and examining them. In this country, and in New York especially, the heroic career and brilliant professional achievements of Dr. Elizabeth Blackwell, the founder of this Institution, have done much to disarm her medical brethren of their prejudices, and the association of many of their eminent professors with the ladies in the Faculty of this College, and the names of Parker and Taylor and Flint, of Smith and McCready, of

Loomis and St. John on its Board of Examiners, are a sure guarantee that the experiment of the medical education of women is here to be tried to its last results with the full sympathy of the most eminent masters of the science.

But I have already trespassed beyond the half hour which the partiality of the Committee allotted to me, and can only say in conclusion to these young women who graduate tonight, that the success of that experiment rests mainly with them and such as they. It is certain that no young woman would voluntarily resign the usual pursuits of their sex, and adopt the severe and arduous profession which they have chosen, unless they were most deeply inspired with an earnest and overwhelming purpose to pursue it for its own sake and for the vast benefits which they may hope by its means to confer upon their fellow women. And in the name and behalf of the countless patients who are waiting the coming of these doctors, we welcome them, each according to her degree, to the honored place in the community which by industry and skill they may aspire to win.

LORD HOUGHTON

ADDRESS DELIVERED AT THE RECEPTION GIVEN TO LORD HOUGHTON,
BY THE UNION LEAGUE CLUB, NEW YORK, NOVEMBER 23, 1875

In seeking this opportunity to pay our respects to the distinguished gentleman who now honors us with his presence, we certainly could not hope by our modest reception to equal the bounteous hospitality which has been showered upon him at the hands of private citizens in every city that he has visited—or to add to the warmth of that cordial greeting which has attended his steps throughout his wanderings in the United States. The familiar maxim by which in the earlier years of his manhood our guest is believed to have trained his Muse, appears to have been practically applied in an altered sense to his lordship at every stage of his American pilgrimage—*Nulla dies sine linea*. No day without a line to come to dinner. Whatever pleasures and whatever perils belong to that peculiar institution of the Anglo-Saxon race, as Emerson calls it, he must have already fully experienced. We must congratulate ourselves and him that he has happily survived them all, with health and strength still unimpaired, for, having done so, he stands before us to-night a living argument to the robust and hardy vigor of the British constitution, of which he is so worthy a representative. Neither can we offer him, at a meeting of the Club, the charms of the feminine presence with which, if he was not misreported on a recent occasion, he has been honored and delighted during his stay among us. It was only yesterday that I read in the newspapers of a high tribute paid by him to the wit and the beauty of the women of America. Had we known in season that his Lordship cherished that gentle enthusiasm, had we supposed it possible that a peer of England would be open to those tender influences—we might have put in practice the theory of natural selection as the occasion would have justified, and have surrounded him on this last night of his stay in America with such a glittering array of loveliness, as would have set his “poet’s eye in a fine phrenzy rolling,” and perhaps some future edition of “Palm Leaves” or of “Poems of Many Lands” would have contained some stanzas to the women of the West by Lord Houghton, that in delicacy and sweetness would have matched the lyric tributes which Monckton Milnes was wont to pay to the far-famed graces of the Orient.

No, we have sought this occasion not so much for his own pleasure as for ours, having little to offer him but the honest expression of that high consideration and regard which has long been felt for his Lordship

in the United States. We desired an opportunity to look upon one whose name has been associated for a whole generation with those things that tend to elevate and improve the condition of mankind. Many of us from childhood have been accustomed to hear of him as one of the men of letters of England, who, by their devotion to good learning and polite literature, have been missionaries of knowledge and pleasure to all who speak and read the English tongue. Some of us have read his books.

And books, we know,
Are a substantial world, both pure and good,
Round these, with tendrils strong as flesh and blood
Our pastime and our happiness will grow.

We have heard by tradition and report of his generous sympathy for humanity in all its suffering forms, that the cause of oppressed nationalities has found in him a constant advocate and friend—whether Poland, the bleeding victim of her rapacious neighbor—or Italy, suffering the accumulated miseries of centuries—or Greece, the classic heir of ancient woes. We have been told also that the promptings of a generous and manly heart have led him to support at home all measures for the reform and amelioration of the criminal classes, and to alleviate the distresses of the poor, and that he wears the well-earned title of a friend of humanity. We have not forgotten his stout assertions of the right of freedom in religion, and remember his statement made when it was not yet altogether popular—that “religious equality is the natural birthright of every Briton.”

But, after all, the chief and immediate title of Lord Houghton to our special regard and gratitude is in the manly stand he took with certain other liberal statesmen of England on the occasion of our late Civil War, by which they proved themselves the steadfast and effective friends alike of their own country and of ours. Not more from political considerations, I think, than from a natural, instinctive, Anglo-Saxon love of fair play—because they could not help it—they insisted—and none more emphatically than our guest of this evening—that England should observe a real and honest friendship to America. To borrow words of his own:

“Great thoughts, great feelings came to them,
Like instincts, unawares.”

He will pardon me, I know, for refreshing your recollection from the Debates with regard to one or two things which he said in his place in the House of Commons. When the seizure of the *Alexandra* was under discussion, in April, 1863, which you will remember as

one of the very darkest periods we ever passed through—it was in that month that President Lincoln, in accordance with a resolution of the Senate, set apart a day of fasting and prayer for the whole people to humble themselves before Almighty God for the deadly scourgings of the war—it was then that, after hearing some violent words spoken in Parliament tending to measures which, if adopted, would force us in our crippled condition into the desperate extremity of war with England, he said, after regretting the violent language to which he had listened:

“Sir: I trust that peace will continue for many reasons, but above all for this. For us to talk of war, for England, armed to the teeth—England, with all her wealth and power, to talk of war against a nation in the very agonies of her destinies, and torn to the vitals by a great civil commotion, is so utterly ungenerous, so repugnant to every manly feeling, that I cannot conceive it possible. Honorable gentlemen opposite talk of acting in a gallant spirit. Is it to act in a gallant spirit for a strong man to fight a man with his arms tied, with his eyes blinded? And that is what you propose to do—you, with the wealth and power of England—when you seek to promote war with the United States.”

Happily for us such friendly and generous words and counsels prevailed, and we escaped that untold calamity. And again, a little earlier, when our blockade, the maintenance of which was so absolutely essential to the successful prosecution of the war, pressed so hard upon their own domestic prosperity as to provoke appeals to the British Government to disregard and ignore it, he scouted the idea, and after arguing that the blockade was as effective as in the nature of things it was possible to make it, he said:

“I have always regarded a disruption of the American Union as a great calamity for the world, believing with De Tocqueville that it would do more to destroy political liberty and arrest the progress of mankind than any other event that can possibly be imagined. * * * The Americans are our fellow-countrymen. I shall always call them so. I see in them our own character reproduced with all its merits and all its defects. They are as vigorous, as industrious, as powerful, as honest and truthful as ourselves. And I can never for a moment disassociate the fortunes of Great Britain from the fortunes of the United States of America.”

No wonder that Lord Houghton finds many friends in America. I need not assure him that we appreciate and reciprocate these generous sentiments, uttered in those dark hours of our sorest need, and that we

join our prayers to his for perpetual peace and friendship between these two nations, that are of but one interest, one tongue, and one blood.

In the name, my lord, of this Club, which may modestly claim to represent a portion of the intelligence and the public spirit of New York, supported as it is to-night by the presence of her Chief Magistrate and of many other eminent citizens, who, without regard to politics or creed, have assembled with it in your honor, I bid you a most cordial and hearty welcome.

THE LEGAL PROFESSION

ADDRESS DELIVERED AT THE NINETEENTH ANNUAL COMMENCE-
MENT OF THE COLUMBIA LAW SCHOOL, NEW YORK,
MAY 16, 1878

The pleasant duty has been assigned to me of welcoming these graduates, all overflowing with youth and therefore with hope, to the ranks of an honorable profession which one of the greatest of its members has declared to be as ancient as magistracy, as noble as virtue, as necessary as justice. As an elder brother, with all my heart I bid them a most cordial and hearty welcome; and your cheering and applauding presence is sufficient to assure them what a vast company of clients awaits them, embracing the grave and the gay, the severe and the lively, the strong, the rich and the fair—so that it remains only for themselves by their lives and labors to determine whether they shall make of this arduous calling on which they are entering a noble and beneficent science or a low and degrading trade, for it must be the one or the other according to the spirit in which it is pursued.

When we read in the census that there are already 60,000 lawyers in the United States, it might seem at first blush that the addition of 200 more in a single group was altogether superfluous—and that there is danger of having too much even of so good a thing. Have we not lawyers enough? asks the press daily. Have we not too many? echoes the heedless voice of society. I answer no; we have not honest lawyers enough—not healthy lawyers enough; not learned lawyers enough, and as the Columbia College Law School is expected to produce none but the best, we may safely hail the coming of all she chooses to send into the world.

That there is a considerable amount of idle and thoughtless prejudice in the world against lawyers cannot be denied, but that is because—and this it will be well for these young gentlemen to remember—the whole profession has to suffer for the faults and vices of its worst and lowest members. We are a band of brothers, and if a single brother turns out to be a rascal, as now and then unfortunately does happen, why the fair name of the whole family suffers with him, of course.

The Pilgrim Fathers of New England appear to have had a unique and intensified grudge against the craft, doubtless because the envious clergy ruled them with a rod of iron, and wished to maintain an undivided sway. So for the first fifty years of the colony they got along

without any, and then with sparing hand the General Court admitted two attorneys to practice, but with the special proviso that they should do nothing to darken the cause or confuse the counsels of the Court—a rule which I fear might decimate the profession, if strictly applied to-day. So the press, arrogant in its unbridled power, too often teems with unfriendly criticisms of our conduct. The stage, catering to the tastes of the galleries—not filled as they are to-night—produces the typical lawyer in the role of an unscrupulous and vulgar pettifogger. And English fiction never tires of reproducing the same type of character at our expense, because no play and no novel is quite perfect without its villain, and we must confess that nobody can fill that part better than a wicked lawyer, who violates his oath and perverts to the destruction of mankind the talents, the learning and the skill which were designed only for its protection and to promote its happiness.

But however satire and fiction may find entertainment in the vices and frailties of our more weak and wicked brethren, the honest and unanswerable voice of history tells quite another story. It exhibits a learned, a fearless and an independent bar as the pride and ornament of every civilized country. It shows that many great triumphs of statesmanship have been achieved by its disciples; that wherever great blows have been struck for the rights of man, some brave lawyer has been in the thickest of the fight; that the champions of popular liberty have been recruited always from our ranks; that whenever the torrents of arbitrary power have threatened to overwhelm and engulf it, some Coke or some Erskine, scorning the wrath of kings and scouting the friendship of princes, has stood forth in its defense; and that, on the other hand, when popular fury rose in a tidal wave for the destruction of the innocent victims, some Otis was found standing in the breach. In short, if the personal liberty of all under the protection of equal laws is the end of government and the object of civilization, then lawyers can safely challenge the men of other professions to show a larger share in the whole work of human progress.

In view, then, of the possibilities of great and heroic service to mankind which the legal profession holds out to its ardent and able votaries, and of the high and useful duty of promoting justice, which its daily pursuit involves, I deem it no idle form of words to congratulate at all times those who stand upon its threshold, qualified and equipped to enter upon it. But never, as it seems to me, has there been a more fortunate and promising time in our country than this, for you who with earnest hearts and singleness of purpose propose to devote your lives to this useful and honorable calling. While you who now stand in the

first flush of manhood were yet hardly out of your cradles, the land was deluged in the blood of civil carnage, and all the horrors of the greatest war of the century were devastating its fields and laying waste its homes. In the midst of arms the laws were silent and the administration of justice was practically suspended throughout half our borders. During all the years of your boyhood and youth the evil results of the war on the civil and social life of the people were being made manifest. Rioting for a few years in that wanton extravagance, that drunken dream of imaginary wealth, which was begotten by the flood of worthless paper money made necessary by the war, our people long since awoke to their fatal error, and five long and miserable years of bankruptcy and financial ruin which followed that era of bloated fulness are but just drawing to a close.

I know it is a common delusion that lawyers flourish in the midst of all these miseries, and fatten like vultures by devouring the carrion of commerce and picking the bones of trade. But never was there a more false and hollow delusion. Lawyers flourish best when the whole community is prosperous, and suffer with all the rest when trade and commerce decline. And never I believe has the rank and file of the profession suffered so severely and been reduced so near to starvation as in these last miserable years of general failure and commercial disaster.

But even now a brighter day is dawning. These countless bankruptcies which are being daily recorded are but the wrecks and debris washed ashore by a storm that has already passed. We can thank God that the public credit at least is already restored; the skies are already clearing. Old fashioned economy and honest living have come again; and you, whose professional lives are all in the future, will see a new and grander era of prosperity than the past has witnessed. When all these idlers in turn have been driven back, as they will be, where they belong, to work upon the soil—the true source of all our American wealth—these fifty millions of people, all working for an honest living, will bring back again the golden age, whose wealth and prosperity shall be as real and solid as that of this paper one has been delusive and imaginary.

But I would not for a moment encourage the thought of holding out the law under any circumstances as a money-making profession. It loses its character as a liberal science as soon as money-making becomes the ruling motive. If that is your object I advise you to abandon all idea of becoming lawyers, and seek for some more congenial and profitable pursuit. You may be sure that every tallow chandler

and pork merchant will outstrip you in the race for wealth. Mr. Webster's oft-quoted saying that "lawyers work hard, live well and die poor" is true in nine cases out of ten, and always will be. The love of money is the root of all evil in the law as in the rest of life, and when it once becomes the fashion the degradation of the profession has already begun.

The lawyer who is inspired to promote litigation for the sake of profit to himself is not a whit better than the doctor who should scatter broadcast in the community the seeds of pestilence, for the fees which it might bring in—and the advocate or the counsellor who defends the public or the private plunderer for a share of his spoils is justly condemned as an accomplice in his crimes. On the other hand, honorable poverty has been in every generation the true cradle of professional character and success. No other motive but the spur of necessity seems powerful enough to furnish the aspirant for forensic honors with the necessary grit, and to carry him through the toil, the drudgery and the self-sacrifice which alone will enable him to master the science and to raise his head above the dead level of mediocrity. Lord Eldon spoke from his own actual experience, and told a hard truth, when to the young barrister who asked him the way to eminence he answered: "If you've got any money spend it. If your wife's got any spend that, and then work like a dog till you are Lord Chancellor." And Erskine, that most consummate of modern advocates, when he made his début at the English bar just one hundred years ago in that splendid achievement in Westminster Hall, which dazzled the eyes of the British public, and raised him at one leap from obscurity and poverty to fame and competence, told the same story of himself, when amid the congratulations that poured in upon him, being asked how he had had the courage to stand up so boldly against Lord Mansfield, he answered that he thought his little children, whom he had left hungry at home that morning, were plucking his robe, and he heard their voices crying, "Now, father, is the time to get us bread."

And now, as you have asked me to address you, I suppose you expect me to give you a little advice; and whether you expect it or not, I will venture to do so, since advice is about all that lawyers ever have to give. I should say, then, that the sound practical lawyer is composed of three parts—the physical, the moral and the mental, and it is hard to tell which of the three is the most important ingredient. I place the physical first, because without a sound and healthy body, a lawyer can no more reach the high places of the profession, than a spavined and broken-winded racer could win the Ascot Cup. Those

ancient anatomists who located the seat of the mind in the stomach were not so far wrong, and I have known lawyers with that great organ iron-clad, who achieved a tolerable measure of apparent success with a very moderate allowance of brains. The bar, at any moment you choose to survey it, furnishes in a physical point of view the happiest illustration of Darwin's great theory of the survival of the fittest, that can be found in modern society. At the word "go" all start on the same line with equal hope and expectation; but one after another, the sick, the infirm, the fat, the lazy and the self-indulgent, drop out of the race, and a few gaunt champions maintain the contest for the foremost places in middle and later life. In these days of intense action and close competition there is no career which calls for more athletic training and more heroic regimen than that of the ambitious advocate in one of our great cities. I should say, then, as the first piece of advice to every young lawyer, look out for your body; don't go into the struggle unless certain that you can rely upon that, and then preserve and strengthen it by exercise, by temperance, and all the sleep that it will hold.

And next in the scale I place the moral element, as necessary to the composition of the sound practical lawyer. If you can't be honest, and must still live by your wits, why, in heaven's name, choose some other calling—any other rather than this, whose special province and duty it is to aid in dealing out exact and equal justice to all men. Turn peddler, turn anything you can lay your hand to, but don't try to turn a dishonest penny in the sacred temple of justice. I know there are sometimes dangerous examples of wicked lawyers who have grown rich by chicanery and plunder, and rare and exceptional cases of men reaching high places at the bar, who had thrown their conscience overboard, and exhibited the loathsome and disgusting spectacle of great talents and opportunities given them for the highest good of their fellowmen, perverted into instruments of fraud and crime. But you may be sure the scorn and contempt of mankind pursue them, and better were it for any one of you that a millstone were hung about his neck and be cast into the sea than to aspire to follow after such false lights. So, too, there are quacks at the bar as well as in the doctor's office, but generally their prosperity soon fails them; first the profession spots them and then the community, and by and by they lose their clients and go into politics, where their peculiar gifts and pretensions find more appropriate scope. The fact is that in every liberal profession whose privileges are undefined as ours are, it is only the conscience of the individual practitioner that can save the whole craft from quackery,

and so my second piece of advice to you is to keep in your sound bodies somewhere a conscience ever lively and quick and cultivated, if you would honor the calling to which you aspire.

And, thirdly, it must be admitted that, next in importance to sound health and clear conscience, brains are necessary to complete the qualifications for admission to the bar. Genius will do, of course, if you happen to have it, but as you probably have not, I wouldn't count on that. Genius is a century plant. One century may produce an Erskine and the next a Webster, but it isn't to be looked for in every graduating class, and so I would advise you to fall back on common sense. Common sense and common honesty combined with uncommon industry will make a successful lawyer, and give a man an honorable place in any generation at the bar. But let no man imagine that in our profession he can travel on his intellectual muscle alone, however good its fibre may be, without lifelong study and unremitting labor. Doubtless you feel more learned now—fresh from your lectures and text-books—than you will at any future period of your professional life. It takes several years for the faithful student of law to find out how little he knows and how much he has to learn. Of course Professor Dwight has taught you many things, but if his reputation does him justice, not more than a hundredth part of what he knows—and it will take you many years yet to master the other ninety and nine. The bane of our profession of late has been the dangerous facility of admission to the bar after an infinitesimal term of study, and we owe the Court of Appeals a great debt of gratitude for its recent order by which even the graduates of the Columbia College Law School are required to add another year of practical study, before they can be admitted to practice as attorneys. Jerrold's advice to the young author may be taken to heart by every candidate for admission to the bar. "Don't take down the shutters until you've got something to show in the window."

And even with the present prolonged term, our preparation here in America is far short of what it ought to be, and far behind that which many foreign schools demand. Study, then, all the law you can and be ready for your opportunity, which sooner or later comes to every man. If it finds him ready it bears him on to honor and success. But the reason why the whole history of the bar is strewn with failures, is that the opportunity, when it does come, fails to find the lawyer ready to embrace and improve it. And while I am on the subject, let me urge every man of you, however much he may study the law, to study daily something else. Ours is not only a learned but a liberal profession, and no more stupid notion ever prevailed than that a good lawyer

is hurt by the highest culture in some other direction. The daily practice of the law without some liberal culture does narrow and benumb the faculties, and unfit them for anything outside the furrowed rut of practice. I know of few spectacles so pitiable as that of a successful lawyer, past middle life, satiated with the gains and even perhaps with the honors of a generous practice, who finds himself tired already of his profession, and yet unable to do anything else or enjoy anything else, because he has long since forgotten everything else that he ever knew, or perhaps never cared to know anything else.

And so I say, add some other subject or study to your legal studies, and don't let go of it when you get into busy life. Every lawyer should have a hobby for his mind to ride in the open air of knowledge, and ride it every day—history, science, politics, language, literature—anything rather than law alone. So only can you be wholly true in manhood to the dreams of your youth, and carry their freshness with you into maturer years.

METROPOLITAN MUSEUM OF ART

ADDRESS DELIVERED AT THE OPENING OF THE METROPOLITAN
MUSEUM BUILDING, NEW YORK CITY, MARCH 30, 1880

Mr. President, Ladies and Gentlemen: If, as has sometimes been said, it is dangerous to know too much about art, you must admire the caution and wisdom of these Trustees in putting forward their most ignorant member to express their sentiments on this occasion.

In their name I bid you a most hearty welcome to these halls. We congratulate ourselves upon the fortunate auspices by which the day is marked. An era of unexampled prosperity gladdens all hearts, and favors so bold an undertaking. The State, for almost the first time in its history, with liberal bounty has provided and equipped a suitable building as the permanent home of the Museum. The presence of the honored President of the Nation [Rutherford B. Hayes] assures us of that general and popular sympathy without which no such institution can prosper, and this great company of the fair, the wise and the powerful, representing the best influences of the city, is itself a living guarantee of substantial encouragement and support.

I shall not attempt to narrate the trials and struggles through which this youthful institution has reached this tenth anniversary of its birth. It has had the usual lot of all infants, and has narrowly but happily escaped the inevitable perils and maladies by which the majority of such undertakings are strangled in their cradles.

The little that it has already achieved, as the beginning only of what it hopes in after times to accomplish, is now spread before your eyes—for your criticism certainly—and, if it meets your approval, for your hearty co-operation.

He who returns to his native land with fresh memories of the Louvre and of Kensington, to compare those splendid results of time and of wealth with this our feeble embryo, may well regard it with concern and solicitude; but could he point to one of the grand old museums of Europe that in its tenth year, without the aid of governmental subsidies or of royal bounty, could show such valuable results as those which are now and here exhibited? Indeed the Duke of Argyle, a high authority on such a subject, was pleased, on his recent visit, to say to General Cesnola, that the British Museum, of which he is himself a trustee, had not in thirty years from its foundation accomplished so much. We beg you always to remember that what has already been

done is the work of a very small number of persons, who fully recognize the fact that a great and useful museum of art could not be created in one decade or one generation: that nothing is so hard as a beginning, and that it must be left to time, and to a larger knowledge and a riper experience, to improve and perfect it.

I will not call a blush to the cheeks of my associates, who sit around me, by telling how they have labored and suffered during these ten tedious years to bring to pass the little that this hour has realized. But some of them have poured out their money like water, and each in his degree has given unstinted time and study to the advancement of their cherished purpose.

Of course, such efforts in a field before untried have not been made without some mistakes, and these have long since been discovered and heralded to the world that revels in the tidings of other men's blunders. The Press, with its hundred eyes and thousand voices, the Press that pours its electric light in every household, every crevice, and the breast of every citizen—so that happy, indeed, is the rare lot of that mortal who dies without being found out—has suffered none of them to remain concealed. But, if we have committed errors, it has been at our own expense; if time and labor have been wasted, they have been only our own; if money has been misspent, it was our own money and that of a few generous friends, who zealously shared our errors; and here, to-day, we bring before you the net result of all our labors, all our aspirations, and all our mistakes. But, on this glad day and in this sympathizing presence, I should fail of a pious duty did I not recall the names of some of our dead associates, whose spirits still linger and whose labors live within these walls. Not to name them all, when I mention John F. Kensett and William T. Blodgett and Theodore Roosevelt, three men whom every intelligent New Yorker remembers with pride and affection: it would be less than the truth to say, that, while they did many other great and generous things for this city, they left here the best impress of their taste, their enterprise and their public spirit, and that this Museum is to-day a bright and lasting monument to their memories.

The erection of this building, at the expense of the public treasury for the uses of an art-museum, was an act of signal forethought and wisdom on the part of the Legislature. A few reluctant taxpayers have grumbled at it as beyond the legitimate objects of government, and if art were still, as it once was, the mere plaything of courts and palaces, ministering to the pride and luxury of the rich and the voluptuous, there might be some force in the objection. But, now that art belongs

to the people, and has become their best resource and most efficient educator, if it be within the real objects of government to promote the general welfare, to make education practical, to foster commerce, to instruct and encourage the trades, and to enable the industries of our people to keep pace with, instead of falling hopelessly behind, those of other States and other Nations, then no expenditure could be more wise, more profitable, more truly republican. It is this same old-fashioned and exploded idea, which regards all that relates to art as the idle pastime of the favored few, and not, as it really is, as the vital and practical interest of the working millions, that has so long retarded its progress among us.

The most enlightened nations of Europe have long since learned to treat the whole subject of art-education as one of governmental and public concern, and have freely expended large amounts of public money in making it general, as the only way to make it practical and effective.

Museums and galleries, schools of design, and the universal teaching of drawing as a necessary element in the education of all children, have been the chief means adopted, and with marvelous results. The German government leading the way in the systematic application of education in art to the practical industries of life, has, it has been well said, transformed a nation of dreamers into the most intensely practical workers that the sun in his rounds looks down upon. France, strong in her ancient prestige, by her persistent devotion to art, has not only made her gay capital the annual rendezvous of travelers and sight-seers from every quarter of the Old World and the New, thereby gathering in an immense revenue which has repaid her ten times over for all her magnificent outlays, but has held the leading place in all the markets of the world with the products of her skilled industries.

But the striking example of England is the most worthy of our attention and emulation.

At the Universal Exhibition of 1851, England found herself at the bottom of the list of nations in all those branches of trade and commerce which involve the application of artistic and technical knowledge to the products of manufacture. With that keen eye to her own interests which always governs her conduct, her statesmen and merchants at once set to work to ascertain the causes of her failure; and it was found that the total neglect of technical training among her artisans, and her entire dependence upon foreign skilled labor for what little she had seemed to accomplish, were the root of the whole evil. Her government itself immediately took the whole matter in hand, and an

organized system of artistic education and culture, aided by frequent and liberal grants of public money, soon wrought a complete revolution in all the branches of her mechanical industry. The South Kensington Museum was founded, upon which hundreds of thousands of pounds have been annually lavished, so that it has become not only a matchless collection of the highest objects of art, from which the most civilizing and refining influence radiates through the land—and reaches even our own shores—but also an immense training-school for teachers and students, for capitalists and workmen in every known industry. Schools of design were opened in all parts of the kingdom, and drawing was everywhere taught, as being quite as necessary as writing or arithmetic; and to-day you will find nearly half a million of children of England regularly instructed in drawing by skilled and competent teachers. The result was that in twelve short years she had recovered all her lost ground; and when she next appeared in the lists of contending nations at the Exhibition of 1862 she had made such marvelous progress that so competent a judge as M. Prosper Mérimée, declared to the astonished Frenchmen that “so prodigious had been the strides of England in ten years, if she continued to march at the same step, France herself would soon be left in the rear;” and before 1870 it was demonstrated by her actual exports that England had carried away nearly half the trade of France in articles which require art in their manufacture. Thus every nation that has tried it has found that every wise investment in the development of art pays more than compound interest.

In our own country, almost nothing in the same direction has yet been undertaken. The State of Massachusetts and the City of Boston, those bold pioneers in all good ideas and good works for America, have set us a wise example, and if New York would maintain her title as the Empire State she cannot neglect the warnings that come to her from all sources. It was in this belief that the founders of this Museum, stimulated by the wise examples set them abroad, and conscious at the same time that whatever was to be done for art among us must be begun, at least, by private means and personal enterprise, projected the undertaking whose progress you have to-day been invited to witness.

They knew the difficulties that lay before them, and fully appreciated the burdens which they volunteered to assume. They looked for success only to the far-distant future, and certainly never expected in so short a time to accomplish the half of what has already been done. Let me briefly state to you their purposes. They believed that the diffusion of a knowledge of art in its higher forms of beauty would tend

directly to humanize, to educate and refine a practical and laborious people: that though the great masterpieces of painting and sculpture which have commanded the reverence and admiration of mankind, and satisfied the yearnings of the human mind for perfection in form and color, which have served for the delight and the refinement of educated men and women in all countries, and inspired and kept alive the genius of successive ages, could never be within their reach, yet it might be possible in the progress of time to gather a collection of works of merit, which should impart some knowledge of art and its history to a people who were yet to take almost their first lessons in that department of knowledge. Their plan was not to establish a mere cabinet of curiosities which should serve to kill time for the idle, but gradually to gather together a more or less complete collection of objects illustrative of the history of art in all its branches, from the earliest beginnings to the present time, which should serve not only for the instruction and entertainment of the people, but should also show to the students and artisans of every branch of industry, in the high and acknowledged standards of form and of color, what the past had accomplished for them to imitate and excel.

It was also a prominent feature of the Trustees' plan, in which some progress has already been made, to establish a Museum of Industrial Art, as distinct from the beautiful in art, for the direct and practical instruction of artisans, showing the whole progress of development from the raw material, through every artistic process to the most highly wrought product of which art is capable. They hoped also to establish under the direct auspices of the Museum, industrial schools for the thorough education of apprentices and workmen in their several branches of industry. Thanks to the liberal interest of a single public-spirited citizen, two such schools are already in successful operation, and others will be opened as soon as means for the purpose are realized.

The importance of that particular effort cannot be overstated. Why should we depend upon the Old World forever for almost every object of beauty that our lives require? Why should we continue to pay as we do, a hundred and fifty millions a year to the nations of Europe for the products of art-industry which our civilization demands, when by instructing our artisans, as they have instructed theirs, we can make them all for ourselves? It is time for a thoughtful and industrious and a proud nation to answer such questions as these.

Two valuable and interesting collections of the fine arts have already come into the possession of the Museum. The Collection of the Dutch and Flemish Masters is highly prized by many who are compe-

tent to judge of its merits; and what a suitable nucleus it affords around which in time to gather all the schools of modern painting, can be estimated from the splendid, but temporary, loan-collection of pictures with which the liberality of their many owners has for the time being filled our galleries.

The world-renowned Cesnola Collection is now for the first time so arranged and exhibited that its real merits and beauty can be understood and appreciated. Its extraordinary value in an archaeological and historical point of view is undisputed. I shall not attempt to discuss its artistic value. That has been thoroughly considered and examined by many learned men in many languages. Its actual relations to the history of Grecian Art will be manifest when we shall be able, as we hope soon to be, to exhibit it side by side with a series of casts of all the masterpieces of Grecian sculpture, to which it will serve as an introduction. Its practical value is already demonstrated by the eagerness with which American potters and artisans have sought it for study and imitation.

But, it is the popular and practical tendency of modern art which chiefly engages the attention of the Trustees, and strict attention to it must be essential to the success of this or any other museum. We dare even to believe that already the indirect influence of this undertaking upon the taste of the community and the trades is beginning to be felt. The splendid display of articles of artistic beauty in our shops, the improved taste exhibited in the decoration and furnishing of our dwellings, and the great increase in the purchase and importation of real works of art, when compared with the meagre and barren memory of the last generation, indicate a rapid and permanent advance in the general knowledge of the subject in the last ten years; and we have good reason to believe that when the irresistible inventive genius of America shall be instructed and regulated by a technical training that shall be worthy of it, our domestic product of articles of beauty will in time equal and supplant the foreign importations upon which we now almost exclusively depend, and that at last American art shall furnish all that is best adapted for the decoration of American life. It is only within the present century that the fine arts, which were always before the private property of the rich, have extended their range so as to provide for the actual wants and comfort of the people. The great art-teacher of England has said that, "At the moment when in any ancient kingdom you point to the triumphs of its greatest artist, you point also to the determined hour of the kingdom's decline; that the names of the great painters are like passing bells; in the name of Velasquez you

hear sounded the fall of Spain; in the name of Titian, that of Venice; in the name of Leonardo, that of Milan; in the name of Raphael, that of Rome." But surely, in the art of the future, which rests upon and ministers to the education, the wants, and the daily life of the people, all this will be changed and the perfection of a nation's arts will mark the period of her highest prosperity.

And now, who shall help us to carry out the great plans which have here been only begun? Whether New York shall be worthy of a great museum must depend upon the public spirit of her citizens, and chiefly upon the men of fortune and estates; and it is especially to the young men and women of inherited fortune, who have also added the culture and the larger knowledge and the truer feeling for art for which their position gives the opportunity, that the city must look for the support and development of such an institution. We can fairly demonstrate that for every dollar expended for such an enterprise a rich return will flow in upon all who are interested in the wealth and prosperity of New York. What a great gallery of choice works of art does to elevate the taste and moral condition of a city you do not need to be told, and its direct material benefit as a source of revenue to the community is equally certain. The wealth and prosperity of Dresden rest largely upon the throngs that resort to its vast galleries, and whole cities in Italy live upon their inherited treasures of art. The Venus of Milo, queen of the marble goddesses, brings annually in the train of her worshipers to Paris a greater wealth than all the gold and jewels and spices that the Queen of Sheba brought to Jerusalem.

Probably no age and no city has ever seen such gigantic fortunes accumulated out of nothing as have here been piled up within the last five years. They have been made in this city and out of this toiling people. Now, all these lucky citizens owe something to the city, and to the people out of whom they have made their millions. Their fortunes are not all their own; and where better than here can they pay this debt of gratitude? These Trustees are too proud to beg a dollar, but they freely proffer their services in relieving these distended and apoplectic pockets. Think of it, ye millionaires of many markets, what glory may yet be yours, if you only listen to our advice, to convert pork into porcelain, grain and produce into priceless pottery, the rude ores of commerce into sculptured marble, and railroad shares and mining stocks—things which perish without the using, and which in the next financial panic shall surely shrivel like parched scrolls—into the glorified canvas of the world's masters, that shall adorn these walls for centuries. The rage of Wall Street is to hunt the Philosopher's Stone,

to convert all baser things into gold, which is but dross; but ours is the higher ambition to convert your useless gold into things of living beauty that shall be a joy to a whole people for a thousand years.

Whoever labors for the growth of American art must look for his reward not to this age only, but largely to the distant future. And who shall dare to set limits to the possibilities that await the energies of this vast people in any department of human effort? It is not fifty years since the possibility of an American literature was scouted and sneered at by the scholars of England; and already the proud Court of St. James has welcomed an American historian to whom the world of letters paid homage, and an American poet of whom the English speaking race is proud, as the fitly designated representatives of the young Republic; and who, in the light of her experience, shall dare to despise or doubt the prophecy that in the fulness of time American architects and painters and sculptors may be held in equal honor?

ADMIRAL FARRAGUT

ADDRESS DELIVERED AT THE REQUEST OF THE FARRAGUT MONUMENT
ASSOCIATION, AT THE UNVEILING OF THE ST. GAUDENS STATUE
OF FARRAGUT, MADISON SQUARE, NEW YORK, MAY 25, 1881

The fame of naval heroes has always captivated and charmed the imaginations of men. The romance of the sea that hangs about them, their picturesque and dramatic achievements, the deadly perils that surround them, their loyalty to the flag that floats over them, their triumphs snatched from the jaws of defeat, and deaths in the hour of victory, inspire a warmer enthusiasm and a livelier sympathy than is awarded to equal deeds on land. Who can read with dry eyes the story of Nelson, in the supreme moment of victory at Trafalgar, dying in the cockpit of his flagship, embracing his beloved comrade with, "Kiss me, Hardy! Thank God I have done my duty" on his fainting lips, bidding the world good-night, and turning over like a tired child to sleep and wake no more? What American heart has not been touched by that kindred picture of Lawrence, expiring in the cabin of the beaten *Chesapeake*, with "Don't give up the ship" on his dying lips? What schoolboy has not treasured in his memory the bloody fight of Paul Jones with the *Serapis*, the gallant exploits of Perry on Lake Erie, and of McDonough on Lake Champlain, and the other bright deeds which have illuminated the brief annals of the American navy?

We come together to-day to recall the memory and to crown the statue of one of the dearest of these idols of mankind—of one who has done more for us than all of them combined—of one whose name will ever stir like a trumpet the hearts of his grateful countrymen.

In the first year of the century—at the very time when the great English admiral was wearing fresh laurels for winning, in defiance of orders, the once lost battle of the Baltic, the bloodiest picture in the book of naval warfare—there was born on an humble farm in the unexplored wilderness of Tennessee, a child who was, sixty years afterwards, to do for America what England's idol had just then done for her, to rescue her in an hour of supreme peril, and to win a renown which should not fade or be dim in comparison with that of the most famous of the sea-kings of the old world. For though there were many great admirals before Farragut, it will be hard to find one whose

life and fortunes combine more of those elements which command the enduring admiration and approval of his fellow-men. He was as good as he was great—as game as he was mild, and as mild as he was game—as skillful as he was successful, as full of human sympathy and kindness as he was of manly wisdom, and as unselfish as he was patriotic. So long as the republic which he served and helped to save shall endure, his memory must be dear to every lover of his country, and so long as this great city shall continue to be the gateway of the nation and the centre of its commerce, it must preserve and honor his statue, which to-day we dedicate to the coming generations.

To trace the career of Farragut is to go back to the very infancy of the nation. His father, a brave soldier of the Revolution, was not of the Anglo-Saxon stock for which we are wont to assert a monopoly of the manly virtues, but of that Spanish race, which in all times has produced good fighters on sea and land. His mother must have been a woman fit to bear and suckle heroes, for his earliest recollection of her was upon the occasion when, axe in hand, in the absence of her husband, she defended her cottage and her helpless brood of little ones against an attack of marauding Indians, who were seeking their scalps. Like all heroes, then, he was born brave, and got his courage from his father's loins and his mother's milk. The death of the mother and the removal of the father to New Orleans, where he was placed by the Government in command of the naval station, introduced the boy to the very scene where, more than half a century afterwards, some of the brightest of his proud laurels were to be won, and led him, by a singular providence, to the final choice of a profession, at an age when children generally are just beginning their schooling. The father of the renowned Commodore David Porter happened to fall ill and die under the roof of Farragut's father, and his illustrious son, whose heart overflowed with gratitude for the hospitable kindness which had welcomed his dying father, announced his intention to adopt a child of that house, and to train him up in his own profession.

That happy conjunction of great merit with good fortune which attended the future Admiral through his whole life, was nowhere more signally marked than in the circumstance which thus threw together the veteran naval commander, already famous, and soon to win a world wide name for skill, and daring, and enterprise, and the boy who, in his own last years, was destined to eclipse the glory of his patron, and to witch the world with still more brilliant exploits.

The influence of such a spirit and character as Porter's on that of a dutiful, ardent and ambitious boy like Farragut, cannot be overes-

timated. It was not a mere nominal adoption. Porter took him from his home, and became his second father, and with him the boy lived, and studied, and cruised, and fought, having thus ever before him an example worthy of himself. No wonder that he aspired to place himself, at last, at the head of the profession into which his introduction had been under such auspices! Behold him, then, at the tender age of nine years the happy recipient of a midshipman's warrant in the United States Navy, bearing date December 17, 1810; and two years later, on the breaking out of the war with Great Britain, making his first cruise with his noble patron, who, as Captain Porter, now took command of the *Essex*, whose name he was to render immortal by his achievements beneath her flag. It was in this severe school of active and important service that Midshipman Farragut learned, almost in infancy, those first lessons in seamanship and war which he afterwards turned to practical account in wider fields and more dangerous enterprises. His faithful study of all the details of his profession, guided and inspired by that ever present sense of duty, which was the most marked characteristic of his life, prepared him, step by step, for any service in the line of that profession which time or chance might happen to bring; and when, at last, in March, 1814, the gallant little frigate met her fate in that spirited and bloody encounter with the British frigate *Phebe* and the sloop of war *Cherub*, off the port of Valparaiso, a contest which brought new fame to the American navy, as well as to all who bore a part in it; the boy of twelve, receiving an actual baptism of fire and blood, was found equal to the work of a man. He seems never to have known what fear was. If nerve makes the man, he was already as good as made. He thus describes this first of his great fights in his modest journal:

"During the action, I was like 'Paddy in the cat-harpins,' a man on occasions. I performed the duties of captain's aid, quarter gunner, powder boy, and in fact did everything that was required of me. I shall never forget the horrid impression made upon me at the sight of the first man I had ever seen killed. It staggered and sickened me at first, but they soon began to fall around me so fast, that it all appeared like a dream, and produced no effect on my nerves. I can remember well, while I was standing near the captain, just abaft the mainmast, a shot came through the waterways and glanced upwards, killing four men who were standing by the side of the gun, taking the last one in the head and scattering his brains on both of us. But this awful sight did not affect me half as much as the death of the first

poor fellow. I neither thought of nor noticed anything but the working of the guns."

He never was in battle again until forty-eight years afterwards, when he astounded the world by the capture of New Orleans, but who can doubt that that memorable day in the *Essex*, when her plucky commander fought her against hopeless odds, only lowering his colors when she was already sinking with all but one of her officers and more than half of her crew on the list of killed and wounded, was a lifelong inspiration to his courage and loyalty, that it planted forever, in the heart of the boy, that starry flag, which, as an old man, he was to bear at last, through bloodier conflicts still, to final victory?

It is wonderful how that half century of routine service in a navy that had nothing to do, in times of profound and unbroken peace, prepared and equipped him for those immense responsibilities and novel undertakings that were finally thrown upon him. One would naturally suppose that fifty years of dead calm—waiting for dead men's shoes while there was no fighting to kill them off—no active service anywhere—would have benumbed the energy and stifled the ambition of an ordinary man and have unfitted him altogether for action, when at last the day of action came. But Farragut was no ordinary man. He magnified his calling when there was nothing else to magnify it, and by being faithful over a few things fitted himself at a moment's notice, to become a ruler over many. Porter, in his report to the Government, had commended him for bravery, but regretted that he was too young for promotion. The close of the war left him at the very bottom round of the ladder, but with a heart full of generous ardor and an unflinching will to do his duty, and so to climb, step by step, to the top, on which he ever kept a steadfast eye. The faithful midshipman was indeed the father of the future admiral. The boy that never shirked, moulded the man that never flinched and never failed.

The traditions of the little American Navy of that early day were proud and glorious ones—and well calculated to fire a youthful heart with generous enthusiasm. It had carried off the honors of the war, and on the lakes and on the ocean in skill, pluck and endurance it had coped successfully with the proud flag of England—the undisputed mistress of the seas—arrogant with the prestige of centuries, and fresh from the conquest of her ancient rivals. Its successful commanders were recognized as heroes alike by their grateful countrymen and by a generous foe, and furnished examples fit to be followed and imitated by the young and unknown midshipman whose renown was one day to cast theirs all in the shade. It was neither by lucky accident nor po-

litical favor, nor by simply growing old in the service, that Farragut came in time to be the recognized head of his profession. From the first he studied seamanship and the laws of naval warfare as a science, and put his conscience into his work, as well in the least details as in the great principles of the business. So as he rose in rank he grew in power too, and never once was found unequal to any task imposed upon him. Self-reliance appears to have been the great staple of his character. Thrown upon his own exertions from the beginning, buoyed up by no fortune, advanced by no favor, he worked his own way to the quarter-deck, and by the single-hearted pursuit of his profession was master of all its resources and ready to perform great deeds, if a day for great deeds should ever come.

Had that protracted and inglorious era of peace and of compromise, which began with his early manhood and ended with the election of Lincoln, been continued for another decade, he would have passed into history without fame, but without reproach, as a brave and competent officer, but undistinguished in that bright catalogue of manly virtue and of stainless honor which forms the muster roll of the American navy. But when treason reared its ugly head, and by the guns at Fort Sumter roused from its long slumber the sleeping courage of the nation to avenge that insulted flag—that flag which from childhood to old age he had borne in honor over every sea and into the ports of every nation—his country found him ready and with all his armor on, and found among all her champions no younger heart, no cooler head, no steadier nerve, than in the veteran Captain, who brought to her service a natural genius for fighting and a mind stored with the rich experience of a well-spent life, and then, at last, all that half-century of patient waiting and of faithful study bore its glorious fruit.

Much as the country owes to Farragut for the matchless services which his brains and courage rendered in the day of her peril, she is still more in debt to him for the unconditional loyalty of his large and generous heart. Born, bred, and married in the South, with no friends and hardly an acquaintance except in the South, his sympathy, while there was yet time or room for sympathy, must all have been with her; "God forbid," he said, "that I should ever have to raise my hand against the South!" The approaching outbreak of hostilities found him on waiting orders at his home in Norfolk, surrounded by every influence that could put his loyalty to the test, in the midst of officers of the army and navy, all sworn like him to uphold the flag of the Republic, but almost to a man meditating treason against it. Could there have been a peaceful separation, could those erring sisters have been

permitted, as at least one great Northern patriot then insisted they should be permitted, to depart in peace, he would doubtless have gone with his State, but with a heart broken by the rupture of his country. But when the manifest destiny of America forbade that folly, there was but one course for Farragut, and there is no evidence that his loyalty ever for a moment faltered.

Other great and manly hearts, tried by the same ordeal, came to a different issue, and, perhaps, history will do them better justice than we can. But, now that it is all over, now that a restored Union has made them fellow citizens once more, we cannot refuse to recognize the manhood with which some of them struggled even to their fall. No candid Northern man can read at this distance of time, without emotion, the heartrending letter of General Lee to General Scott, resigning his commission, and redeeming his sword for Virginia, although history has pronounced it treason; but this we may say, and must say, that Lee and all who followed his example loved their State indeed, but forgot and betrayed their country, while Farragut, when the issue came, knew only his country; loved only his country, and meant still to have a country to love. Not a single moment could he hesitate, and when Virginia, who had only a few weeks before elected delegates, by a large majority, pledged or instructed to maintain her allegiance, was suddenly and treacherously, as he expressed it "dragooned out of the Union," he could not sleep another night on the soil of Virginia. At ten o'clock in the morning on the 18th of April, 1861, news came to Norfolk that the ordinance of secession had passed—and Farragut's mind was made up; he announced to his faithful wife, that for his part, come what might, he was going to *stick to the flag*; and at five in the afternoon they had packed their carpet bags and taken the first steamboat for the north. That *stick to the flag* should be carved on his tombstone, and on the pedestals of all his statues as it was stamped upon his soul. *Stick to the flag* shall be his password to posterity, to the latest generations—for he stuck to it when all about him abandoned it. He was

"Faithful found

Among the faithless—faithful only he."

It is a striking coincidence, recalling the most critical and gloomy hour through which the country was then passing, that when the steamboat which bore Farragut northward flying from secession, and hastening to lay his sword at the feet of the President, arrived at Baltimore on the morning of the 19th of April, the brave boys of the

Massachusetts Sixth Regiment had just been fired upon in the streets, as they were marching to the rescue of the imperilled capitol;—the pavement was still wet with their blood, the first blood of the Rebellion for slavery, just as eighty-six years before, at that very day and hour, the common at Lexington had been crimsoned with the blood of the ancestors of those very lads, the first that was shed in that other rebellion which, for freedom's sake, at once became a Revolution. What a day for Massachusetts to celebrate! Mother of Liberty, as she is! Lincoln and his distressed Cabinet at Washington stood in sore need that day of the voice and the presence and the sword of every patriot, and the timely coming of so great a soldier as Farragut to the rescue was as good to their souls as the coming of a friendly squadron, as events soon proved.

Never was a nation less prepared for naval war than the United States in April, 1861. Forty-two old vessels, many of which were unseaworthy, the remains only of a decrepit peace establishment, constituted our entire navy; and all at once we had three thousand miles of exposed sea-coast to blockade and defend, our own great sea-ports to protect, rebel cruisers to pursue, and American commerce to maintain, if possible. The last was utterly impossible; the merchant service took refuge under other flags, and our own almost vanished from the seas, where it had so long proudly floated. But the same irresistible spirit of loyalty, the same indomitable will to preserve the imperilled Union, which brought great armies all equipped into the field, soon created a fleet also that commanded the respect of the world, and placed the United States once more in the front rank of naval powers. The active services of such a man as Farragut could not long be spared, and when that great naval enterprise, the opening of the Mississippi, was planned—an enterprise the like of which had never been attempted before—he was chosen by the Government to lead it, by the advice of his superiors in rank, and with the universal approval of the people, on the principle of choosing the best man for the service of greatest danger; and he accepted it on his favorite maxim, that the greatest exposure was the penalty of the highest rank. His experience was vast, but there was no experience that would of itself qualify any man for such a service.

It was upon his personal qualities that the country relied. Success was absolutely necessary. The depressing reverses of the first year of the war, the threatened intervention of foreign powers, and the growing arrogance of the confederacy forbade the possibility of a failure. And all who knew Farragut knew that in his lexicon there

was no such word as—fail. When he saw the gigantic preparations that had been made, he had said that he could take New Orleans, and everybody knew that he would take it, or pay his life as the forfeit. "I have now attained," said he, "what I have been looking for all my life—a flag—and having attained it, all that is necessary to complete the scene is a victory. If I die in the attempt, it will only be what every officer has to expect. He who dies in doing his duty to his country, and at peace with his God, has played out the drama of life to the best advantage." He put his trust in God, and in his own indomitable will, and none of Homer's heroes had more implicit faith in the God of Battles than he was wont to express. In every trying moment he looked to Him as his leader, and after every victory he gave to Him the praise. But still, like Sydney, he believed that God only helps those who help themselves, and acted on Cromwell's advice, "Trust in God, my boys, but keep your powder dry." So he wrote from Ship Island, "God alone decides the contest, but we must put our shoulders to the wheel." And when he was putting the *Hartford* into action, he crowded her with guns wherever a gun could be worked. It was Farragut's peerless courage that ironclad his wooden frigate, and carried her safely through the hellish fire of the forts. He had that two-o'clock-in-the-morning kind of courage of which Bonaparte boasted, and defined as "unprepared courage—that which is necessary on an unexpected occasion, and which, in spite of the most unforeseen events, leaves full freedom of judgment and decision." Happy was the day, therefore, for us all when Farragut, on his own merits, was put in command of by far the most powerful naval expedition that had ever sailed under the American flag, for the most perilous enterprise that any fleet had ever attempted. The sun would set upon us if we were to undertake this afternoon to tell the story of the capture of New Orleans. The world knows it by heart, how when Farragut gave the signal at two o'clock in the morning the brave Bailey, in the *Cayuga*, led the way, and how the great admiral, in the *Hartford*, in two short hours carried his wooden fleet in triumph through that storm of lightning from the forts, and scattered and destroyed the whole fleet of rebel gunboats and ironclads, and how it pleased Almighty God, as he wrote at sunrise to his wife, to preserve his life through a fire such as the world had scarcely known. Thus, in a single night, a great revolution in maritime warfare was accomplished, and a blow struck at the vitals of the Confederacy which made it reel to its centre. New Orleans, the key of the Mississippi—the Queen City of the South, was taken never to be lost again, and the opening made for

all those great triumphs which soon crowned our arms in the West. But victory found our brave captain as modest and merciful as the conflict had proved him terrible, and history may be searched in vain for greater clemency shown to a hostile city captured after such a struggle than that with which the Federal commander, under circumstances of the utmost aggravation and insult, treated New Orleans.

In all his subsequent service on the Mississippi—in clearing the river at Vicksburgh and running the batteries of Port Hudson, we find him exhibiting the same great traits of character, on the strength of which, at New Orleans, both friends and foes had united in pronouncing him a hero of the first class. The same fertility of resource—the same contempt of personal danger—the same caution in his designs, and the same resistless energy in execution, and withal, the same gentleness and modesty always.

"You know my creed," he says, on the day after his gallant passage of the terrible batteries of Port Hudson, "I never send others in advance where there is a doubt; and being one on whom the country has bestowed its greatest honors, I thought I ought to take the risks which belong to them, so I took the lead. I knew the enemy would try to destroy the old flagship, and I determined that the best way to prevent that result was to try and hurt them the most."

The ardent loyalty of all his officers and men, who loved and believed in him, and whom his own coolness and courage inspired, the generous applause of a grateful country, and the faithful support of the Government, who realized his merits, sustained him through all those trying months and years, while the final triumph of the cause of the Union, so long promised and expected, seemed ever receding like the horizon before him.

But, at last, he got the chance that his hopeful heart had longed for—to strike that fatal blow at Mobile, which forever sealed up the Confederacy from all intercourse with the outer world, and hastened its final dissolution, making hopeless, on its part, any further struggle in the West, while Grant and Sherman and Sheridan and Hancock, were dealing its death blows in Virginia and Georgia.

The battle of Mobile Bay has long since become a favorite topic of history and song. Had not Farragut himself set an example for it at New Orleans, this greatest of all his achievements would have been pronounced impossible by the military world, and its perfect success brought all mankind to his feet in admiration and homage. As a signal instance of one man's intrepid courage and quick resolve converting disaster and threatened defeat into overwhelming victory, it had no

precedent since Nelson at Copenhagen defying the orders of his superior officer and, refusing to obey the signal to retreat, won a triumph that placed his name among the immortals.

When Nelson's lieutenant on board the *Elephant* pointed out to him the signal of recall on the *Commander-in-Chief*, the battered hero of the Nile clapped his spyglass with his only hand to his blind eye, and exclaimed: "I really do not see the signal. Keep mine for closer battle flying. That's the way I answer such signals. Nail mine to the mast!" and so went on and won the great day.

When the *Brooklyn* hesitated among the fatal torpedoes, in the terrible jaws of Fort Morgan, at the sight of the *Tecumseh* exploding, and sinking with the brave Craven and his ill-fated hundred in her path, it was one of those critical moments on which the destinies of battles hang. Napoleon said that it was always the quarters of an hour that decided the fate of a battle; but here a single minute was to win or lose the day, for when the *Brooklyn* began to back, the whole line of Federal ships were giving signs of confusion, while they were in the very mouth of hell itself, the batteries of Fort Morgan making the whole of Mobile Point a living flame. It was the supreme moment of Farragut's life. If he faltered all was lost—if he went on in the torpedo-strewn path of the *Tecumseh* he might be sailing to his death. It seemed as though Nelson himself were in the maintop of the *Hartford*. "What's the trouble?" was shouted through a trumpet from the flagship to the *Brooklyn*. "Torpedoes," was the reply. "Damn the torpedoes," said Farragut. "Four bells, Captain Drayton, go ahead full speed," and so he led his fleet to victory.

The painters and poets have vied with each other in depicting the hero of Mobile Bay lashed in the shrouds of the *Hartford* as she sailed through that fiery storm of shot and shell, leading her companions to glory. That was indeed no holiday station, for, in nineteen months of actual service, the flagship had been struck already not less than two hundred and forty times, but never once had a hair of that head, which always showed in the most exposed position on the vessel, been touched. No wonder that his crews and officers believed that he bore a charmed life, and were always ready to follow in the same spirit wherever he dared to lead—no wonder that this last sublime self offering of their dear leader to the God of Battles, whom he trusted, inspired every man in the fleet to almost equal confidence and daring, as it did.

Van Tromp sailed up and down the British channel, in sight of the coast, with a broom at his masthead, in token of his purpose to

sweep his hated rivals from the seas. The greatest of English admirals, in his last fight, as he was bearing down upon the enemy, hoisted on his flagship a signal which bore these memorable words: "England expects every man to do his duty"—words that have inspired the courage of Englishmen from that hour to this; but it was reserved for Farragut, as he was bearing down upon the death-dealing batteries of the rebels, to hoist nothing less than himself into the rigging of his flagship, as the living signal of duty done, that the world might see that what England had only expected, America had fully realized, and that every man, from the Rear-Admiral down, was faithful.

The creative genius of the young and brilliant artist, who produced this noble statue of Farragut, which has to-day been unveiled, to stand for centuries in this busy highway of American life—presents him, as he stood in that crowning hour of victory, the very incarnation of courage and loyalty, commanding the homage of his countrymen, and the admiration of mankind. That terrible era of fraternal bloodshed, which witnessed his conflicts and triumphs, can never be forgotten, or the crimes of its authors forgiven, but the great Civil War will be worth all its frightful cost—if it has realized in the heart of every American the lessons of Farragut's life, and his supreme conviction, that the people of these thirty-eight States have but one country, that unconditional allegiance to the Union—to the Union for Liberty only—is the sole condition of citizenship, and that whoever hereafter lifts his hand against its Flag must be forever dishonored.

The golden days of Peace have come to last, as we hope, for many generations. The great Armies of the Republic have been long since disbanded—our peerless Navy, which, at the close of the war, might have challenged the combined squadrons of the world to combat, has almost ceased to exist—but still we are safe against attack from within and from without. The memory of our heroes is "the cheap defence of the Nation, the nurse of manly sentiment and of heroic enterprise" forever. Our frigates may rot in the harbor—our ironclads may rust at the dock, but if ever again the flag is in peril, invincible armies will swarm upon the land, and steel-clad squadrons leap forth upon the sea to maintain it. If we only teach our children patriotism as the first duty, and loyalty as the first virtue, America will be safe in the future as she has been in the past. When the war of 1812 broke out she had only six little frigates for her navy, but the valor of her sons eked out her scanty fleet, and won for her the freedom of the seas. In all the single engagements of that little war, with one exception, the Americans were victors, and, at its close, the stars and stripes were

saluted with honor in every quarter of the globe. So, when this war of the Rebellion came suddenly upon us, we had a few ancient frigates, a few unseaworthy gunboats, but when it ended, our proud and triumphant navy counted seven hundred and sixty vessels of war, of which seventy were ironclads. We can always be sure, then, of fleets and armies enough. But shall we always have a Grant to lead the one, and a Farragut to inspire the other? Will our future soldiers and sailors share, as theirs almost to the last man shared, their devotion, their courage and their faith? Yes, on this one condition, that every American child learns from his cradle, as Farragut learned from his, that his first and last duty is to his country, that to live for her is honor, and to die for her is glory.

PRESIDENT ELIOT

ADDRESS AT THE PRESENTATION OF A GOLD MEDAL BY THE HARVARD ALUMNI TO CHARLES W. ELIOT ON THE TWENTY-FIFTH ANNIVERSARY OF HIS ELECTION TO THE PRESIDENCY OF HARVARD COLLEGE, BOSTON, JUNE 28, 1894

Mr. President and Brethren of the Alumni: Do you remember the question put by Lowell in his great commemoration ode? He said: "Our slender life runs rippling by, and glides into the silent hollow of the past. What is there that abides to make the next age better for the last?"

Well, to that question we can make a proud answer of our president today. These 25 years—but yesterday, when it is finished in the immortal life of the college, but to him the chief part of his allotted time—he has filled to overflowing with honest and fruitful and triumphant work.

This work will still abide to make the next age of Harvard, of Massachusetts, of America, better for the last. (Great applause.)

I deem it a great honor to be selected to express for the alumni today their sentiments of affection, of gratitude, of obligation, of allegiance to President Eliot.

But I come not here to praise our Caesar, nor to bury him (great laughter and applause)—nor to bury him under a load of adulation which it would be as offensive for you and for him to hear as for me to utter. Let his works speak for him. If you seek for his monument, look around you everywhere. (Great applause.)

It was my good fortune at the commencement dinner in 1869 to welcome our then youthful president, on behalf of the young alumni of that day, to his new duties and responsibilities; and perhaps he will permit me to recall that occasion and contrast its spirit with the enthusiasm which pervades our ranks today.

The corporation then as now, composed of fellows wise and sensible and old (laughter)—the youngest of them 60—had resolved upon a wild, a bold, a startling departure from all the traditions of the college, and had called from the ranks of the alumni a mere youth of 35—a layman, a student and a teacher of science, an advocate for carrying the elective system to its last result.

A man who believed that there must be a new Harvard to justify the old Harvard, of which her sons were all so proud. He was to fill the place, the chair that since the days of Dunster had been occupied

by older men, mostly clergymen, men elected because they were already famous men—men who believed in the good old way, who believed that what was good enough for the fathers was good enough also for the sons, and that the chief duty of the college was to prepare men for service in the three old and time-honored professions which from time immemorial have monopolized the name learned.

Well, the overseers had taken the matter up; they had cracked their whips over his head, as overseers are so fond of doing, and then had ratified his nomination (laughter), and we came on the next commencement day to eat the commencement dinner, the only institution at Harvard that time has not improved. (Great laughter and applause.)

The aged graduates, from 1800 down, looked a little blue. Speech after speech was made by dignified venerable orators full of praise of the past of Harvard, but without any allusion or word of cheer to its young president, who was about to take its future destinies upon his shoulders.

At last, as the sun's declining rays shot horizontally across Harvard Hall, the presiding officer, in a moment of absence of mind I suppose, called upon one of Mr. Eliot's admirers who had known him from boyhood, who believed in his possibilities, and who then, as now, was willing to say what he thought; and immediately the audience turned its back on the past and looked the future straight in the face.

He ventured to hold up that first and finest example in the art gallery of Harvard, the picture of its five successive presidents, sitting side by side as they sat in life, and he invoked upon the head of the new and youthful president this blessing: That he might combine the virtues of all the five in his life and conduct as president in the place that they had occupied—the rugged honesty and strength of Quincy, the effective speech of Everett, the gentle modesty of Sparks, the genial culture of Felton, and the never-failing wisdom of Walker—and apply them all to the discharge of the duties of the office which he had inherited from them. (Applause.)

And, brethren, has he justified that hope? (Loud and prolonged cheers.) Has he proved himself worthy of the confidence you placed in him 25 years ago? Has he accomplished the work that you gave into his hands? Has he kept this, our dear old Harvard, abreast with the ever onward march of life, of energy, of prosperity, which, in one generation, has created a new America out of the ashes of war and rebellion? (Great applause.)

I leave you to answer the question as you have answered it; I could not answer it in his presence without shocking his modesty.

(Applause.) And now, brethren, we may not presume to give to one man or to one generation credit for all that has made our dear old alma mater what she is today. There were great heroes before Agamemnon; there were great presidents before Eliot. He himself is the ripened fruit of that old Harvard which it is the fashion of this day to decry to the advantage of the new. He and you, president of the alumni, are fair average specimens—(great laughter and applause)—fair average specimens of what our nursing mother could bring forth and nourish before she had become so rich and so splendid, and had bedecked herself in all these new functions and modern improvements. They are the product of that epoch at Harvard from the close of President Quincy's administration to the accession of Eliot, which Prof. Langdell has wittily described as a period when the college authorities exacted from the students as little as possible. (Laughter.)

Who knows, Mr. President, but that the less they took out of us the more they left in us. (Great laughter.)

I think with equal truth he might have said that it was a period when the college authorities put into us as little as possible (laughter), for in those days no one was in danger of taking more than he could hold.

Now, brethren, I do not propose to try to condense the events of a quarter of a century into a quarter of an hour. The story has been told already in glowing terms by Prof. Dunbar, Prof. Langdell and Dr. Richardson, and everybody must read what they have to say who would wish to know and realize how, in these twenty-five years under the administration of these friends of ours, Harvard has grown from a college still local and provincial into a great national university where everything that is worth learning can be learned by everybody. Now, today each class numbers more than the whole college did in our time, and there are almost as many teachers as there were students then—how her wealth has quadrupled and her territory expanded; how noble halls, museums and dormitories have risen and are still rising beneath the shade of her elms, so that it taxes the educated intelligence of a graduate before the war to thread his way among the college buildings and actually requires more study to find out where he is than it did to take the degree of master of arts (great laughter and applause); how the elective system has become universal and universally successful; how the different departments of the university have been brought into harmony, and under the administration of a new, wise and far seeing head, have been made only the parts of one living organism, all of whose members work for the common good and common glory

of the whole as a great institution of learning, a university worthy of the name; how the standard and dignity of our professional schools have been elevated so that today the degree of a doctor of medicine or bachelor of laws means what it says, as it never meant before, (applause), and when a man holds that under the seal of Harvard he goes forth a physician qualified to deal with the lives of his fellow-citizens, or a lawyer competent to take care of their interests and their rights; how, in all this period, in all this work, Harvard has not merely kept pace with, but has led the van in the march of progress which our times have witnessed—and better than all, how the interest of her alumni has been kept alive, their enthusiasm revived and rekindled, and their pockets opened to produce the means for accomplishing all those great and good ends. For it is never to be forgotten, brethren, that the great bulk of benefits that have come to Harvard, not merely in the last 25 years, but from the beginning, have come from the open hands and open hearts of her sons. (Loud applause.) It was the peculiar felicity of President Eliot, when he entered upon the duties of his great office, that he was called upon to build upon foundations that were as solid and as stable as the everlasting hills.

He said in his inaugural address that a university is not built in the air, but it rests upon social and literary foundations that preceding generations have bequeathed, and he concluded that memorable address, which many of you doubtless heard, delivered in the presence of all that was great and good and glorious in Harvard, by this solemn promise—that the future of the university should not be unworthy of its past; and what a glorious past it had already enjoyed.

The hands of the Puritan fathers had planted it; the bequest of the faithful, living and dying, in two centuries, had watered it; it had grown with the growth of the colony. All generations, from Winthrop down, had been busy in building it; all the energy, all the thought, all the life of Massachusetts had found expression here; all the struggles for freedom, all the aspirations for national life, all those controversies and great upheavals of opinion through which this great commonwealth worked its way at last out of the dark night of intolerance, bigotry and superstition into the broad sunlight of liberty, had left their indelible marks upon Harvard College. (Applause.)

Her alumni had been at the front in every movement for light or liberty. In the revolution, Warren and Hancock and the Adamses, and in the civil war, then so lately ended, Wardsworth and Shaw and the Lowells, had been but the leaders and representatives of the long roll of honor among the list of her graduates.

All that was choicest and best in the learning, the culture, the character of this great state had been gathered here, and Harvard was ready at the parting of the ways, waiting for her young and enthusiastic president to lead her on, and he has led her on, as he promised that he would, to a future that was worthy of that great past. (Loud applause.)

Brethren, I began by saying that I would not praise President Eliot to his face, and I have kept my word. (Laughter.) But you cannot speak the truth within these sacred walls, from which the worthies of two centuries look down, but that every word will echo to his honor. (Great applause.)

His brain conceived, his hand has guided, his prudence has controlled, his courage has sustained, this great advance; and if I might in his presence be permitted to ascribe to him one cardinal virtue which comprehends them all, I would say that he has always had as his watchword Harvard's perennial countersign, "Veritas." (Great cheering.)

He has always been true—true to himself and true to us; true to his own convictions; true to the dreams of his youth; true to the promise of that early manhood, in which he took into his charge the affairs, the honor and the conscience of this ancient university.

And so, gentlemen, in your name, and under your commission, I bestow upon him this medal, to commemorate this day, as a token of your love to him and of your loyalty to Harvard; and I am sure that he will cherish it in life, and will transmit it to his children as your priceless gift. (Loud cheers.)

AMERICAN SOCIETY OF CIVIL ENGINEERS

ADDRESS DELIVERED AT THE OPENING OF THE NEW SOCIETY HOUSE,
NEW YORK CITY, NOVEMBER 24, 1897

Mr. President and Ladies and Gentlemen: Unfortunately for you I have received no intimation to be brief. But my safety lies, and yours too, in my little knowledge of the subject in hand. It was a great philosopher who said "One thing I know—that I know nothing," and always afterwards he was regarded as one of the greatest and wisest of mankind. But I do feel very grateful for the opportunity that has been given me on behalf, as it was suggested by the Committee, of the other professions, of welcoming this youngest, most vigorous, and, I believe, most useful, of all the learned professions in this very critical and important day in its life. There is necessarily a fellowship and a very close fellowship among all the learned professions. We are all engaged alike in studying and applying laws to the uses and convenience of mankind, and in that respect the engineers, as it seems to me, have a very decided advantage over the other and older professions. They work from known and certain premises to inevitable conclusions. Theirs is an exact science, based not upon opinion, based not upon judgment, but upon absolute and fundamental facts in respect to which they ought not and cannot be allowed to err. But we of the other professions stand very differently. Ours are all uncertain—based upon opinion, upon experiment, upon judgment. When the doctor loses his patient, it is never his fault. He goes on, he lives on, and acquires new patients and new fame. When the lawyer loses his case, it is never his fault. He can always trace it to the infirmities of the law, or the weakness of the judge, or the dullness of the jury, or the evil conduct of his client. But it is not so with the engineer—the civil engineer; with him a blunder is indeed a crime. If his bridge falls, he falls with it. If his tunnel collapses, he collapses with it—and had better be buried in its ruins. Now, there is another respect in which, as I think, the profession of engineering has another very decided advantage over us. Our works perish. The breath of the lawyer is the measure of his fame. The rules, the practice and the law of the medical profession change from age to age, and—if the Bishop will allow me to say so—even the dogmas of theology are not forever unchangeable. But the works of the engineer live after him as an enduring monument to carry down to a distant posterity his merits and his defects.

In a little term of leisure last winter I wandered over the Island of Sicily, and on the heights of Euryalus overlooked what once had been the site of the City of Syracuse, which had absolutely disappeared so that not a vestige of it remained. The great fortifications that the predecessors of Archimedes had built under that lofty hill remained unchanged as they were built for military purposes more than two thousand years ago. At Girgenti and Pæstum we gazed upon temples still standing, in form perfect, as they were erected by engineers and builders whose names have been forgotten, still holding out models of beauty and grace for the imitation and instruction of mankind. At Rome we rode over the bridge of St. Angelo, more than a thousand years old. We stood under the dome of that matchless model of architecture, the Pantheon, as perfect apparently as when the name of its builder, Agrippa, was emblazoned upon its front. We stood before the ruins, the matchless ruins, the splendid ruins, of the Coliseum. All these great structures testify to a far-distant posterity of the power and the beauty that dwelt in the minds of their designers; and I have been wondering since I was invited to take part in these proceedings whether any works yet constructed by engineers or builders in this America of ours will last as long as those; whether the men of the thirtieth century, the students of architecture, of engineering, will find something yet to admire, even though it be in ruins, of the works of the men of the nineteenth and the twentieth centuries? That question I shall prefer to leave to these distinguished experts who are members of this American Society of Civil Engineers. But the truth nevertheless does remain that the work of these great engineers of to-day, the men who build our great bridges, our great docks, our great tunnels, our great railroads, will be carried down to a posterity that will long since have forgotten the doctor, the lawyer, and even the clergyman, who are now ruling over us.

I think it a very fortunate thing in respect to these days and events that the opening of this building for the use of the American Society of Civil Engineers is exactly coincident with the starting of this great metropolis in which we live and of which, in spite of its mistakes, we are all so proud, upon its new and greater career. Why, New York is only an infant to-day. She is just bursting her swaddling bands. She has outgrown herself and is really bursting her bands in all directions. You cannot venture into the streets without the peril of losing your life as a sacrifice to the great engineering works that are going on to-day. And I am sure that that great province for engineering now extending over an area of 350 square miles—359 square miles is the

exact quantity—holds out more work for the conscientious, the intelligent and the skilful engineer than all America did fifty years ago. What bridges are to be built over these noble rivers! What tunnels are to be excavated! What roads laid out! What docks constructed! Why, think of it; we have one project now pending before us, one work of tunneling and of bridging and of road building at an expenditure—the appalling expenditure—of 50 millions of dollars! Now, what I hope is that the new administration, which the people of this city in their wisdom have elected to preside, will come here—I hope they are here—I hope the Mayor-elect is here, to learn a lesson that no other place could teach as well as this; that the great engineering works of this city, which are to absorb millions upon millions of the people's money and occupy years and decades in their construction, shall be placed under the charge of competent engineers as the heads of the departments in which the public works belong. I think the science of engineering has advanced so far, and I hope the science of municipal government has advanced so far, that hereafter it will not be considered sufficient to have as Commissioner of Public Works either a lawyer or a politician, who is as ignorant of engineering as the unfortunate person who now has the honor of addressing you.

This Society well calls itself the American Society of Civil Engineers because it is a truly national institution for the service of the whole nation, made up of educated engineers, engineers in every branch of civil engineering. Now, President Schurman has said something about its being a new profession, and General Craighill asserted that it was the oldest profession that he knew anything about. Well, that is only a difference of verbiage, or phraseology. It is true that fifty years ago there were not many civil engineers, and if they had been presented to an audience like this, the audience would have been quite at a loss to know what they were. But they have been training, and are being trained from the beginning. It is true the colleges did not do much for them. I remember when ex-President Morison, one of the most distinguished engineers of this country, and one of the most distinguished ex-Presidents of this Society, left Harvard College, he found it necessary to spend a year or two in my law office to lay the foundations of that great engineering fame. And I am happy to say now that three successive Presidents of this Society, including the gentleman who presides here to-day, are graduates of Harvard College. I think it shows what we believe in the other professions, that for technical education there must first be laid as a foundation a broad, liberal education. But I was going to say what the engineers

had done for the Nation. It is true they have not been the founders of the Nation; but they have been the makers and the builders of the Nation. Now, let us see exactly how that is in a very few words. When this Nation was founded, for I look upon the making and adoption of the Federal Constitution in 1787 as the founding of the Nation, there had been no engineering and no engineers in America except the military gentlemen whom Washington had summoned to his aid for the conduct of the war. There was no bridge over any navigable river in what now constitutes the United States; no harbor but presented its natural appearance as it had been from the beginning of time. Of course, no railroads, no tunnels, no roads worthy of the name, of any description. Why, then, it took the Members of Congress who went in their own carriages from Boston to Philadelphia six days to make the journey, and they had to cross in ferries the mouths of six navigable rivers. Two hundred years had been spent by the settlers in grappling with the wilderness, and in desperate struggling. What had been accomplished? Fifty miles in breadth along the Atlantic coast, from Maine to Georgia, was all that then represented the triumphs of those two centuries. Well, then the Federal Constitution was adopted. You remember that memorable scene on the day when Hamilton wrote the names of the States on the last page of the document, at the foot of the document, and Washington and Franklin and all the rest of them subscribed their names. But if Washington and Franklin, the two wisest members of all that wise gathering, could have foreseen that within a hundred years the area of the United States—in which the Constitution which they then formed was to carry the blessings of liberty to a distant posterity—was to extend not simply from the Atlantic to the Mississippi, but three times as far—from the Atlantic to the Pacific, and from the Gulf to the Lakes, and that in the ordinary administration of executive power it might be necessary for the President to issue an order, for the very salvation of the Republic, that should be obeyed within one hour on the Pacific coast—if they had contemplated that it might be necessary to transport in three days three hundred thousand men from the Lakes to the relief of the beleaguered capital—even they would have trembled at the sublime audacity of the experiment that they were undertaking. Why Franklin himself, with all his power, with all his learning—he had snatched the lightning from the clouds and the sceptre from tyrants; he knew all about steam that anybody knew; he was the matchless master of electricity up to that date, and yet even he had no conception of the means and appliances by which this nation was after all to

be made one. Let me read you what he said only the year after the convention adopted the Constitution and adjourned. In writing to a friend of his, in the month of October, 1788, from Philadelphia, he says:

"We have no philosophical news here at present, except that a large boat rotated by the force of steam is now exercised upon our river, stems the current and seems to promise being useful when the machinery can be more simplified and the expense reduced."

And Mr. Madison in the *Federalist*, in arguing very laboriously the possibility of the Federal Government exercising efficient control over our vast territory as it then extended from the Atlantic to the Mississippi and from Maine to Georgia, says:

"The difficulties will indeed be great, but as the nation will extend no further than the Mississippi and no further south than Georgia, it will be quite practicable for the delegation from those distant regions to reach the seat of government in time to take part in the deliberations of Congress."

And now what do you see? What has been done since then; all done by these engineers? As Mr. Seward said at the outbreak of the War of the Rebellion: "No parchments, no laws, will hold this nation together; but bridges and railroads and steam and the telegraph, they will and must do it."

Now, I will not detain you, for you all know what these engineers have done. The highway from the Atlantic to the Pacific was the very saving of our Pacific seaboard, the Rocky Mountain States, to the Union. You all know perfectly well what immense works, both public and private, have been constructed by them in every quarter of the Union; how peace and plenty, and order and law, and art and civilization have followed in their track; how they have made commerce so fruitful, the people so flourishing and happy and have brought with them to stay prosperity throughout the land.

Now, when I received this invitation I thought I would like to know something about some engineers, and I got one of the most entertaining books or set of books that I for one have ever read. As there are some here who are not engineers, I advise them to get it and read it, and that is Smiles' "*Lives of the British Engineers.*" They are more fascinating, each one of them, than anything that can be found in the *Arabian Nights*—more bewitching in their fortune, their character and their achievements. They all seem to tell one story. They had no colleges, they had no universities where they could study the elements of their profession. They were almost uniformly sons of laborers,

born in laborers' cottages, nurtured under hardships, apprenticed to a youth of hard labor, manifesting always indomitable courage, vast power of labor, a perfect passion for construction, and patience that knew no end, and courage that equaled anything that any warrior ever exhibited, and conscience always—it is one of the most honest and conscientious professions that has yet come into the world. They stumbled upon their first works apparently almost by accident. They showed themselves worthy by the perfection of the work they did, the conscientiousness with which they did it, and they went on from one piece of work to another, ever greater and grander and grander; and when they were called to their last home they were followed to the grave, not by humble cottagers who had surrounded them at birth, but by kings and nobles and the intelligence, the brains, the culture and the wisdom of the realm. Where did they end their careers? Just where they should; among the greatest benefactors of mankind, in Westminster Abbey. Doubtless all of you remember that splendid statue of Watt, to whom President Schurman has already referred, by Chantry, on which is inscribed an epitaph prepared by Lord Brougham which he counted the greatest honor of his life to have been permitted to write; and then, too, you find as you walk through the nave the graves of Thomas Telford and of Robert Stephenson—two more of the great benefactors of the human race—the one the "Colossus of Roads," as his friend Southey delighted to call him; the other the perfecter of the locomotive. He and his greater father—if I may be permitted to call him so—George Stephenson, had worked together in the development of that vast machine upon which now the prosperity of the human race itself depends.

Now, how did they do all this? How did these great engineers achieve these marvelous triumphs? Well, I think it was only—to borrow a phrase of Emerson's—by hitching their wagon to a star, and if you will permit me to read a few words from Emerson in conclusion, which I think he intended for just such an occasion as this, and in writing which I believe he had in mind the American Society of Civil Engineers and all civil engineers in general, you will understand what I mean when I say—recalling Lord Bacon's phrase, that every man owes a debt to his profession—that the debt these civil engineers owe is to follow in the footsteps of those great men whom they all unite in honoring and revering; and now, if you will allow me to read this short passage from Mr. Emerson, I will take my seat. He says:

"Now, that is the wisdom of a man, in every instance of his labor, to hitch his wagon to a star and see his chore done by the gods themselves. That is the way we are strong, by borrowing the might of the elements. The forces of steam, gravity, galvanism, light, magnets, wind, fire, serve us day by day and cost us nothing. Hitch your wagon to a star. Let us not fag in paltry works which serve our pot and bag alone. Let us not lie and steal. No god will help. We shall find all their teams going the other way—Charles' Wain, Great Bear, Orion, Leo, Hercules: every god will leave us. Work rather for those interests which the divinities honor and promote—justice, love, freedom, knowledge, utility. If we can thus ride in Olympian chariots by putting our works in the path of the celestial circuits, we can harness also evil agents, the powers of darkness, and force them to serve, against their will, the ends of wisdom and of virtue."

OUR PROFESSION

ADDRESS DELIVERED BEFORE THE CHICAGO BAR ASSOCIATION,
FEBRUARY 4, 1898

Mr. President and Brethren of the Bar Association of Chicago:
No language can express my gratitude for your cordial invitation to me—as unexpected as it was undeserved—or my appreciation of your truly overwhelming hospitality and your enthusiastic greeting. Let me declare with absolute sincerity that in more than forty years of uninterrupted professional labor, no success, no reward, no recognition has surpassed this rare honor. But I cannot claim it for myself alone—I must not accept it as a purely personal compliment. I recognize it as a spontaneous expression of that hearty sympathy and fraternal good will which this great and learned and powerful bar of the center of the continent feels for its brethren in the Atlantic states and in the nation at large. I am a life-long believer in the brotherhood of the American Bar, and so I could not find it in my heart to decline your invitation, although to accept it seemed almost to imply that some merit of my own had brought it upon me.

I had long heard of the unstinted hospitality of Chicago. I fully realized it on my arrival. No sooner had I reached the Auditorium than I was waited upon by the entire press of Chicago in a body. They tendered me the freedom of the city wrapped up in a newspaper. They opened their columns to me to address all mankind freely on every subject. They were very curious people. Their extreme youth demonstrated the truth of what I had heard that Chicago relies for its best work upon its young men. Each one of them seemed to carry a kodak in his eye, and they took views of me from every quarter of the world, New York, Washington, Hawaii, Cuba, China and St. Petersburg. They came within an ace of taking my life. They told me of a thousand incidents in my career which never happened, and put into my mouth a hundred jokes which I never uttered. They tried to father upon me some of Depew's bantlings. They told me exactly how much I was worth, which my wife and children will be very glad to hear. At last one of them, more forward than the rest, declared, "Well, Mr. Choate, you must have attended at least a million dinners." As that, at one dinner a day would carry me back, according to Dr. Schlieman, to the days of the Trojan war and make me the pot companion of Agamemnon and Ulysses or of Priam and

Hector, I denied the soft impeachment, I told them that my life was altogether quiet and domestic, that I always avoided the scorching glare of publicity when I could keep in the shade and that I liked nothing so much as to be let alone. So they kindly took their departure, promising to be with me again to-night, and no doubt every child of them is among us taking notes, and Faith he'll print 'em.

As I flew hither on the wings of night, in that marvellous train which brings us in absolute comfort and luxury a thousand miles in twenty-four hours, through cities, towns and villages teeming with riches and plenty, which to the pioneers of America would have been a journey of three months through the wilderness, I could not help thinking how time and space between New York and Chicago have utterly vanished; and how these two greatest cities of the Western Hemisphere are henceforth one in interest, in sympathy, in culture and in duty. The greater New York may not include Chicago within its growing boundaries, but Chicago with its far reaching influence and power will touch and embrace New York. In one respect you have an immense advantage over us—if New York is our gateway to Europe—Chicago is the gateway, East and West and North and South, not of our nation only but of the whole continent. As was said of Rome in imperial days, "all roads lead to Chicago." Here the great throbbing centre sends forth life to the whole body of America. These bands of steel which radiate from here in every direction are the arteries and veins which convey and reconvey the very life blood between the heart of the nation and its utmost extremities—these tiny threads of wire reaching from Chicago to every city and village and almost literally to every household in the land, constitute the nervous system which keeps the whole alive with thought and soul and brain.

One future, one hope, one destiny awaits us all alike—if one section suffers, all the rest will suffer with it—if one member perishes the whole body will perish at the same time. And if there is, which I do not believe, a growing jealousy and strain between East and West, Chicago with her equal hold on both must be the mediator, and we of New York may well envy the share which the bar of Chicago will take in such a conciliation.

When I look around me on this great company of busy and successful lawyers resting for a moment from their never-ending labors, when I study the lines which time has traced upon their features, I can easily see that success in our profession rests everywhere upon the same foundation. It is the same old story of the sound mind

and the honest heart in the sound body. The sound body is at the bottom of it all. The stomach is indeed the key of all professional eminence. If that goes back on you, you might as well throw up your sponge. And sleep without worry must cherish and nourish it all the time.

Sleep that knits up the ravelled sleeve of care,
The death of each day's life,
Sore labor's bath, balm of hurt minds,
Great nature's second course
Chief nourisher in life's feast.

Why should we worry over miseries and troubles which concern our clients only, and not us at all? Our entire responsibility ends when we have done our best, and the rest belongs to the judges and juries or the clients themselves, and if we fail the fault lies with the former for being so dull, or so inappreciative of our efforts and arguments, or with the latter for having such bad and hopeless cases. Next comes that patient industry which never flinches and never falters, as Lord Eldon put it in recounting his own experiences as plain Jack Scott: "If you've got any money, spend it; if your wife's got any, spend that, and then work like a dog till you're Lord Chancellor."

And then the unconquerable will with courage never to submit or yield, which is success itself. I have known all the leaders who have flourished at the eastern bar for forty years, and most of those from other parts of the country, and although no two of them were alike in physical or mental endowments, all agreed in this one moral quality—a grim tenacity of purpose to hang on and hold out through everything and against everything until the end was reached—then sprinkle in the mental qualities each to suit his own taste and according to what he happens to have on hand—but last and more than all what Mr. Emerson said of character is far more true in our profession than anywhere else, that character is a far higher power than intellect, and character and conscience in the long run are sure to come out ahead.

So, if I rightly read your lineaments, this great bar of Chicago is built up on health, industry, courage, brains, character and conscience, and must hold its own against the world.

When I recall some of the great names that have graced and ennobled the legal annals of this city and state, first and foremost always, the immortal Lincoln, who by sheer force of his intellect, in spite of every possible disadvantage, became eminent in his profession here, and then by genius in debate exposed to the listening nation the fatal question on which its destiny hung, and at last by the matchless

power of his sublime character carried it through blood and fire to the triumphant solution of that question—to a Union never again to be shaken, because founded on absolute and equal justice to men of every color, race and creed, and to that new birth of freedom which he proclaimed at Gettysburg; and again, when I recall the name of Lyman Trumbull, through a long life a great champion in the legal arena, and who once in the very prime of his life and the summit of his powers, had the good fortune to render a great service to his country, when, believing as he did that the great executive office of the nation itself was on trial, he cast a decisive vote to preserve it, although at the sacrifice of his political prospects and power; when I remember the brilliant and accomplished Wirt Dexter, who transplanted from the old Bay State the prestige and tradition of a family of great lawyers and maintained it here with new and undiminished lustre, and then your own Goudy, so lately lost and so lamented, not here only, but wherever the capacity to solve great questions and handle great affairs, by skill, by tact, by wisdom and by learning, was appreciated and honored; when I recall the signal service to the nation and to human welfare which the courts of this region, both State and Federal, have rendered—how when anarchy seemed on the point of gaining the mastery they have mastered it—by courage, by reason, by the intrepid exercise of the judicial power, without regard to personal danger or consequences and how by the steady and wise labor of half a century they have built up your system of law and equity to a height which commands respect and authority in all places and in all courts—I feel that New York can look to Chicago and Illinois for light and leading, with the same faith and confidence that you in turn look back to her.

When I contemplate your wonderful city, and contrast it with what it was when I first saw it forty-three years ago, when it had but 80,000 inhabitants, and its streets were almost submerged beneath the waters of the lake—when I survey its commerce, its manufactures, its parks and museums and charities, its grand boulevards, its splendid architecture and towering edifices—above all when I see, to use the language of Burke, how population shoots in this quarter of the land, I can realize how it was that the people of New York City, alarmed at your progress and jealous of your mighty strides to power hit upon the scheme of Greater New York in the vain hope of keeping ahead of Chicago. They heard that your population was doubling every ten years—that your area was expanding to an extent as boundless as the prairies that surround it—that you had more money than you knew what to do with, and were already becoming the bankers and money

lenders of Europe, and they determined by the artificial scheme of annexation to circumvent you—vain hope and foolish expectation. You will go on as you have before and continued until now. Here is to be the favorite home of the new American, that composite creature in whose veins the mingled strains of all the scattered branches of the Aryan race unite, with whose energy and daring and speed and wind and bottom, the tired cities of the east will strive in vain to keep an even pace.

We are all lawyers here to-night, and by courtesy we may for the occasion include even the judges as members of our craft. Although they have soared aloft on silken wings to a higher and a nobler sphere, they are not unwilling to return to us on nights like this, as the retired tallow chandler was wont to return to the shop on melting days. How delightful it is to meet them on an even keel and at short range and speak our minds freely without any fear of being committed for contempt. There's a divinity that doth hedge a judge, I know, but to-night the hedge is down and they are very fair game indeed.

Let me speak of our noble profession and some of the reasons we have for loving and honoring it—above all others.

In the first place I maintain that in no other occupation to which men can devote their lives, is there a nobler intellectual pursuit or a higher moral standard than inspires and pervades the ranks of the legal profession. To establish justice, to maintain the rights of men, to defend the helpless and oppressed, to succour innocence and to punish guilt, to aid in the solution of those great questions, legal and constitutional, which are constantly being evolved from the ever varying affairs and business of men—are duties that may well challenge the best powers of man's intellect and the noblest qualities of the human heart. I do not, of course, mean to say that among the ninety thousand lawyers whom the census counts in our seventy millions of people, there is not much base alloy—I speak of that great body of active and laborious practitioners upon whom rests the responsibility of substantial litigations and the conduct and guidance of important affairs; you will look in vain elsewhere for more spotless honor, more absolute devotion, more patient industry, more conscientious fidelity than among these. I am not unmindful of that ever mooted question how we can with the strictest honor, maintain the side that is wrong, and the suggestion that as only one side can be right in every lawsuit, we must half the time be struggling for injustice. But that vexed question has long been settled by the common sense of mankind. It is only out of the contest of facts and of brains that the right can

ever be evolved—only on the anvil of discussion that the spark of truth can be struck out. Perfect justice, as Judge Story said, “Belongs to one judgment seat only—to that which is linked to the throne of God”—but human tribunals can never do justice and decide for the right until both sides have been fully heard. When Jeremiah Evarts, the father of my great master in the law, and himself a truly great and righteous man, had graduated from Yale and was considering the law as his profession, this same question disturbed his honest and conscientious mind, and he consulted Judge Ellsworth, afterwards Chief Justice of the United States, who solved his doubts by advising him that any cause that was fit for any court to hear was fit for any lawyer to present on either side, and that neither judge nor counsel had the right to prejudice the case until both sides had been heard, and he told him of Sir Matthew Hale, one of the most righteous lawyers and judges in English history, who began with the same misgivings, but modified his views when several causes that he had condemned and rejected proved finally to be good. Nor is ours the only profession in which the same question has been advocated, for we read in the life of John Milton that when his good old father had lavished a good part of his fortune upon his education at Cambridge until he had taken his degree of master of arts, having no other thought than that his son should devote his great character, intellect and eloquence to the church—the youthful poet after a full study of the question decided for himself that he could not enter a profession which would require him to advocate what he did not believe to be true.

Again, we love the law because among all the learned professions, it is the only one that involves the study and the pursuit of a stable and exact science. Theology it is true, was once considered an immutable science—but how has it changed from age to age and even from year to year. We are bred to believe that everything and every word within the four corners of Holy Writ was absolutely inspired truth. But now upon what unhappy times have we fallen, in which the props of our faith are being knocked from under us day by day. Only a month or so ago the pastor of Plymouth Church announced that the sacred story of Jonah and the whale was only a myth, that the whale did not swallow Jonah or hold him in his stomach for three days or vomit him up on the shore at all—and so that charming narrative to which we had pinned our faith in youth and manhood as one inspired piece of history which we could and must believe, vanished forever from our mental vision. Not to be outdone by Dr. Abbott, another of our metropolitan divines has declared that in the deluge

the waters did not cover the whole earth, and so we must abandon the delightful and tragic drama which has fascinated the world for thousands of years, of Noah and the ark, and the destruction of the wicked, and the dove and the olive branch, and the only true theory of the invention of the rainbow. And last of all a distinguished bishop announces at a public dinner that nowadays nobody but printers believe in the existence of a personal devil. Why, without him, where shall we be? And who will foment the litigations for our successors to conduct or to settle? And now it only remains for some great Chicago divine to discover that Nebuchadnezzar did not really eat grass—that his skin was not really wet with the dews of heaven, until his hair became as eagles' feathers, and his nails as birds' claws. So will the foundations of our faith be utterly destroyed, and we can no longer cherish that signal chapter of religious history, which has come to us straight from Babylon to Chicago, and which was at the same time one of the greatest political triumphs on record—and worthy of perpetual imitation, for how can we better dispose of our oppressors, of our unjust rulers, governors, judges, senators, than by turning them out to grass.

And then as to medicine, how its practice and its theories succeed each other in rapid revolution, so that what were good methods and healing, doses, and saving prescriptions a generation ago, are now condemned as poisons and nostrums, and all the past is adjudged to be empirical.

Meanwhile the common law like a nursing father makes void the part where the fault is and preserves the rest, as it has been doing for centuries, and we are busy applying to each new case as it arises, the same principles, the same rules of right and justice, which have been established for many generations. We preserve the real fruit and throw away the rind. The technicalities which have too long encrusted the law have been stripped away, and now, like Lord Mansfield, our judges try to solve every case by common sense and the sense of justice, and the sense of honor, which in their highest manifestation, constitute the most eminent and valuable judicial qualities.

We hear sometimes that the American bar has degenerated, that it does not equal its predecessors in power and character and influence, but this I utterly deny. To the demands which each generation makes upon it, it is always adequate. Times change and men change with them. The intense pressure of modern life and business leaves its mark upon our profession, as upon every other vocation. What once could be said in three days must now be said in two hours—what once

could be done in a month must now be done in a day, and for one I do not hesitate to say that for skill, efficiency, utility and power, the service which our profession lends to the community to-day has not been surpassed in any former generation. It must be so. Take from the bar of New York as it stands a hundred of its leading practitioners in court and in office, and fifty of equal rank from the bar of Chicago, and they will do more and better work than any equal number in any past age.

So when these carpers who would laud the past at the expense of the present, ask me if the Bench of to-day is what it was in the olden time, I answer No, it is better qualified for the work it has to do than any of the old judges would have been. The bench, like the bar of every generation, is evolved from the character and condition of the age and the demands which it makes upon the profession. Take the Supreme Court of the United States as the most striking and illustrious example. When John Jay, the first chief justice, presided, the court was almost always adjourned because there were no cases to be heard. All the time that Marshall presided the records were never printed—the original manuscript record was handed along the bench for the several judges to examine. Webster and Pinkney and their compeers would go in from the senate to the court which sat three days in the week, and agree for a day for argument two or three months ahead, and then appear and argue without limit of time—two or three days apiece as the case might be. Arguments concluded, Marshall and Story could take the great cases to Richmond and to Salem, and have weeks or months to prepare those learned and elaborate opinions which really laid the foundations of our Federal law, and settled the Constitution upon an imperishable basis. Now, steam and electricity and the telegraph and telephone and the intense pressure of business which has grown out of these has changed the whole order of things, and I prefer to adapt the question to the changed conditions and to turn it end for end and to ask: Could Marshall and Story and their associates, if now summoned to the task, do the work which Fuller and Harlan and their associates discharge so ably, so conscientiously and so well? The question answers itself—Let the dead past bury its dead. Gathering all the light it can from the past, and responsible to the future for the results of its conduct, the living present suffices for its own work.

There is one respect, I admit, in which we have declined, and which for one I do greatly deplore—the cultivation of the fraternal and social spirit among ourselves has been almost abandoned, and it ought

to be revived and transmitted. In thirty years we have had but two bar dinners in New York, and our younger brethren only know by tradition how those who preceded us mitigated the austerity of the law by constant social festivities—how they went on circuit as a band of brothers—and however lustily they might contend in the court room, outside of it they were boon companions.

Our English brethren set us a most worthy example in this regard.

In Shakespeare's time when he haunted the Mermaid Tavern in company with Ben Jonson, he saw the barristers come in from the courts, and from what he saw he puts into the mouth of Tranio in the Taming of the Shrew:

Please ye we may contrive this afternoon,
And quaff carouses to our Mistress' health,
And do as adversaries do in law—
Strive mightily, but eat and drink as friends.

The Inns of Court have been the scenes of constant daily intercourse, and not rarely of the most jovial festivities. From the times of Charles the First, when they contrived their great historic masque for the entertainment of the king and queen and court, a jollification in which the greatest barristers of the day, such as Hyde, afterwards Earl of Clarendon, and John Selden, whose delightful table talk has come down to us through two centuries and a half, and Attorney General Noy and Bullstrode Whitlock, took an active part, down to the days of Lord Coleridge and Sir Charles Russell, and Sir Frank Lockwood, whose recent death, so untimely and so lamented, has been a serious loss to the profession both here and there, the London barristers have been the lights of each succeeding age—the leaven that leavened the whole lump of English life and society. Let us imitate a little more their bright and shining example—let us lead lives less dry—less sterile—less a matter of pure and unmitigated business—let us each ride not only a horse, but a hobby, also—above all, let us get all the entertainment we can out of our work as we go along, for we may rest assured that if we postpone the fun of life until the work is done it will never come, for it will find us as dry and dusty as so many remainder biscuits after a voyage. So I trust that we in New York shall imitate your example, and that this occasion may be only the beginning of a real interchange of a living brotherhood between the bar associations of our two great and noble cities.

But there is one respect in which the American Bar has far outshone not only its brethren in England, but in every other country of

modern times. I mean in its great share in the conduct and shaping of public affairs. In all our history, among the gallant champions of liberty, the wise founders of free states, the framers and defenders of free constitutions and of the rights of the people under them, the lawyers of America have ever been foremost. I refer not now to official life, though all the great civil offices, state and Federal, have always been, are now, and always must and will be, to a large degree filled from their ranks—but I speak of that lofty public and patriotic spirit for the people's good, which ought to animate the heart of every lawyer worthy of the name. When James Otis resigned his rich office as crown advocate to maintain the cause of the merchants and the people of Boston against the oppression of general warrants, refusing all rewards, saying "in such a cause I despise all fees" and delivered in the old State House that great plea for popular rights, so telling, so overwhelming that John Adams, who was present, declared long afterwards that on that day and in that room "the child Independence was born," he set the pace for all the future lawyers of America. When John Adams and Josiah Quincy, Jr., braved the popular wrath in their successful defense of Captain Preston and his British soldiers for their part in the Boston massacre—and when Patrick Henry in that little court house in Virginia argued the Parsons' cause and displayed for the first time his transcendent power as the people's orator, they embodied that public spirit which has animated the patriotism of the profession ever since.

I believe that with one consent the common judgment of mankind would point to Hamilton, Webster and Lincoln as the three American lawyers whose actual public services had most largely contributed to the formation and preservation of the Constitution, on whose continuance the hopes of civil liberty for all coming time depend. God made them greater than the rest, and the opportunities came to them for great achievements which found each in turn ready and able for the service demanded. Hamilton's creative genius was displayed in the part he took in framing the Constitution, and again in securing its adoption, and finally in launching the new government in practical and successful operation under it, which probably surpasses any political service ever rendered by one man in our national history. To Webster I ascribe a share second to that of no other man in the final triumph of the Constitution and the Union over all their foes. It has been the fashion of late years to belittle him because of the infirmities of his declining years, but for two entire generations he was at all times and in all places inculcating in the breasts of the youth of America that

ardent patriotism which inspired his own—that devotion to the flag which would compel them to follow it wherever freedom led and to the Union one and inseparable. So that at last when the fatal summons from Sumter sounded, though dead, he yet spoke to them, his heart which had warmed, his brain which had illuminated New England for them and their fathers seemed to live once more—and under his inspiration still they marched to death or to victory—but at all hazards as he had taught them to save the Union without which all else was lost. Of Lincoln, why should I try to say more in this presence or in this city or state. History has long since decided that to him under God the world owes it that government of the people by the people and for the people has not perished from the earth. A thousand years from now his name will stand as bright as to-day as the synonym of freedom and free government. Opportunities such as these three great representatives enjoyed and improved may not come to every or to any generation of American lawyers. But at all times, and especially in this our day great public duties await us. So long as the Supreme Court exists to be attacked and defended—that sheet anchor of our liberties and of our government—so long as the public credit and good faith of this great nation is in peril—so long as the right of property which lies at the root of all civil government is scouted, and the three inalienable rights to life, to liberty and the pursuit of happiness, which the Declaration of Independence proclaimed and the Constitution has guaranteed alike against the action of Congress and of the states, are in jeopardy, so long will great public service be demanded of the Bar.

Let us magnify our calling. Let us be true to these great occasions, and respond with all our might to these great demands, so that when our work is done, of us at least it may be said that we transmitted our profession to our successors as great, as useful and as spotless as it came to our hands.

Again, with all my heart, I thank you. To the end of my life the radiance, the good cheer, the generosity of this occasion will illumine my way and endear to me more than ever the profession which has honored me so much to-night.

TRIAL BY JURY

ANNUAL ADDRESS BEFORE THE AMERICAN BAR ASSOCIATION, SARATOGA, AUGUST 18, 1898

We meet at a most auspicious moment. Since this Association last assembled for its annual conference the nation has been engaged in a war which has absorbed all thoughts and necessarily distracted us from those peaceful purposes which annually bring us together. But now, with unexpected suddenness, at the cost of great treasure and much precious blood of our heroes, the truly noble object of the war has been accomplished, and peace is already in sight. It might perhaps be expected that in accepting the very great honor of delivering the annual address provided by your Constitution, I should enter upon a discussion of some of those important questions which must arise out of the consequences and results of the war. It is obvious that all such questions as they arise must naturally engage the best thought and the noblest and most patriotic exertions of our profession, which has always exercised a controlling influence upon controversies about Constitutional power and national policy, and to whose special keeping is entrusted the study of those principles of right and justice, which must govern the conduct of nations as well as of the individuals who compose them. At all the great and critical points of our national progress the American Bar has found its appropriate spokesman for the public honor and the public safety. When Otis, against the malignant power of the British Crown, pleaded for the right of every citizen to be secure against tyranny in his person, his home and his papers, and set the ball of freedom rolling; when Henry led the friends of Colonial rights in Virginia and shook the Continent by the thunder of his eloquence; when Hamilton by the main strength of his arguments carried the Federal Constitution against a defiant majority in the New York Convention; when Webster by his majestic speech inculcated in the hearts of Americans that flaming spirit of nationality which saved the Union twice and will preserve it forever, when Fessenden and Trumbull sacrificed their political fortunes to rescue the great office of the Federal Executive from destruction,—they furnished examples for the lawyers of all times to stand at all hazards for public justice and for public honor. But it seems to me that it would be out of place for us to-day to undertake to pronounce, as the organized representatives of the American Bar, upon the possible, but as yet unformulated, questions in diplomacy, in policy, and in public law which will naturally

follow upon such a momentous struggle and such overwhelming victories by sea and land. In the meantime I prefer, as I hope you prefer, to rely upon the wisdom and the patience, the courage and the firmness, of the President and his constitutional advisers, who have conducted the campaigns of our gallant army and navy to swift and sweeping victory.

You will remember that only two years ago in this very presence, the Lord Chief Justice of England, in his admirable discourse before you on arbitration, declared, with your unanimous approval, that there may be even greater calamities than war, and that national dishonor is one of them. Nothing can be more certain now, than that we should have incurred real national dishonor if we had any longer refrained from intervening for the rescue of our oppressed and down-trodden neighbors. In that intervention war was the last argument and the only really effective one. The God of Battles and the judgment of the Nations have completely vindicated that step, and I have no fear that ambition for dominion or lust of glory will bring upon us any calamity or dishonor whatever. In truth, the generous, the magnanimous terms of peace offered to our fallen and prostrate foes have already demonstrated that. The Constitutional Power to declare war is in Congress, but the equally important power to make peace rests with the President, subject to the subsequent approval of the Senate as to the terms of the treaty. It rests safely with him, and for one I am not in favor of intruding upon him too much outside advice and assistance. The war, of course, could not cease until every foot of American soil was purged of the last vestige of Spanish power; but in war, as in law, the beaten party must pay the costs, and in settling the terms of peace, we meet novel problems and serious and unexpected responsibilities, which the triumph of our arms has imposed upon us in both hemispheres. These responsibilities we cannot shirk if we would, and would not if we could, and in dealing with them the government must not be held too rigidly to purposes and expectations declared before the commencement of the war, and in utter ignorance of its possible results. If that had been the rule, our fathers would never have been permitted to declare and maintain their independence, for it was only a month before the battle of Lexington, that Franklin declared to Lord Chatham that he had travelled far and wide in America and had found not one man drunk or sober who was in favor of independence. If that had been the rule, the proclamation of emancipation could never have been issued, and the shame of slavery would still blot the stars upon our flag, for at the outset nothing was more distinctly declared

by Lincoln and his advisers, than that slavery where it existed would not be interfered with. In war, events change the situation very rapidly, and only when the end crowns the work, shall we truly comprehend the great questions which await us. In the meantime let us trust the President who has our national honor most truly and wisely at heart.

Recurring then to the more strictly professional objects of our meeting, and selecting a topic pertaining to the science of jurisprudence, which this Association was organized to promote, I have thought that you would indulge me for a brief hour in considering a subject to which I could bring at least the results and convictions of a large experience, and which I have greatly at heart—a subject so trite, that perhaps nothing new can be said about it, which has been more discussed than any other, but which yet remains a subject of ever fresh and vital interest to every American lawyer and citizen—the trial by jury.

Since you last met, a thrilling event of prime importance in its relations to jurisprudence has occurred in France, which must have arrested the attention of every thoughtful observer, and have led especially those sagacious theorists who have never tired of denouncing trial by jury, and those experimental philosophers and legislators who are always seeking to limit or to mutilate it, or tamper with it in some way or other, to reconsider the matter and to think once more whether we should not do better to let it alone, or only sustain and improve it so as to preserve it inviolate, as the Constitution of the United States and those of most of the states require.

You will readily recall the main incidents of the trial of Zola. An army officer belonging to a race obnoxious to the hatred and jealousy of the French people, accused of an infamous crime, hounded by a licentious press, had been tried and convicted by a court martial, and after the most shameful degradation, had been condemned for life to solitary confinement upon a rock in the sea, eating out his heart with despair more biting than the talons of the vulture or the beak of the eagle. He protested his innocence, and scores of the best men in France declared their faith in it also, among them statesmen and officials of high rank and character, and before long it became apparent that, whether guilty or innocent, he had been condemned practically unheard, and the Government declared that "reasons of State" forbade that the truth should be known. It was at this point that Zola, the most notorious at least, if not the most powerful, of French writers, with a courage and a chivalry never surpassed, took up the unhappy

victim's cause, proclaimed his innocence, and challenged the authorities to bring himself to trial for his accusation against the court martial, which, as he declared, had covered the illegality of the conviction of Dreyfus by the judicial crime of consciously acquitting the real criminal. The government took up the challenge, and then followed a trial which, for reckless and cruel disregard of every principle of right and justice known to us, is surely without a precedent in modern history, and yet it purported to be a jury trial. A jury was sworn, but apparently its sole function was to register the edict of the government, the army and the press, which demanded conviction. Of course, the defendant was presumed to be guilty until he should prove himself to be innocent, but every effort of himself and his counsel to elicit the truth was thwarted. A hostile audience, with which the court room was packed, was permitted to cover the accused with contumely. "Conspuez Zola!" greeted his entrance. Invective from Court, prosecutor and witnesses took the place of evidence and of argument. There was no right of cross-examination, no law of evidence; witnesses who were summoned defiantly stayed away; those who came refused to testify further than they chose, and were suffered to harangue the jury for the prisoner and against the prisoner, and "retired amid irrepressible applause." Hearsay was the main staple of the proceedings. A perfect pandemonium prevailed throughout the trial, and at the end of two weeks, as everybody had known from the beginning, the heroic defendant was convicted and sentenced, and his principal witnesses were degraded or dismissed from the public services.* However satisfactory such a method of administering criminal justice may be to the French people, who cling to it through all changes of government, it could not but excite horror and disgust throughout the Anglo-Saxon world. The proceedings were read wherever Zola's fascinating romances had preceded them. Every safe-guard of personal liberty enjoyed in England and America for two centuries had been violated. We could not read the account of the trial without contrasting it with our own trial by jury, or without the pious utterance from every lip, "Thank God! I am an American."

Heroic Zola! It is pleasant to think of him enjoying the free air of Switzerland after all, having taken French leave of his country, instead of rotting in the dungeon to which her despotism under a republican mask would have consigned him.

This signal event, so shocking to our sense of justice and right, has

* "Zola, Dreyfus, and the Republic," by F. W. Whitridge, *Political Science Quarterly*, June, 1898, page 259.

done more, I am happy to believe, than whole volumes of argument to strengthen and perpetuate our faith in our wholly different system of procedure for the ascertainment of facts on which life, liberty or property are to be brought in judgment. It will help to preserve in its integrity our precious trial by jury, by which no man can be deprived of life or liberty by the sentence of a court until his guilt has been proved beyond all reasonable doubt to the unanimous satisfaction of twelve of his fellow citizens, and no man can lose reputation or property by judgment of a court until by a clear preponderance of evidence his right to it has been disproved before a similar tribunal.

I do not appeal to mere sentiment or popular prejudice in defence of this which I believe to be the best method yet devised for the determination of disputed questions of fact in the administration of justice. There is no need of such appeals—and if I were weak enough to resort to them, they would be wasted upon an assemblage of lawyers like this.

The truth is, however, that the jury system is so fixed as an essential part of our political institutions; it has proved itself to be such an invaluable security for the enjoyment of life, liberty and property for so many centuries; it is so justly appreciated as the best and perhaps the only known means of admitting the people to a share, and maintaining their wholesome interest, in the administration of justice; it is such an indispensable factor in educating them in their personal and civil rights; it affords such a school and training in the law to the profession itself; and is so embedded in our constitutions which, as I have said, declare that it shall remain forever inviolate, requiring a convention or an amendment to alter it—that there can be no substantial ground for fear than any of us will live to see the people consent to give it up.

For the trial of persons charged with crimes, I do not believe that any material alteration of its character will ever be thought of. It is so much better that ten guilty men should escape than that one innocent man should suffer. In truth, in these days of multiplied statutory crimes and misdemeanors, a large majority of guilty men do escape by not being found out, by not being accused, by not being brought to trial after indictment, and largely, too, by setting aside the verdict by Courts of Appeals, so that our established public policy seems to lean against any harsh or rigid or arbitrary application of the criminal laws.

But accepting, as we must, the rule that the defendant's guilt must be established beyond all reasonable doubt before he can be convicted, it is hard to see how, as long as three, or two, or one honest man on

the jury has a reasonable doubt, the prisoner can justly be deprived of the benefit of it without destroying our cardinal rule. But the insuperable answer to any change so far as criminal trials are concerned, is the question what substitute will you provide—and none has ever been suggested that would command the approval of lawyers or of laymen.

Let me call your attention to two cases in the Court of Appeals in New York which will illustrate the necessity of the absolute inviolability of the jury in criminal cases for which I contend, one of long standing and one just announced, both of which resulted in the reversal of convictions for murder, and which must as I believe, commend themselves to general approval. In the celebrated *Cancemi Case* [18 N. Y. 128], a juror being taken ill and unable to go on with the trial, the Government and the prisoner's counsel in his presence consented that the case should go on to a verdict with the remaining eleven jurors, and the defendant was convicted—but the Court reversed upon the ground that a jury of eleven was a tribunal for the trial of felony unknown to the common law, and that it was too dangerous a precedent to establish. It held that the public had a vital and inalienable interest in the preservation intact of this constitutional tribunal which it had created for the trial of crimes—that if the prisoner could waive one juror he could waive eleven, and create a tribunal of his own; and then, how could a man on trial for his life be competent to determine on the sudden as to the wisdom or safety of going on with a juror lost, and who else could be empowered to decide for him? The other was the *Sheldon Case* [156 N. Y. 268], decided but yesterday, where the trial judge kept the jury out eighty-four hours and so compelled a conviction, and the Court of Appeals reversed on the ground that the prisoner was convicted by force and not by reason or evidence; a result which all the world must approve.

There is one serious infirmity in trial by jury in criminal cases in times of great excitement, especially when the more boisterous portion of the press undertakes, as it generally does, to prejudge the case and to condemn the accused unheard. The jury, under such circumstances, find it hard to resist the impression of public sentiment so loudly proclaimed. The courage and firmness which stood as an effectual barrier against the wrath and tyranny of kings, and which won for the petit jury so much of its prestige and glory in English history, are certainly likely at times to fail when confronting the outraged sentiment of that more potent and dangerous despot an enraged democracy. Fortunately, such tempests of popular fury are very rarely directed against innocence, and other tribunals do not withstand their fury

while the storm lasts, any better than the jury. Judges of the first instance, and even the local tribunals of appeal, have been found equally powerless to stem the tide. Study the reports of our own Court of Appeals in recent years, and you will find more than one instance of public wrath in our great metropolis, fanned into a devouring flame by some lawless newspapers and a somewhat lawless investigating committee, where the trial Court, unconsciously influenced and loudly sustained by public opinion, committed fatal errors against the prisoner, which were confirmed by the local tribunal of appeal, and it was only when the storm had passed and the atmosphere cooled, that the Court of last resort sitting in the remote capital corrected the error, and each time with the unfortunate result that an apparently guilty prisoner, who had been convicted upon illegal evidence or rulings, escaped altogether.

One other charge against trial by jury in criminal cases is the possibility of corruption and bribery of individual jurors. But in my judgment, the common estimate of the extent of this danger is greatly exaggerated. There are but a few well authenticated cases of such crimes in the jury box. I have had little to do with the trial of criminal cases, but in an experience of more than forty years in the trial of civil cases before juries, I cannot recall one case where I had reason to believe that corruption or bribery had reached a single juror. And if you can show me a few authentic cases of such infamy in the jury box, I will undertake to match them with an equal number of similar crimes committed by judges who have been properly exposed and punished.

No! with all its defects and faults which cannot be denied or disguised, there is no danger of trial by jury in criminal cases being supplanted in the confidence of the American people—nor has any possible substitute for it ever been seriously suggested.

It is for the integrity, efficiency and utility of trial by jury in civil causes that I am chiefly concerned, and would most earnestly plead to-day with my professional brethren, who are naturally responsible for public sentiment on such a subject. For I cherish, as the result of a life's work nearing its end, that the old-fashioned trial by a jury of twelve honest and intelligent citizens remains to-day, all suggested innovations and amendments to the contrary, the best and safest practical method for the determination of facts as the basis of judgment of courts, and that all attempts to tinker or tamper with it should be discouraged as disastrous to the public welfare.

You may say that I am contending for an ideal tribunal. On the

contrary I speak for what is not only possibly, but actually within the reach of every state and every community,—ideal only for the purpose designed, as when we say that a particular man would make an ideal judge, an ideal senator, or an ideal general.

Let me say what I understand by a jury trial; that picturesque, dramatic and very human transaction, that arena on which has been fought the great battle of liberty against tyranny, of right against wrong, of suitor against suitor, that school which has always been open for the instruction and entertainment of the common people of England and America, that nursery, that common school of lawyers and judges, which has had five times more pupils than all the law schools and Inns of Court combined—for there are ninety thousand lawyers in America of whom four-fifths probably never saw the inside of a law school.

Well, the first and most essential element in a jury trial is a wise, learned, impartial and competent judge—a judge qualified by his character, learning and experience to preside over and control the proceedings, and to advise the jury as to the discharge of their duties. Add to the ordinary modicum of legal learning, courage, honesty and common sense, and you have the kind of a judge I mean. If we say that an adequate supply of such judges, possessed of these ordinary qualities of manhood cannot be found, we libel our own profession, we befoul our own nest wherein they are bred. Of course they cannot be had, if we apply to judicial nominations our favorite democratic idea that one man is as good as another for any office; of course they cannot be had if selected for partisan services; of course they cannot be had if appointed by a boss, or if they are required or allowed to pay for their nominations directly or indirectly; but they can be had if selected on their merits from the gladiators in this same arena, as England has selected her judges since 1688, always with assured success. They must be had, if our institutions are to be preserved.

And then there are the twelve honest and intelligent jurors drawn from the body of the community, sworn to pass upon the issue, and to return whence they came when their task is done. If we say that the average citizen is not equal to the duty, we belie our American manhood, we contradict the whole course of judicial history, and we fail of our duty to the communities of which we form a part, which rely upon us implicitly for the legislative machinery by which juries are to be secured.

And then you must have the earnest and loyal advocates, sworn to do their whole duty; which means to employ all their powers and

attainments, and to use their utmost skill and eloquence, in exhibiting the merits each of his own side of the case. In doing so, as Mr. Justice Curtis well said, the advocate only does his duty, and if the adversary does his, the administration of justice is secured. I omit not the indispensable presence of the public, an ever essential feature in this great historic forum, for justice, though blind to the parties and to everything but the merits of the case, must never be secret. It is the sacred possession of the people in whose name and by whose authority it is done. Do you say again that this is an ideal picture? Who of you has not seen it? Who of you does not know that it is not only possible, but can be and ought to be the actual and every day scene in our Courts? I well remember witnessing such an administration of justice by Chief Justice Shaw and his associates in the Supreme Judicial Court of Massachusetts, aided uniformly by juries representing the best citizenship of that grand old State, and by a group of advocates whose superiors the world has never known, disposing of great causes in the presence of a bar instructed, and of a public educated, by the noble spectacle. I have witnessed the same scene in the City of New York under the administration of Chief Justice Oakley and Judge Duer and their associates, and coming down from those early days to the present I have seen it a hundred times since, down to the last term of our Federal Court when I saw an important and intricate cause disposed of by as good a jury as ever sat, under the guidance of a faithful and competent judge.

Are we willing to admit that the bench, the bar, the intelligence of the community from which the average juror, is drawn, have so degenerated in the last fifty years, or in our generation, that this great tribunal, which has commanded the confidence and approval of all English speaking people for centuries, is no longer adequate for our public needs? For one I refuse to believe that. I know that the bar of to-day is adequate for the duties of to-day—that it can furnish material for the bench worthy of the great service of justice. And I feel quite sure that the average standard, not only of morals but of intelligence in our American communities which furnish our supply of jurors, has not receded but has actually advanced in the last half century.

This trial by jury for which I stand, is not only ancient as magistracy, rich in the traditions of freedom and of justice, glorified by the prestige and the prowess of all the great advocates of our race, but it is the proudest and most delightful privilege of our whole professional life. It alone atones for and mitigates all the drudgery and

painful labor of the rest of our professional work. Here alone we feel the real joy of the contest, that *gaudium certaminis*, which is the true inspiration of advocacy. Here alone occur those sudden and unexpected conflicts of reason, of wit, of nerve, with our adversaries, with the judge, with the witnesses; those constant surprises, equal to the most startling in comedy or tragedy. Here alone is our one entertainment, in the confinement for life to hard labor, to which our choice of profession has sentenced us, and here alone do the people enter into our labors and lend their countenance to our struggles and triumphs. Sorry indeed for our profession will be the day when this best and brightest and most delightful function, which calls into play the highest qualities of heart, of intellect, of will and of courage, shall cease to excite and to feed our ambition, our sympathy and our loyalty.

Let me now consider the principal evils and mischiefs incident to and perhaps inseparable from this much prized trial by jury, for which all sorts of nostrums and legislative innovations have been suggested as radical cures. The existence of some cannot be denied, but I am persuaded that the force and effect of each of them has been grossly exaggerated, and that they can all be remedied, not by any material alteration, but by a better administration of the system as it now exists in our Federal courts, and in the vast majority of states whose constitutions still require that it shall be preserved inviolate.

And first and most common is the complaint of the rule of unanimity, which requires the entire votes of the twelve to render a verdict. To listen to the impassioned arguments of those who seek to destroy this ancient and time-honored rule of unanimity, you would think that in almost every jury impanelled there is among the twelve one Judas ready to betray the cause of justice, or one crooked stick which by no amount of application can be made to fit in with the rest. But, in truth, the discharge of a jury because they are unable to agree, and the consequent necessity of a new trial is a comparatively infrequent event.

So far as the imperfect statistics which I have been able to gather show, only about three or at most four per cent. of all jury trials end in a disagreement.

There is a certain percentage of cases so doubtful and so difficult, that the disagreement of the jury instead of being a disaster is a positive good, as leading the parties to such a compromise as they ought to have made before carrying the case into Court—or if that fails, in giving an opportunity for new light and re-consideration. Take for instance the Sheldon Case, to which I have already alluded—

to be sure it was a criminal case, but the same considerations will apply in this respect to a civil case—how much better it would have been for the cause of justice and the spirit of truth, if instead of making the decision the result of a contest of physical endurance among the twelve, they had been discharged after a reasonable number of hours and a new jury entrusted with the case. A new jury can always be impanelled at the next term, and no great delay is involved.

Again, where very great amounts are involved and the contest is extremely close—and these are the cases, I think, in which the largest percentage of disagreements occur, a second trial is not an unmixed evil—a second trial is better than a wrong decision. The truth is discoverable of course in every case, but how often on the first trial in such cases is some evidence omitted or misunderstood from lack of preparation or of knowledge—which being cleared up on a second trial makes the truth more obvious and discernible.

So clearly is this recognized in the public policy of the State of New York as embodied in its statutes, that in actions for the recovery of title to land, so apprehensive are the State and the law, of accident, or surprise, or negligence, or lack of knowledge of evidence, that even after one full trial and verdict rendered, either party may have the verdict vacated and a new trial, as matter of right, on payment of costs. So jealously is the right guarded, and so much better is it deemed both for the parties and the public, that there should be a right decision than a quick decision.

Again, if I may rely upon my own experience and observation, the disagreement when it does happen is quite as likely to be the fault of the judge as of the jury. The failure of the judge to perform his most important duty, to explain to the jury the proper legal bearing of the evidence upon the issues of fact which it is their sole province to decide, is the most frequent cause of disagreement. It sends the jury in an intricate case to their consultation room without a proper understanding of the questions submitted to them. Some judges at *nisi prius* are lazy, and some don't care what the verdict is to be, and some care too much; and the least appearance of partiality in the judge is apt to awaken the jealousy and resentment of some more or less intelligent jurymen. Juries are, as a rule, extremely jealous of their province of deciding the facts, and anything like invasion of it by the judge very properly tends to excite their alarm. Perhaps I may cite an actual case in my own experience which I tried twice. Each time the jury disagreed, necessitating a third trial. Both disagreements were directly traceable to the clear manifestation of

pressure or bias on the part of the judge. It was a speculative case for damages. The tort was plain enough, and the question was how much damages. On the first trial the judge charged so strongly for the plaintiff, and on the second trial another judge charged so strongly for the defendant, that in both cases the jury, instead of taking an average verdict, as is the only way in such cases to reach a verdict at all, revolted and disagreed.

This leads me to say that the vast majority of cases brought to trial before juries are cases where the principal, if not the only question to be determined by them, is the amount of unliquidated damages; and for the decision of such a question there can be no reasonable doubt that the average of the estimates of twelve sensible laymen is far safer, and far more likely to approximate to the just estimate, than the assessment of one man, however learned and instructed in legal questions he may be. There is something in the technical training and habit of mind of the judge that tends really to unfit him to pass alone upon such a question; and for his caprice, his prejudice, his error of judgment, there is no check or balance and no cure; and so long as the power of the judge who tries the case to reduce the verdict for manifest excess, or to set it aside for manifest insufficiency, is reasonably exercised, any practical danger of injustice is eliminated.

So let me say, and again upon the same authority of personal experience and observation, that for the determination of the vast majority of questions of fact arising upon conflict of evidence, the united judgment of twelve honest and intelligent laymen, properly instructed by a wise and impartial judge, who expresses no opinion upon the fact, is far safer and more likely to be right than the sole judgment of the same judge would be. There is nothing in the scientific and technical training of such a judge that gives to his judgment upon such questions superior virtue or value, and we cannot be too frequently reminded of the valuable opinion on this point, of one of our clearest and broadest minded judges, Mr. Justice Miller, given as the deliberate result of a quarter of a century's experience in the chief court of the nation.

"It is of the highest importance," he says, "that in a jury trial the judge should clearly and decisively state the law which is his peculiar province, and point out to the jury with equal precision the disputed questions of fact arising upon the evidence, which it is the duty of that body to decide. Without this a jury trial is a farce."

"An experience of twenty-five years on the bench, and an observa-

tion during that time of cases which came from all the courts of the United States for review, as well as of cases tried before me at *nisi prius* have satisfied me, that when the principles above stated are faithfully applied by the Court in a jury trial, and the jury is a fair one; as a method of ascertaining the truth in regard to disputed questions of fact, a jury is in the main as valuable as an equal number of judges would be, or any less number. And I must say that in my experience in the conference room of the Supreme Court of the United States, which consists of nine judges, I have been surprised to find how readily those judges came to an agreement on questions of law, and how often they disagreed upon questions of fact, which apparently were as clear as the law."

But the great objection to dispensing with the rule of unanimity, and requiring the decision of a majority or of two-thirds or three-quarters of the jury to control, is the certain danger of hasty and therefore of unjust or extravagant verdicts. It is not to be forgotten that with every verdict when carried into judgment property passes, or claims to money or property are determined. The rule so long insisted upon by the English and American people, that the right to the property or money in question shall not pass until the whole jury is satisfied, by the clear preponderance of evidence, that it ought to pass, is not too great a security by which the sacred right of property ought to be held. The right of property, as Mr. Webster said at Plymouth in 1820, is the corner stone of civil society, and its sanctity cannot be safely invaded or impaired.

The secrets of the jury room generally leak out after they are discharged, and it very rarely happens that a majority, and seldom that two-thirds or even three-quarters, are not united on the first ballot, and if you make their vote decisive you will have a hasty verdict; while experience has often shown that intelligent discussion in the jury room is just as effective as it is anywhere else, and often results in converting the majority to the real truth. The prejudice of juries, so far as it affects their conduct, is always and naturally for the weak against the strong, for the poor against the rich, for the individual against the corporation, and it sometimes sways the whole to the very verge and even beyond the verge of injustice; and if you break down the barrier which lies in the rule of unanimity, and which has heretofore for ages been only the sufficient safeguard of property, you will be likely to cause a great deal more injustice than you will cure by such a change. Imagine a jury roused to even just indignation by the oppression, or misconduct of a rich individual or gigantic

corporation against an unfortunate plaintiff, and not restrained by the cooler sense and judgment of the three or four most conservative or intelligent of their number, and you can easily foresee what havoc they would make with the rights of property.

It takes no prophet to foretell that the great contests in the courts in the coming generation are to be against and in defence of the right of property, and I can conceive of no more destructive and fatal weapon, which its adversaries could secure in advance, than the abolition of this rule of unanimity, excluding practically the votes of the more conservative, the more deliberate, the more just members of the tribunal.

Coming down then to the isolated instances where juries disagree by the dissent of one from the decision of the eleven, whether the one be a crank or, as sometimes happens, the only man who is right, I submit that the cases of such disagreement are very rare indeed, not one per cent. of jury trials, and present no good reason for a change in the rule which, in the general, has worked well in the whole history of our litigation. I decline to discuss the question of bribery and corruption in this connection, for its occurrence is so nearly infinitesimal that I do not believe in its existence.

Nor do I overlook the fact that learned essayists and philosophers without number, who probably never sat upon a jury or participated in the trial of a cause, headed by Bentham, who failed as a lawyer and hated all form of litigation, and had a special aversion to Blackstone, have decried the rule of unanimity. On such a question better fifty years of experience than a whole cycle of theories. And I treat with equal indifference that constant torrent of declamation from the periodical and the newspaper press, which declares that the effect of the rule of unanimity is to create popular discontent, and to bring the administration of justice into contempt. I believe that the great mass of the people, whose rights and interests are herein chiefly involved, are satisfied with the rule as it now stands, and cannot and ought not to be argued out of it.

But I do not forget that certain judges of the very highest repute, to whom we owe all deference and honor—Mr. Justice Miller among them—have declared themselves in favor of some departure from the ancient rule of unanimity, and that a report was once made to this Association by a majority of its standing Committee on Judicial Administration and Remedial Procedure in favor of such a change; that by the constitutions of three or four states which include less than

ten per cent. of our people, a verdict by nine of the jury has been directly provided for, and that by those of four or five other states, indirect provision in the same direction has been made, by authorizing the legislature, under prescribed limitations, to enact laws to the same effect, and that in Scotland a verdict by three-quarters of the jury has long been permitted.

But it is fair, I think, to say, that the judges referred to, however eminent, represent but an infinitely small proportion of judicial opinion on the subject, that their suggestions on this point were rather *obiter dicta*, without any statement of reasons, and that they had for the most part been long removed in appellate tribunals from direct touch with *nisi prius* affairs; that the report of your committee referred to, after a very brief discussion, was consigned to an oblivion from which it has never emerged—that the few states which have by their constitutions made the direct change, adopted it under social conditions differing somewhat from those of the older states that maintain the old rule; that although in those states the new method is said by some to work well, there is no evidence that anywhere it works on the whole any better than the old rule—that the legislatures who have received constitutional permission to make such change have, as I understand, hitherto wisely refrained from making it; and that as to Scotland, her whole system of judicial administration is peculiar, and that her course in this regard, however satisfactory to her own people, has never suggested to the English people or government the idea of following her example.

Upon the whole, the English people and ours maintain sound and wholesome views on this important subject, which ought not to be disturbed, especially in these times, when the aggressive ranks of socialism and populism are disposed to strike at the right of property, the foundation of civilized society, and would naturally seek to convert the jury box into a weapon of offense.

The next formidable charge against the common law trial by jury is to accuse it of a great share in the law's delay. But I deny the charge absolutely and altogether. There is nothing in the whole realm of litigation so short, sharp and decisive as the ordinary jury trial. From the first moment when the impanelling of the jury begins, down to the last when the verdict is recorded, there is no pause or interruption except such as the natural wants of those concerned, for food and rest and sleep require. It would not be possible to devise a mode of trial which in its actual operation would more absolutely preclude delay. As compared with the abominable system of references which

is the practical substitute for it, a trial by jury is like the lightning's flash. These references hang on for months and generally for years; they wear out the life blood of the parties, and pile up an accumulated mass of expense for the fees of lawyers, referees and stenographers, fatal to the patience and endurance of clients. Why, I have one in my hands to-day which began in September, 1864, has survived both parties, all the witnesses, and a long succession of referees, and will still live on to be buried with the surviving counsel.

In these days too, when in trial by the judge without a jury, written and printed briefs are to be submitted after the oral argument, indefinite delays ensue.

No, the charge of delay against juries and jury trials is wholly without foundation.

But there are most grievous delays, between the joining of issue of fact and the opportunity to try the case before a jury, and further grievous delays between a just and righteous verdict and the realization of the money or property represented by it—delays at both ends, for which the jury are in no wise responsible, and which are the direct result of vicious legal machinery, capable in a large degree of alleviation and cure. It is to these that I bespeak your most careful attention; for here, as it seems to me, this association owes a duty to the profession and to the community from the constant performance of which it ought not to shrink. These codes of procedure, which have taken the place of a simple practice regulated by rules of court, have become so cumbrous and impossible, they afford and create such opportunities for delay, they provide for and contemplate such countless preliminary motions, each a litigation in itself, that there seems no way out but to cut the Gordian knot and return to the ancient practice. Take our own New York code alone, the degenerated mother of so many illegitimate offspring, it has grown to a monster of more than 3,600 sections, each section pregnant with some procedure—and while, unhappily, in our City, it takes nearly two years, except in preferred cases, to reach a jury case for trial, every intervening week from the day of its commencement may be filled with a distinct and separate motion. Surely this fruitful source of delay could be and ought to be cut up by the roots.

The long waiting for a jury case to be reached on the calendar is in many cases a denial of justice. If ten jury terms constantly at work, for instance in our City, are not enough to keep the calendar down, twenty ought to be assigned to sit until the docket is cleared.

The avoidable delays subsequent to appeal, waiting for years for

the appeal from judgment on the jury's verdict to be heard and disposed of, ought also to be remedied and prevented for the future. Of course my experience is mostly confined to the New York courts, but there it does now take nearly three years from verdict to final judgment in the Court of Appeals, making five years from commencement of suit to the recovery of one's just dues by suit, and all this delay—not an hour of it chargeable to the jury—avoidable and therefore inexcusable. It is very clear now that we made a great mistake in the Constitutional Convention of 1894 in revising the judiciary article, in not retaining the clause which provided for the appointment of a special commission when necessary for clearing off all arrears of appeals. No wonder that suitors tire and resort to settlements, arbitrations, and board committees for a prompt and speedy adjustment of their controversies. Such a result however brought about, is a direct benefit, for litigation is a positive evil. But for the thousands upon thousands, the vast majority of suitors in every community who remain and claim their rights in the courts, these intolerable grievances by delay ought to be remedied, so that the administration of justice may not be brought into contempt, and this unjust and wholly undeserved stigma, falsely imputed to trial by jury, be forever removed.

There is one other serious evil after verdict which the common sense and sound judgment of our judicial brethren might and should reduce, if they cannot altogether remove it without new legislation. I mean the granting of new trials for trivial and unsubstantial errors, in the charge of the trial judge, or in the admission or rejection of evidence. Where, for such errors which do not go to the root of the action or defence, a new trial is granted, I think that your universal experience will testify that a second jury, in at least twenty-nine cases out of thirty, finds the same verdict over again;—making the whole procedure between the two verdicts a total loss of time, expense and labor. And so, as the judges should exercise a liberal discretion in reducing excessive verdicts in cases of unliquidated damages, they should exercise a like discretion in other cases, and never grant a new trial, even for manifest errors, where it is clear that no positive harm has resulted and substantial justice been done. Review by appeal is only designed for parties really aggrieved, and in jurisdictions where full power to this extent does not already rest in the courts, it ought to be provided. Juries are naturally jealous of any interference by the Courts with their exclusive domain, and their will must finally prevail upon the facts. In the celebrated case of *Shaw v. Boston & Worcester R. R. Co.* [8 Gray, 45], the Supreme Court of Massachusetts

set aside the first verdict of \$10,000 for error. The second jury gave \$18,000 and the Court set it aside on the same ground again. The third jury gave \$22,500, and then the court denied the motion to set it aside as excessive, but gave up the unequal contest and let it stand.

The only other important defect attributed to the trial by jury as conducted from time immemorial, is the too prevalent notion that it permits to the trial judge too great a power in conducting the trial and guiding the deliberations of the jury. And so jealous have the people in some of the states become of such imputed interference of the judges with the functions of the jury, that in several states, instead of taking measures to improve their breed of judges, statutory contrivances have been devised to curtail and impair what seems to me to be the necessary function of the court, as an inherent part of the tribunal, without which its duties cannot be well and properly performed, whereby frequent failure of justice must eventually result. As an illustration of these devices the New York Legislature at its last session was asked to pass a bill, said to be a literal copy of recent enactments of other States providing not only that the judge in charging the jury shall only instruct them as to the law of the case, but also that no judge shall instruct the jury in any case unless such instructions are reduced to writing, and that a charge once made shall not be modified; and various other similar devices for shortening the arm of the court in jury trials have been proposed and occasionally enacted.

I can conceive of nothing better adapted than all such devices for mutilating and emasculating trial by jury, marring its symmetry, and destroying its utility as the best means of ascertaining the truth of the facts for judgment. That they are an unconstitutional invasion of the rights of the court and the people, in a state whose constitution like that of New York provides that trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever, may be claimed with great force and probable success. They seem to be clear and palpable encroachments by the legislature upon the judiciary department, as was well explained by Mr. Justice Brown in the admirable paper read by him before this Association in 1889, and by Mr. Justice Field in the judicial opinion which he cited. But aside from that, my objection is that they tend to disable and impair the jury itself, so far as they tend to deprive it of the rightful and necessary aid and assistance of the court. If the first provision merely means that the court shall not attempt to thrust upon the jury its opinion on the questions of fact, it was wholly unnecessary—it always was the law—and no self-respecting judge ever would or did interfere with that exclusive province

of the jury. But as I understand, as generally construed and applied in states where they have been enacted, these provisions operate to limit the court to the submission in writing to the jury of bald propositions of law on legal questions in the case, without any comments or advice upon the relevancy, or application, or relative force of the testimony on the issues of fact which they are to decide.

The proper functions of the judge in a jury trial were never better expressed than by Lord Bacon in his charge to Mr. Justice Hutton in handing him his commission to the Court of Common Pleas, "That you be a light to jurors to open their eyes and not a guide to lead them by their noses." And when those great judges to whom I have already referred as models in the conduct of jury cases, to whom we look for example as young painters look to the old masters, Chief Justice Shaw and Chief Justice Oakley, charged the jury, having kept in their hands all the threads of the evidence from beginning to end, whether the trial lasted a day, or a week, or a month, they stated clearly to the jury what the distinct questions of fact were upon which they were to pass. They then proceeded to go over the testimony and point out its application to those issues, and to instruct them by what rule and standard they were to measure the relative weight and credibility of conflicting pieces of testimony, in applying them to the questions to be decided by them. And the result was that when the judge's charge was finished, the jury understood the case as they had never realized it till then, they understood what questions they had to decide, and what material they had for making up their decision. How they should decide those questions was their own business, and those great judges never presumed to suggest or interfere; and there is no doubt that that was jury trial, according to the uniform course of the common law both in England and America.

But you will say that all our judges are not Shaws or Oakleys. Neither were they in those days. Those were the great models. The others differed in degree rather than in kind, and so they do now. But if your judges don't suit you, get better ones. Don't remove the ancient land marks of the constitution and law, and turn trial by jury into a farce. There is no doubt that jurymen require such aid and assistance to enable them to perform their proper duty, and that whatever tends to deprive them of it, in whole or in part, to that extent weakens their capacity and impairs their usefulness.

It is impossible for twelve jurymen, laymen of average or even of superior intelligence, unaccustomed to the application of evidence to issues, called from their several vocations for the service of the court,

however patient and attentive they may be, without aid from the court to carry along all the evidence as it falls from the lips of witnesses for a week or a month, to apply each piece of testimony to the issues, and pack it away in their minds as they go along, to measure the results of cross examination upon the direct testimony, to weigh the evidence of the one side against that of the other. They are necessarily intent for the moment upon each word of testimony as it drops from the lips of the witnesses. In a long trial the general effect of the evidence upon their minds is vague and indefinite, their memory of details far from clear, the conflicting arguments of counsel confusing, and they naturally look to the judge to be the light, as Lord Bacon says, to open their eyes to see their way through the labyrinth, and find the clues that shall conduct them to the truth.

Take the Tichborne cases—the civil and the criminal trials both—those master-pieces of trial by jury, those colossal specimens of adjudication, full of great masses of conflicting evidence,—the lost baronet's own mother had actually recognized the claimant as her son,—the civil trial lasting 103 days and the criminal 188 days, where Counsel at the Bar summed up for weeks, and Lord Chief Justice Cockburn charged the Jury for 18 days, recalling to their minds the whole evidence on both sides, and instructing them how to apply it to the issues, with the result that the Jury, to whom the whole case, without that marvelous charge, would have been a perfect maze, were led to the light and the truth. What a farce, what an insult to judicial genius, what a reproach to law, what a hindrance to truth and justice, if Parliament had said to the jury at the close of the evidence and the summing up of counsel: You can have no aid from the Court; all it can do is to hand you written statements of propositions of law, upon which you will retire and decide the case the best way you can.

No, for common assault and battery cases these new devices may not stand in the way of Justice, but when great and complicated cases arise—as they are likely to arise any day, when men's passions are excited—when long and complicated trials ensue, on which great interests depend, they are intolerable stumbling blocks.

But you will justly ask, is there no defect, no drawback, no decadence in this much boasted trial by Jury? and is there no improvement, no remedy which you can suggest as the result of forty years' experience, as a participant in this mode of trial? and you will very properly expect from me an answer to these questions.

Well, I do admit the existence in some degree of the very faults

which I have been considering, but the result of my experience and observation has been, that in the general estimate their extent is grossly exaggerated, and if you have followed me thus far and read between the lines of my address, you have seen that I have no faith in the legislative remedies which have been experimentally applied, because they tend generally to impair the integrity, the efficiency, and the utility of this great and time-honored tribunal, and because they do not propose—there has never yet been proposed—any adequate substitute to take its place.

But if you would have jury trial as it has been and ought still to be, if you would make it still worthy of the high encomiums which have been pronounced upon it by great jurists and great lawyers since 1688, and worthy of the confidence which it still enjoys with the great mass of the people, for whose security and safety all courts exist; if you would transmit it to posterity as a heritage from the past improved and not impaired by your keeping; there is an obvious and an open way. If you would have trial by jury as it has been exhibited in those wholesome and impressive instances to which I have referred, you must lend your aid to make the component parts of the tribunal what they can be and should be, and to furnish better jurors, better judges and better advocates to conduct the proceeding.

That the general grade of jurors especially in our large cities can be raised to the ideal standard there can be no doubt, and generally the existing statutes are ample. It is neglect and abuse in executing and administering them, neglect and abuse for which I think the commissioners, the courts and the bar are largely responsible, that brings into the jury box too often too much of the refuse of our city directories, too much of ignorance and incapacity, and allows the men of business, of property and of character to escape the arduous and responsible duty. What lawyer practising at the bar, what Bar Association in any state, has ever taken any pains to see to it, that the power of selection entrusted to official hands is so exercised as to bring fit men to this important service? Have our judges taken due care in exercising the power entrusted to them to compel the reluctant to serve? Take for instance the city of New York with its six or seven hundred thousand voters, and its annual need of ten or twenty thousand jurors, a list to be selected by a commissioner appointed for the purpose. Will anybody pretend to say that if the duty of selection is properly performed, a body of men amply qualified can not be had for the service of the state, and ignorance, incapacity and low character in all respects excluded from the first approach to the jury box? Let me give you an

illustration which shows what the faithful discharge of the duty of selection will accomplish. In the Circuit Court of the United States for the Southern District of New York, petit jurors are selected by the clerk and a designated commissioner under the supervision of judges who take pride in securing competent jurors. Instead of selecting from the vast list of voters men who are not known, as seems to be the too common method, they select only those who are known for character, for intelligence, for merit and fitness, and the result is that a panel of twelve for the trial of any case can always be had representing the general intelligence of the community and even better, and entirely worthy of the palmiest days of jury trials. And competent men, having been thus selected, must be compelled to serve. Too great exemptions are allowed, too paltry excuses accepted, and the very men who by their weight and character would leaven the whole lump escape altogether.

Jury duty is a great political and public service, as much so as voting or military service, or the payment of taxes, and no fit men ought to be allowed to escape from the liability to perform it. I know how irksome it is—I know how thankless it too often appears to be, but if our political institutions are worth saving, if this cardinal feature of free and popular government is to be preserved and transmitted entire, this peculiar form of public service must be performed by citizens fit for the duty; voluntarily if they will—but by force of compulsion if need be—and it is very largely in the hands of the Bar and of the courts to see to it that this is done. But we mustn't wait till our case is called, and a battalion of incompetents lined up for our choice. If we strike at the fountain and insist upon the proper selection of the lists by the constituted authorities, we shall clear the whole stream from pollution, and any legislation necessary to that end we ought to devise.

And then I insist that the judge who presides in the Court is the keystone of the arch in the jury trial, that he must be permitted to have control of the proceedings from beginning to end, and he indeed a clear light to open the eyes of the jurors. The selection of judges lies largely in the hands of the bar, whose members generally compose by a large majority the judiciary nominating conventions of both parties. All that can be done—all that ought to be done in each instance is to select with sole regard to merit and fitness, the best man that can be had for the judicial seat. I will not insist without regard to party—although I think so—but without regard to the dictation of any party machine or of any party despot. You may be republicans or you may

be democrats, but you are lawyers and citizens first, and you owe this duty at least to your profession and your country. By common consent, the American people, in all but four of the states, have long ago abandoned an appointed judiciary, as inconsistent with their theory of republican institutions, and have insisted upon the election by the people of every judicial officer—but under the system of boss rule, the only part the people are permitted to take in the selection of judges is simply to choose between two candidates, each selected by an irresponsible despot, who generally makes his choice for personal or party allegiance, with just as much and just as little regard to merit and fitness as his own partisan necessities require or dictate. How long will the bar submit to be the instruments of such a power?

There is one other abuse against which we can at least utter an indignant protest. I mean the toleration of judicial candidates who are willing or permitted to pay for their nomination or to pay their party for their election. No matter what their personal or professional qualifications in other respects may be, such a means of reaching the office cannot but degrade the Bench. Imagine John Marshall, or James Kent, or John Jay contributing ten thousand dollars or any other sum to his party, as a condition precedent to taking office, could it have been said of either of them that the judicial ermine touched nothing less spotless than itself when it fell upon his shoulders?

And finally the advocates, the third great factor and component of the trial by Jury. They at least are in your hands, and they must rise or fall to the standard which you fix. They are not a class set apart, like the English Barristers, by special training and office for the work of the court room, but are necessarily eliminated by accident, by ambition, by personal faculties, for this peculiar service. In the long run the doctrine of selection operates. It is necessarily the survival of the fittest that groups them by themselves, but the fountain cannot rise higher than its source, and their courage, their honesty, their training and fitness will always be measured by the standard which the Bar at large exemplifies, imposes and demands.

Give us then competent jurors, able judges and honest, fearless and learned advocates, and trial by Jury, which I am sure the people of America are determined to maintain, will still be the best safeguard of their lives, their liberties and their property.

This Association necessarily looks to the future for the results of its annual conferences, and its earnest work. Our individual labors are nearly finished, but we can do much to clear the field for our sons, for the youth who as we hope will follow in our footsteps. The

best hopes of our noble profession have always been, as they always will be, in its youngest ranks, and this was never so true as at this very moment. The standard of legal education has never before been advanced to its present height. The young men who come annually from the Law Schools to recruit our ranks, are better equipped and qualified—far more so than we ever were—to enter upon the arduous and responsible duties that await them. Let us preserve and restore and transmit to them in all its wonted vigor this ancient and noble tribunal;—to arouse their ambition, to stimulate their ardor, to stir their eloquence, to seal their devotion, and if in turn they prove true to the dreams of their youth—which are always of lofty aims and high ideals—our jurisprudence will indeed have been advanced.

SIR WALTER SCOTT

ADDRESS BEFORE THE EDINBURGH SIR WALTER SCOTT CLUB,
NOVEMBER 11, 1899

Mr. President and Gentlemen: I thank you most warmly for this cordial greeting, but I take all the credit of it for my country and not for myself. Truly your country and mine are connected by bonds of sympathy which were never stronger and closer than at this very hour. When Dandie Dinmont had listened to the reading of Mrs. Margaret Bertram's will, he threw himself back and gave utterance to that great saying: "Blood is thicker than water." Little did he dream that he was giving to two great nations a watchword for the exchange of love and greetings eighty years afterwards.

I can assure you that Lord Salisbury, in his generous and cordial words last night at the Lord Mayor's banquet, will meet with a quick and hearty response on the other side of the Atlantic. Our great poet has said that "peace hath her victories not less renowned than war," and this ironclad friendship that now prevails between these two kindred nations is her last and greatest victory. It means peace not merely between your country and mine, but among all the great nations of the earth, and it tends, by advancing civilization, to promote the prosperity and welfare not of the Anglo-Saxon race alone, but of the whole human race.

Now, it must be said that Americans and Scotchmen in particular have a great deal in common. Even in those lighter personal characteristics which sometimes amuse our common critics, they are very much alike. Our national habit, for I confess it is a fixed habit, of making ourselves at home wherever we go, must have been inherited from some remote Scottish progenitor, for I assure you that your people come over and settle down upon us and make the very fat of our land their own. They celebrate the birthday of your patron saint in America with far more gusto than you have ever done at home. No doubt about that. And on the thirtieth of November, they convert our great land, from the Atlantic to the Pacific into another land of cakes.

I have known more than one of these invaders who, landing on our shores in youth with nothing but sound minds and brave hearts in stalwart bodies, have returned in mature age to become the owners of lordly castles and broad domains of which princes and dukes might well be proud.

There is another habit of ours which I do not admit, but which malicious critics ascribe to us,—of being very eager in the pursuit of the almighty dollar. Well, I have been studying the Scottish character somewhat since my arrival, and I am bold enough to ask the question whether that is not, after all, a feeble and respectful imitation of your keen and constant pursuit of the five times more almighty pound.

Although those are circumstances in which we are alike, there is one ruling trait more striking than either of these, and that is that innate modesty—that overwhelming modesty and distrust of ourselves, which is truly the common characteristic of both peoples, and which always puts us in a pious frame of mind and leads us to unite in uttering that well worn prayer: “Lord, help us to have a good conceit of ourselves.”

But, seriously, in those essential and vital qualities that go to make up the national character, we are also alike; and we may boast and be proud of our mutual resemblance. I mean in that inborn love of independence; that claim for the individual to all the liberty and all the scope which is consistent with the general welfare; in the pure spirit of the highest and noblest democracy at home in these islands as well as in the United States, and in that spirit by which we measure men more by their worth than by their birth.

“The rank is but the guinea’s stamp,
The man’s the gowd for a’ that.”

And then we agree also in that love of national liberty; of freedom bred in the bones of every nation that has struggled for and achieved it. They all, you all, we all, worship the champions that have helped us win it even for centuries after they are turned to dust, and if liberty ever should be in danger on either continent, we should invoke their venerated names and spirits.

“Oh, once again to freedom’s cause return
The patriot Tell, the Bruce of Bannockburn.
O’er the broad ocean let the summons run
And wake to life the sword of Washington.”

We acknowledge with gratitude the service which Scotchmen have rendered to us in every period of our national history. They helped us found more than one of our infant colonies; they helped us to win our independence; and in your ancient cemetery, the monument erected to our great patriot, Lincoln, (the first erected to him on this side of the water) recalls the valor of Scottish soldiers who helped us to maintain our political independence; to strike the shackles from the limbs of four millions of slaves, and to prove, in the words of our

martyr President, that "government of the people, by the people and for the people shall not perish from the earth."

I have been told to-night to propose the theme of literature, but that entire sentiment at this place and in this presence centres upon the name and personality of one man. All the other fixed stars in the spacious firmament of Scottish literature must pale a little to-night before the light of this central luminary.

To an American visiting, for the first time, Scotland and your romantic, your picturesque, your beautiful city of Edinburgh, everything around him speaks of Scott. Go where you will, turn in whichever direction, his name seems to sanctify and hallow everything. I have read in your last annual report, and to my intense amazement, that it requires the efforts of the Society to induce the schoolboys of Edinburgh to read Walter Scott's works. I can hardly believe it. No, I will not believe it. Why, in America he finds hundreds of thousands of readers every year. The press teems with new editions, and every educated man is supposed to be, and is really, familiar with his leading poems and romances. When we come here we do not come as strangers. He has made us feel at home, more at home in Edinburgh than in any other city of Europe. There is not any other city, not even Rome itself, that has become so familiar to Americans who have never seen it, than this beautiful city of yours, and all thanks to the marvellous descriptions of this your beloved poet and novelist.

So, when we come here, we come, as it were, as pilgrims to visit shrines that he has made familiar in story; to the haunts and homes of his heroes and heroines; to Arthur's Seat and Holyrood; to his own professional and personal places; to Abbotsford, the sad memorial of his tragic struggle, and Dryburgh Abbey, where his sacred dust reposes, while his spirit still walks abroad among all English speaking peoples, to fill them with love of Scotland, its history, its scenery and its people.

Carlyle has said, after nobly describing Scott as the pride of all Scotsmen, giving him credit for an open soul—a wide, far reaching soul—that carried him out in absolute sympathy with all human things and people; after giving him credit for that wonderful and innate love of the beauty of nature and the power of describing it, and his infinite sympathy with man as well as with nature, he has, in one of his most acrid utterances, said that if literature has no other task than pleasantly to amuse indolent, languid men, why here in Scott was the perfection of literature. Well, now for one, I must confess that

every now and then. I am one of those indolent, languid men, and as I look along these tables, if I rightly study your characters and moods, I suspect that this is a great group of those indolent, languid men, who believe that it is not the only task, but that it is one of the most valuable tasks of literature to amuse and to entertain mankind.

I have often thought that I would rather have been the author of one such book as *Waverley*, or *Kenilworth*, or *Henry Esmond*, or *Romola*, than to achieve any other kind of personal, professional or public fame. The good that these books do us, the rest they give us, the enjoyment they yield us among the hundreds of millions who read the language in which they are written, is absolutely infinite, and the fame that the author of such a book wins rivals, if it does not outshine, all other kinds of fame.

Look at it now! *Waverley* was written in 1814, a memorable event in the history of British literature; the battle of Waterloo was fought in the next year, one of the great critical battles of all human history. Eighty-five years have gone by since then, and which name is now dearer to mankind? Which one now enjoys the wider and the better fame, Wellington or Walter Scott? I shall not answer that question. I leave every man to answer it for himself.

So much has been said about Walter Scott to-night that I will not tell you all I wish to say about him. I would like to recall just four points of his character, which are the dearest to me in it all—his humanity, his cleanliness, his heroic industry and his patriotism.

His humanity! He was the most humane of men, with the sunniest of souls in the soundest of bodies, and with a cheerful and happy temperament which is always worth millions to its possessor. What would not Carlyle have given for a share of it? He loved God and he loved man, and what more can you say? His heart went out to all his fellow men and theirs in turn came back to him. Everybody loved him. Even the dumb animals fawned at his feet, and it was this intense, everloving and glowing humanity that was in his heart that made him as he was in his day and generation, the most popular man in all the world.

Well, this humanity was godliness, and it is the old proverb that "cleanliness is next to godliness." Now, to have written so much, to have found so many millions of readers, to have found his way in every family, in every land that reads at all, and yet not one word in the whole, not one word that he, dying, would wish to erase, not one false suggestion, not one double meaning, not a single thought or suggestion that could bring a blush to the cheek of the most innocent and delicate

reader. This ought not to be high praise, but it is high praise when you recall some modern novels, not French only, but some English, which have brought fame and profit to their authors, which find their way into every family upon the plea that everybody reads them, catering to the morbid passion for mental and nervous stimulus, and which present to the minds of our young people scenes and incidents which men and women of the world cannot read without a shudder.

I am happy to believe that there is a reaction from the modern poison; that there is a return to a better state of feeling. Lead the minds of our young people back to the more wholesome diet, such as Scott and Thackeray and Dickens and George Eliot provide, and I recognize, in the work of this Society, a step in that direction. It is not in vain that you have taken up such a work as that. Literature ought not to contain such poison as I have referred to, and, thanks to such men as Scott, Thackeray and Dickens, and such women as George Eliot, there is ample reading without any resort to that.

And then his heroic industry. Shall I say one word about that? Scotchmen and Americans have been brought up for so many generations upon the gospel of hard work that mere industry is not such a venerable virtue, but in him it indicated that high reserve, that indomitable purpose, which has hardly been manifested in such force by any other man in all my reading. When adversity overwhelmed him, when great schemes that he had built up with so much ambition came toppling about his head, he never wavered. He lost not one jot of heart or life. He held his head erect and worked on, until his tireless pen dropped from his dying hand. Every hour was full of life and aspiration to the end, and he personified in his own action, in his own fashion, his own favorite maxim:

"One crowded hour of glorious life
Is worth an age without a name."

And then his patriotism, noblest and proudest of his gifts. He loved his country with an intensity exceeding that of woman. He never tired of describing the glorious virtues of Scottish heroes, the beauties of Scottish landscape, and all that went to make the land of his birth heroic and beautiful. And so he drew the eyes and hearts of all men hither to admire and to love. His biographer says that upon the publication of the *Lady of the Lake*, swarms of English tourists came flocking over the borders the next summer, to visit the places which his magic pen had described.

But that was not all. This patriotic fervor, this irresistible charm which mark all his writings, goes a great deal deeper and further than

that. It inspires the hearts of his young countrymen to imitate the heroic deeds of their ancestors whom he so fondly loved to describe. Wherever the Scottish soldier goes, wherever you find him in the hour of trial, in the trenches, in the hospital, or in the camp, you find in many a knapsack stray copies of *Marmion*, *Rob Roy*, or other of his charming works, for the solace and entertainment and inspiration of the soldier who has gone forth to battle. If you hear, as you will hear, of young soldiers of Scotland doing great deeds and dying heroes' deaths, I am sure you will give some of the credit to this great wizard of the North, who has inspired them with his own patriotic fervor.

Scott stands midway between Burns and Carlyle in your literature. How fortunate the country, the little country, that has produced, in a single century, three such wonders as these. Where will you find the like? Search through history, ancient and modern—where will you find three such wonderful boasts of literature as Burns, Scott and Carlyle? The emerald, the ruby and the diamond, the three great jewels in Scotland's crown. And in their name I give you the toast of Literature, and I am proud and happy to couple with it the name of one who has done, I think, as much as any other living man to keep the well of English pure and undefiled. I give you the toast of Literature and Mr. Andrew Lang.

ABRAHAM LINCOLN

ADDRESS DELIVERED BEFORE THE EDINBURGH PHILOSOPHICAL INSTITUTION, NOVEMBER 13, 1900

When you asked me to deliver the Inaugural Address on this occasion, I recognized that I owed this compliment to the fact that I was the official representative of America—and in selecting a subject I ventured to think that I might interest you for an hour in a brief study in popular Government, as illustrated by the life of the most American of all Americans. I therefore offer no apology for asking your attention to Abraham Lincoln—to his unique character and the part he bore in two important achievements of modern history: the preservation of the integrity of the American Union and the Emancipation of the colored race.

During his brief term of power, he was probably the object of more abuse, vilification and ridicule than any other man in the world; but when he fell by the hand of an assassin, at the very moment of his stupendous victory, all the nations of the earth vied with one another in paying homage to his character; and the thirty-five years that have since elapsed have established his place in history as one of the great benefactors not of his own country alone, but of the human race.

One of many noble utterances upon the occasion of his death was that in which "Punch" made its magnanimous recantation of the spirit with which it had pursued him:

"Beside this corpse that bears for winding sheet
The stars and stripes he lived to rear anew,
Between the mourners at his head and feet
Say, scurrile jester, is there room for you?

* * * * *

Yes, he had lived to shame me from my sneer
To lame my pencil, and confute my pen—
To make me own this hind—of princes peer,
This rail-splitter—a true born king of men."

Fiction can furnish no match for the romance of his life, and biography will be searched in vain for such startling vicissitudes of fortune, so great power and glory won out of such humble beginnings and adverse circumstances.

Doubtless, you are all familiar with the salient points of his extraordinary career. In the zenith of his fame he was the wise, patient, courageous, successful ruler of men; exercising more power than any monarch of his time, not for himself, but for the good of the people who

had placed it in his hands; commander-in-chief of a vast military power, which waged with ultimate success the greatest war of the century; the triumphant champion of popular Government, the deliverer of four millions of his fellow men from bondage; honored by mankind as Statesman, President and Liberator.

Let us glance now at the first half of the brief life, of which this was the glorious and happy consummation. Nothing could be more squalid and miserable than the home in which Abraham Lincoln was born—a one-roomed cabin without floor or window in what was then the wilderness of Kentucky, in the heart of that frontier life which swiftly moved westward from the Alleghanies to the Mississippi, always in advance of schools and churches, of books and money, of railroads and newspapers, of all things which are generally regarded as the comforts and even necessities of life. His father, ignorant, needy and thriftless, content if he could keep soul and body together for himself and his family, was ever seeking, without success, to better his unhappy condition by moving on from one such scene of dreary desolation to another. The rude society which surrounded them was not much better. The struggle for existence was hard, and absorbed all their energies. They were fighting the forest, the wild beast and the retreating savage. From the time when he could barely handle tools until he attained his majority, Lincoln's life was that of a simple farm laborer, poorly clad, housed and fed, at work either on his father's wretched farm, or hired out to neighboring farmers. But in spite, or perhaps by means, of this rude environment, he grew to be a stalwart giant, reaching six feet four at nineteen, and fabulous stories are told of his feats of strength. With the growth of this mighty frame began that strange education which in his ripening years was to qualify him for the great destiny that awaited him, and the development of those mental faculties and moral endowments, which, by the time he reached middle life, were to make him the sagacious, patient, and triumphant leader of a great nation in the crisis of its fate. His whole schooling, obtained during such odd times as could be spared from grinding labor, did not amount in all to as much as one year, and the quality of the teaching was of the lowest possible grade, including only the elements of reading, writing and ciphering. But out of these simple elements, when rightly used by the right man, education is achieved; and Lincoln knew how to use them. As so often happens, he seemed to take warning from his father's unfortunate example. Untiring industry, an insatiable thirst for knowledge, and an ever-growing desire to rise above his surroundings, were early manifestations of his character.

Books were almost unknown in that community, but the Bible was in every house, and somehow or other Pilgrim's Progress, Æsop's Fables, a History of the United States, and a Life of Washington fell into his hands. He trudged on foot many miles through the wilderness to borrow an English Grammar, and is said to have devoured greedily the contents of the Statutes of Indiana that fell in his way. These few volumes he read and re-read—and his power of assimilation was great. To be shut in with a few books and to master them thoroughly sometimes does more for the development of mind and character, than freedom to range at large, in a cursory and indiscriminate way, through wide domains of literature. This youth's mind, at any rate, was thoroughly saturated with Biblical knowledge and Biblical language, which, in after life, he used with great readiness and effect. But it was the constant use of the little knowledge which he had that developed and exercised his mental powers. After the hard day's work was done, while others slept, he toiled on, always reading or writing. From an early age he did his own thinking and made up his own mind—invaluable traits in the future President. Paper was such a scarce commodity that, by the evening firelight, he would write and cipher on the back of a wooden shovel, and then shave it off to make room for more. By-and-by, as he approached manhood, he began speaking in the rude gatherings of the neighborhood, and so laid the foundation of that art of persuading his fellow men, which was one rich result of his education, and one great secret of his subsequent success.

Accustomed as we are in these days of steam and telegraphs to have every intelligent boy survey the whole world each morning before breakfast, and inform himself as to what is going on in every nation, it is hardly possible to conceive how benighted and isolated was the condition of the community at Pigeon Creek in Indiana, of which the family of Lincoln's father formed a part, or how eagerly an ambitious and high-spirited boy, such as he, must have yearned to escape. The first glimpse that he ever got of any world beyond the narrow confines of his home was in 1828, at the age of nineteen, when a neighbor employed him to accompany his son down the river to New Orleans to dispose of a flat boat of produce—a commission which he discharged with great success.

Shortly after his return from this first excursion into the outer world, his father, tired of failure in Indiana, packed his family and all his worldly goods into a single wagon drawn by two yoke of oxen, and after a fourteen days' tramp through the wilderness, pitched his camp once more in Illinois. Here Abraham, having come of age and being

now his own master, rendered the last service of his minority by ploughing the fifteen acre lot and splitting from the tall walnut trees of the primeval forest enough rails to surround the little clearing with a fence. Such was the meagre outfit of this coming leader of men, at the age when the future British Prime Minister or Statesman emerges from the University as a double first or senior wrangler, with every advantage that high training and broad culture and association with the wisest and the best of men and women can give, and enters upon some form of public service on the road to usefulness and honor, the University course being only the first stage of the public training. So Lincoln, at twenty-one, had just begun his preparation for the public life to which he soon began to aspire. For some years yet he must continue to earn his daily bread by the sweat of his brow, having absolutely no means, no home, no friend to consult. More farm work as a hired hand, a clerkship in a village store, the running of a mill, another trip to New Orleans on a flat boat of his own contriving, a pilot's berth on the river: these were the means by which he subsisted until, in the summer of 1832, when he was twenty-three years of age, an event occurred which gave him public recognition.

The Black Hawk War broke out, and the Governor of Illinois calling for volunteers to repel the band of savages whose leader bore that name, Lincoln enlisted and was elected captain by his comrades, among whom he had already established his supremacy by signal feats of strength and more than one successful single combat. During the brief hostilities he was engaged in no battle and won no military glory, but his local leadership was established. The same year he offered himself as a candidate for the Legislature of Illinois, but failed at the polls. Yet his vast popularity with those who knew him was manifest. The District consisted of several counties, but the unanimous vote of the people of his own county was for Lincoln. Another unsuccessful attempt at store-keeping was followed by better luck at surveying, until his horse and instruments were levied upon under execution for the debts of his business adventure.

I have been thus detailed in sketching his early years because upon these strange foundations the structure of his great fame and service was built. In the place of a school and university training fortune substituted these trials, hardships and struggles as a preparation for the great work which he had to do. It turned out to be exactly what the emergency required. Ten years instead of the public school and the University certainly never could have fitted this man for the unique work which was to be thrown upon him. Some other Moses would

have had to lead us to our Jordan, to the sight of our promised land of liberty.

At the age of twenty-five he became a member of the Legislature of Illinois, and so continued for eight years, and, in the meantime, qualified himself by reading such law books as he could borrow at random—for he was too poor to buy any—to be called to the Bar. For his second quarter of a century—during which a single term in Congress introduced him into the arena of national questions—he gave himself up to law and politics. In spite of his soaring ambition, his two years in Congress gave him no premonition of the great destiny that awaited him, and at its close, in 1849, we find him an unsuccessful applicant to the President for appointment as Commissioner of the General Land Office—a purely administrative Bureau; a fortunate escape for himself and for his country. Year by year his knowledge and power, his experience and reputation extended, and his mental faculties seemed to grow by what they fed on. His power of persuasion, which had always been marked, was developed to an extraordinary degree, now that he became engaged in congenial questions and subjects. Little by little he rose to prominence at the Bar, and became the most effective public speaker in the West. Not that he possessed any of the graces of the orator; but his logic was invincible, and his clearness and force of statement impressed upon his hearers the convictions of his honest mind, while his broad sympathies and sparkling and genial humor made him a universal favorite as far and as fast as his acquaintance extended.

These twenty years that elapsed from the time of his establishment as a lawyer and legislator in Springfield, the new capital of Illinois, furnished a fitting theatre for the development and display of his great faculties, and, with his new and enlarged opportunities, he obviously grew in mental stature in this second period of his career, as if to compensate for the absolute lack of advantages under which he had suffered in youth. As his powers enlarged, his reputation extended, for he was always before the people, felt a warm sympathy with all that concerned them, took a zealous part in the discussion of every public question, and made his personal influence ever more widely and deeply felt.

My brethren of the legal profession will naturally ask me, how could this rough backwoodsman, whose youth had been spent in the forest or on the farm and the flat boat, without culture or training, education or study, by the random reading, on the wing, of a few miscellaneous law books, become a learned and accomplished lawyer? Well, he never

did. He never would have earned his salt as a Writer for the Signet, nor have won a place as advocate in the Court of Session, where the technique of the profession has reached its highest perfection, and centuries of learning and precedent are involved in the equipment of a lawyer. Dr. Holmes, when asked by an anxious young mother, "When should the education of a child begin?" replied, "Madam, at least two centuries before it is born!" and so I am sure it is with the Scots lawyer.

But not so in Illinois in 1840. Between 1830 and 1880, its population increased twenty-fold, and when Lincoln began practising law in Springfield in 1837, life in Illinois was very crude and simple, and so were the Courts and the administration of justice. Books and libraries were scarce. But the people loved justice, upheld the law and followed the Courts, and soon found their favorites among the advocates. The fundamental principles of the Common Law, as set forth by Blackstone and Chitty, were not so difficult to acquire; and brains, common sense, force of character, tenacity of purpose, ready wit and power of speech did the rest, and supplied all the deficiencies of learning.

The lawsuits of those days were extremely simple, and the principles of natural justice were mainly relied on to dispose of them at the Bar and on the Bench, without resort to technical learning. Railroads, corporations absorbing the chief business of the community; combined and inherited wealth, with all the subtle and intricate questions they breed, had not yet come in—and so the professional agents and the equipment which they require were not needed. But there were many highly educated and powerful men at the Bar of Illinois, even in those early days, whom the spirit of enterprise had carried there in search of fame and fortune. It was by constant contact and conflict with these that Lincoln acquired professional strength and skill. Every community and every age creates its own Bar, entirely adequate for its present uses and necessities. So in Illinois, as the population and wealth of the State kept on doubling and quadrupling, its Bar presented a growing abundance of learning and science and technical skill. The early practitioners grew with its growth and mastered the requisite knowledge. Chicago soon grew to be one of the largest and richest and certainly the most intensely active city on the Continent, and if any of my professional friends here had gone there in Lincoln's later years, to try or argue a cause, or transact other business, with any idea that Edinburgh or London had a monopoly of legal learning, science or subtlety, they would certainly have found their mistake.

In those early days in the West, every lawyer, especially every Court lawyer, was necessarily a politician, constantly engaged in the public

discussion of the many questions evolved from the rapid development of town, county, State and Federal affairs. Then and there, in this regard, public discussion supplied the place which the universal activity of the Press has since monopolized, and the public speaker who, by clearness, force, earnestness and wit, could make himself felt on the questions of the day, would rapidly come to the front. In the absence of that immense variety of popular entertainments which now feed the public taste and appetite, the people found their chief amusement in frequenting the Courts and public and political assemblies. In either place, he who impressed, entertained and amused them most was the hero of the hour. They did not discriminate very carefully between the eloquence of the forum and the eloquence of the hustings. Human nature ruled in both alike, and he who was the most effective speaker in a political harangue was often retained as most likely to win in a cause to be tried or argued. And I have no doubt in this way many retainers came to Lincoln. Fees, money in any form, had no charms for him—in his eager pursuit of fame, he could not afford to make money. He was ambitious to distinguish himself by some great service to mankind, and this ambition for fame and real public service left no room for avarice in his composition. However much he earned, he seems to have ended every year hardly richer than he began it, and yet as the years passed, fees came to him freely. One of £1,000 is recorded—a very large professional fee at that time, even in any part of America, the paradise of lawyers. I lay great stress on Lincoln's career as a lawyer—much more than his biographers do—because in America a state of things exists wholly different from that which prevails in Great Britain. The profession of the law always has been—and is to this day—the principal avenue to public life; and I am sure that his training and experience in the Courts had much to do with the development of those forces of intellect and character which he soon displayed on a broader arena.

It was in political controversy, of course, that he acquired his wide reputation, and made his deep and lasting impression upon the people of what had now become the powerful State of Illinois, and upon the people of the Great West, to whom the political power and control of the United States were already surely and swiftly passing from the older Eastern States. It was this reputation and this impression and the familiar knowledge of his character which had come to them from his local leadership, that happily inspired the people of the West to present him as their candidate, and to press him upon the Republican

Convention of 1860, as the fit and necessary leader in the struggle for life which was before the Nation.

That struggle, as you all know, arose out of the terrible question of Slavery—and I must trust to your general knowledge of the history of that question to make intelligible the attitude and leadership of Lincoln as the champion of the hosts of freedom in the final contest. Negro slavery had been firmly established in the Southern States from an early period of their history. In 1619, the year before the "Mayflower" landed our Pilgrim Fathers upon Plymouth Rock, a Dutch ship had discharged a cargo of African slaves at Jamestown in Virginia. All through the colonial period their importation had continued. A few had found their way into the Northern States, but in none of them in sufficient numbers to constitute danger or to afford a basis for political power. At the time of the adoption of the Federal Constitution, there is no doubt that the principal members of the Convention not only condemned slavery as a moral, social and political evil—but believed that by the suppression of the slave trade it was in the course of gradual extinction in the South, as it certainly was in the North. Washington, in his will, provided for the emancipation of his own slaves, and said to Jefferson that it "was among his first wishes to see some plan adopted by which slavery in his country might be abolished." Jefferson said, referring to the institution, "I tremble for my country when I think that God is just; that His justice cannot sleep for ever"—and Franklin, Adams, Hamilton and Patrick Henry were all utterly opposed to it. But it was made the subject of a fatal compromise in the Federal Constitution, whereby its existence was recognized in the States as a basis of representation, the prohibition of the importation of slaves was postponed for twenty years, and the return of fugitive slaves provided for. But no imminent danger was apprehended from it till, by the invention of the cotton gin in 1792, cotton culture by negro labor became at once and forever the leading industry of the South, and gave a new impetus to the importation of slaves, so that in 1808, when the constitutional prohibition took effect, their numbers had vastly increased. From that time forward, slavery became the basis of a great political power, and the Southern States, under all circumstances and at every opportunity, carried on a brave and unrelenting struggle for its maintenance and extension.

The conscience of the North was slow to rise against it, though bitter controversies from time to time took place. The Southern leaders threatened disunion if their demands were not complied with. To save the Union, compromise after compromise was made; but each one

in the end was broken. The Missouri Compromise, made in 1820 upon the occasion of the admission of Missouri into the Union as a Slave State—whereby, in consideration of such admission, slavery was for ever excluded from the Northwest Territory—was ruthlessly repealed in 1854, by a Congress elected in the interests of the slave power, the intent being to force slavery into that vast territory which had so long been dedicated to freedom. This challenge at last aroused the slumbering conscience and passion of the North, and led to the formation of the Republican party for the avowed purpose of preventing, by constitutional methods, the further extension of slavery.

In its first campaign in 1856, though it failed to elect its candidates, it received a surprising vote and carried many of the States. No one could any longer doubt that the North had made up its mind that no threats of disunion should deter it from pressing its cherished purpose and performing its long neglected duty.* From the outset, Lincoln was one of the most active and effective leaders and speakers of the new party, and the great debates between Lincoln and Douglas in 1858, as the respective champions of the restriction and extension of slavery, attracted the attention of the whole country. Lincoln's powerful arguments carried conviction everywhere. His moral nature was thoroughly aroused—his conscience was stirred to the quick. Unless slavery was wrong, nothing was wrong. Was each man, of whatever color, entitled to the fruits of his own labor, or could one man live in idle luxury by the sweat of another's brow, whose skin was darker? He was an implicit believer in that principle of the Declaration of Independence that all men are vested with certain inalienable rights—the equal rights to life, liberty, and the pursuit of happiness. On this doctrine, he staked his case and carried it. We have time only for one or two sentences in which he struck the keynote of the contest:—

“The real issue in this country is the eternal struggle between these two principles—right and wrong—throughout the world. They are the two principles that have stood face to face from the beginning of time, and will ever continue to struggle. The one is the common right of humanity, and the other the divine right of kings. It is the same principle in whatever shape it develops itself. It is the same spirit that says, ‘You work and toil and earn bread and I’ll eat it.’”

He foresaw with unerring vision that the conflict was inevitable and irrepressible—that one or the other, the right or the wrong, freedom or slavery, must ultimately prevail, and wholly prevail, throughout the country; and this was the principle that carried the war, once begun, to a finish.

One sentence of his is immortal:

"Under the operation of the policy of compromise, the slavery agitation has not only not ceased, but has constantly augmented. In my opinion it will not cease until a crisis shall have been reached and passed. 'A house divided against itself cannot stand.' I believe this Government cannot endure permanently half slave and half free. I do not expect the Union to be dissolved. I do not expect the house to fall—but I do expect it will cease to be divided. It will become all one thing or all the other—either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction, or its advocates will push it forward till it shall become alike lawful in all the States, old as well as new, North as well as South."

During the entire decade, from 1850 to 1860, the agitation of the slavery question was at the boiling point, and events which have become historical continually indicated the near approach of the overwhelming storm. No sooner had the Compromise Acts of 1850 resulted in a temporary peace, which everybody said must be final and perpetual, than new outbreaks came. The forcible carrying away of fugitive slaves by Federal Troops from Boston agitated that ancient stronghold of freedom to its foundations. The publication of "Uncle Tom's Cabin," which truly exposed the frightful possibilities of the slave system; the reckless attempts by force and fraud to establish it in Kansas against the will of the vast majority of the settlers; the beating of Sumner in the Senate Chamber for words spoken in debate; the Dred Scott decision in the Supreme Court, which made the nation realize that the slave power had at last reached the fountain of Federal justice; and finally the execution of John Brown, for his wild raid into Virginia, to invite the slaves to rally to the standard of freedom which he unfurled: all these events tend to illustrate and confirm Lincoln's contention that the nation could not permanently continue half slave and half free, but must become all one thing or all the other. When John Brown lay under sentence of death, he declared that now he was sure that slavery must be wiped out in blood; but neither he nor his executioners dreamt that within four years a million soldiers would be marching across the country for its final extirpation, to the music of the war-song of the great conflict:

"John Brown's body lies a-mouldering in the grave,
But his soul is marching on."

And now, at the age of fifty-one, this child of the wilderness, this farm laborer, rail-splitter, flat-boatman—this surveyor, lawyer, orator,

statesman and patriot found himself elected by the great party which was pledged to prevent at all hazards the further extension of slavery, as the chief magistrate of the Republic, bound to carry out that purpose, to be the leader and ruler of the nation in its most trying hour.

Those who believe that there is a living Providence that over-rules and conducts the affairs of nations, find in the elevation of this plain man to this extraordinary fortune and to this great duty which he so fitly discharged, a signal vindication of their faith. Perhaps to this Philosophical Institution the judgment of our philosopher Emerson will commend itself as a just estimate of Lincoln's historical place:

"His occupying the Chair of State was a triumph of the good sense of mankind and of the public conscience. He grew according to the need; his mind mastered the problem of the day: and as the problem grew, so did his comprehension of it. In the war there was no place for holiday magistrate, nor fair weather sailor. The new pilot was hurried to the helm in a tornado. In four years—four years of battle days—his endurance, his fertility of resource, his magnanimity, were sorely tried, and never found wanting. There, by his courage, his justice, his even temper, his fertile counsel, his humanity, he stood a heroic figure in the centre of a heroic epoch. He is the true history of the American people in his time, the true representative of this continent—father of his country, the pulse of twenty millions throbbing in his heart, the thought of their mind articulated in his tongue."

He was born great, as distinguished from those who achieve greatness or have it thrust upon them, and his inherent capacity, mental, moral, and physical, having been recognized by the educated intelligence of a free people, they happily chose him for their ruler in a day of deadly peril.

It is now forty years since I first saw and heard Abraham Lincoln, but the impression which he left on my mind is ineffaceable. After his great successes in the West he came to New York to make a political address. He appeared in every sense of the word like one of the plain people among whom he loved to be counted. At first sight there was nothing impressive or imposing about him—except that his great stature singled him out from the crowd; his clothes hung awkwardly on his giant frame, his face was of a dark pallor, without the slightest tinge of color; his seamed and rugged features bore the furrows of hardship and struggle; his deep-set eyes looked sad and anxious; his countenance in repose gave little evidence of that brain power which had raised him from the lowest to the highest station among his countrymen; as he talked to me before the meeting, he seemed ill at ease, with

that sort of apprehension which a young man might feel before presenting himself to a new and strange audience, whose critical disposition he dreaded. It was a great audience, including all the noted men—all the learned and cultured—of his party in New York: editors, clergymen, statesmen, lawyers, merchants, critics. They were all very curious to hear him. His fame as a powerful speaker had preceded him, and exaggerated rumor of his wit—the worst forerunner of an orator—had reached the East. When Mr. Bryant presented him, on the high platform of the Cooper Institute, a vast sea of eager upturned faces greeted him, full of intense curiosity to see what this rude child of the people was like. He was equal to the occasion. When he spoke he was transformed; his eye kindled, his voice rang, his face shone and seemed to light up the whole assembly. For an hour and a half he held his audience in the hollow of his hand. His style of speech and manner of delivery were severely simple. What Lowell called “the grand simplicities of the Bible,” with which he was so familiar, were reflected in his discourse. With no attempt at ornament or rhetoric, without parade or pretence, he spoke straight to the point. If any came expecting the turgid eloquence or the ribaldry of the frontier, they must have been startled at the earnest and sincere purity of his utterances. It was marvellous to see how this untutored man, by mere self-discipline and the chastening of his own spirit, had outgrown all meretricious arts, and found his own way to the grandeur and strength of absolute simplicity.

He spoke upon the theme which he had mastered so thoroughly. He demonstrated by copious historical proofs and masterly logic, that the Fathers who created the Constitution in order to form a more perfect union, to establish justice, and to secure the blessings of liberty to themselves and their posterity, intended to empower the Federal Government to exclude slavery from the territories. In the kindest spirit, he protested against the avowed threat of the Southern States to destroy the Union if, in order to secure freedom in those vast regions, out of which future States were to be carved, a Republican President were elected. He closed with an appeal to his audience, spoken with all the fire of his aroused and kindling conscience, with a full outpouring of his love of justice and liberty, to maintain their political purpose on that lofty and unassailable issue of right and wrong which alone could justify it, and not to be intimidated from their high resolve and sacred duty by any threats of destruction to the Government or of ruin to themselves. He concluded with this telling sentence, which drove the whole argument home to all our hearts: “Let us have faith

that right makes might, and in that faith let us to the end dare to do our duty as we understand it." That night the great hall, and the next day the whole city, rang with delighted applause and congratulations, and he who had come as a stranger departed with the laurels of a great triumph.

Alas! in five years from that exulting night, I saw him again, for the last time, in the same city, borne in his coffin through its draped streets. With tears and lamentations a heart-broken people accompanied him from Washington, the scene of his martyrdom, to his last resting place in the young city of the West, where he had worked his way to fame.

Never was a new ruler in a more desperate plight than Lincoln when he entered office on the 4th of March, 1861, four months after his election, and took his oath to support the Constitution and the Union. The intervening time had been busily employed by the Southern States in carrying out their threat of disunion in the event of his election. As soon as that fact was ascertained, seven of them had seceded and had seized upon the forts, arsenals, navy yards and other public property of the United States within their boundaries, and were making every preparation for war. In the meantime the retiring President, who had been elected by the slave power, and who thought the seceding States could not lawfully be coerced, had done absolutely nothing. Lincoln found himself, by the Constitution, Commander-in-Chief of the Army and Navy of the United States, but with only a remnant of either at hand. Each was to be created on a great scale out of the unknown resources of a nation untried in war.

In his mild and conciliatory inaugural address, while appealing to the seceding States to return to their allegiance, he avowed his purpose to keep the solemn oath he had taken that day, to see that the laws of the Union were faithfully executed, and to use the troops to recover the forts, navy yards, and other property belonging to the Government. It is probable, however, that neither side actually realized that war was inevitable, and that the other was determined to fight, until the assault on Fort Sumter presented the South as the first aggressor and roused the North to use every possible resource to maintain the Government and the imperilled Union, and to vindicate the supremacy of the flag over every inch of the territory of the United States. The fact that Lincoln's first Proclamation called for only 75,000 troops, to serve for three months, shows how inadequate was even his idea of what the future had in store. But from that moment Lincoln and his loyal supporters never faltered in their purpose. They knew they could win, that it was their duty to win, and that for America the whole hope of

the future depended upon their winning, for now by the acts of the seceding States the issue of the Election—to secure or prevent the extension of slavery—stood transformed into a struggle to preserve or to destroy the Union.

We cannot follow this contest. You know its gigantic proportions; that it lasted four years instead of three months; that in its progress instead of 75,000 men, more than 2,000,000 were enrolled on the side of the Government alone; that the aggregate cost and loss to the nation approximated to 2,000,000,000 pounds sterling, and that not less than 300,000 brave and precious lives were sacrificed on each side. History has recorded how Lincoln bore himself during these four frightful years; that he was the real President, the responsible and actual head of the Government through it all; that he listened to all advice, heard all parties, and then, always realizing his responsibility to God and the nation, decided every great executive question for himself. His absolute honesty had become proverbial long before he was President. "Honest Abe Lincoln" was the name by which he had been known for years. His every act attested it.

In all the grandeur of the vast power that he wielded, he never ceased to be one of the plain people, as he always called them, never lost or impaired his perfect sympathy with them, was always in perfect touch with them and open to their appeals; and here lay the very secret of his personality and of his power, for the people in turn gave him their absolute confidence. His courage, his fortitude, his patience, his hopefulness, were sorely tried but never exhausted.

He was true as steel to his Generals, but had frequent occasion to change them, as he found them inadequate. This serious and painful duty rested wholly on him, and was perhaps his most important function as Commander-in-Chief; but when, at last, he recognized in General Grant the master of the situation, the man who could and would bring the war to a triumphant end, he gave it all over to him, and upheld him with all his might. Amid all the pressure and distress that the burdens of office brought upon him, his unfailing sense of humor saved him—probably it made it possible for him to live under the burden. He had always been the great story-teller of the West, and he used and cultivated this faculty to relieve the weight of the load he bore.

It enabled him to keep the wonderful record of never having lost his temper, no matter what agony he had to bear. A whole night might be spent in recounting the stories of his wit, humor, and harmless sarcasm. But I will recall only two of his sayings, both about General Grant, who always found plenty of enemies and critics to urge the

President to oust him from his command. One, I am sure, will interest all Scotchmen. They repeated with malicious intent the gossip that Grant drank. "What does he drink?" asked Lincoln. "Whiskey" was, of course, the answer; doubtless you can guess the brand. "Well," said the President, "just find out what particular kind he uses and I'll send a barrel to each of my other Generals." The other must be as pleasing to the British as to the American ear. When pressed again on other grounds to get rid of Grant, he declared, "I can't spare that man, he fights!"

He was tender-hearted to a fault, and never could resist the appeals of wives and mothers of soldiers who had got into trouble and were under sentence of death for their offences. His Secretary of War and other officials complained that they never could get deserters shot. As surely as the women of the culprit's family could get at him, he always gave way. Certainly you will all appreciate his exquisite sympathy with the suffering relatives of those who had fallen in battle. His heart bled with theirs. Never was there a more gentle and tender utterance than his letter, to a mother who had given all her sons to her country, written at a time when the angel of death had visited almost every household in the land, and was already hovering over him.

"I have been shown," he says, "in the files of the War Department a statement that you are the mother of five sons who have died gloriously on the field of battle. I feel how weak and fruitless must be any words of mine which should attempt to beguile you from your grief for a loss so overwhelming—but I cannot refrain from tendering to you the consolation which may be found in the thanks of the Republic they died to save. I pray that our Heavenly Father may assuage the anguish of your bereavement and leave you only the cherished memory of the loved and the lost, and the solemn pride that must be yours to have laid so costly a sacrifice upon the altar of freedom."

Hardly could your illustrious Sovereign, from the depths of her queenly and womanly heart, have spoken words more touching and tender to soothe the stricken mothers of her own soldiers.

The Emancipation Proclamation, with which Mr. Lincoln delighted the country and the world on the first of January, 1863, will doubtless secure for him a foremost place in history among the philanthropists and benefactors of the race, as it rescued, from hopeless and degrading slavery, so many millions of his fellow beings described in the law and existing in fact as "chattels-personal, in the hands of their owners and possessors, to all intents, constructions and purposes whatsoever." Rarely does the happy fortune come to one man to render such a serv-

ice to his kind—to proclaim liberty throughout the land unto all the inhabitants thereof.

Ideas rule the world, and never was there a more signal instance of this triumph of an idea than here. William Lloyd Garrison, who thirty years before had begun his crusade for the abolition of slavery, and had lived to see this glorious and unexpected consummation of the hopeless cause to which he had devoted his life, well described the Proclamation as a "great historic event, sublime in its magnitude, momentous and beneficent in its far-reaching consequences, and eminently just and right alike to the oppressor and the oppressed."

Lincoln had been always heart and soul opposed to slavery. Tradition says that on the trip on the flat boat to New Orleans, he formed his first and last opinion of slavery at the sight of negroes chained and scourged, and that then and there the iron entered into his soul. No boy could grow to manhood in those days as a poor white in Kentucky and Indiana, in close contact with slavery or in its neighborhood, without a growing consciousness of its blighting effects on free labor, as well of its frightful injustice and cruelty. In the Legislature of Illinois, where the public sentiment was all for upholding the institution and violently against every movement for its abolition or restriction, upon the passage of resolutions to that effect, he had the courage with one companion to put on record his protest, "believing that the institution of slavery is founded both in injustice and bad policy." No great demonstration of courage, you will say; but that was at a time when Garrison, for his abolition utterances, had been dragged by an angry mob through the streets of Boston with a rope around his body, and in the very year that Lovejoy in the same State of Illinois was slain by rioters while defending his press, from which he had printed anti-slavery appeals.

In Congress, he brought in a Bill for gradual abolition in the District of Columbia, with compensation to the owners—for until they raised treasonable hands against the life of the nation, he always maintained that the property of the slave-holders, into which they had come by two centuries of descent, without fault on their part, ought not to be taken away from them without just compensation. He used to say that, one way or another, he had voted forty-two times for the Wilmot proviso, which Mr. Wilmot of Pennsylvania moved as an addition to every Bill which affected United States territory—"That neither slavery nor involuntary servitude shall ever exist in any part of the said territory"—and it is evident that his condemnation of the system, on moral grounds

as a crime against the human race, and on political grounds as a cancer that was sapping the vitals of the nation, and must master its whole being or be itself extirpated, grew steadily upon him until it culminated in his great speeches in the Illinois debate.*

By the mere election of Lincoln to the Presidency, the further extension of slavery into the territories was rendered for ever impossible—*Vox populi, vox Dei*. Revolutions never go backward, and when founded on a great moral sentiment stirring the heart of an indignant people, their edicts are irresistible and final. Had the slave power acquiesced in that election, had the Southern States remained under the Constitution and within the Union, and relied upon their constitutional and legal rights, their favorite institution, immoral as it was, blighting and fatal as it was, might have endured for another century. The great party that had elected him, unalterably determined against its extension, was nevertheless pledged not to interfere with its continuance in the States where it already existed. Of course, when new regions were for ever closed against it, from its very nature it must have begun to shrink and to dwindle; and probably gradual and compensated emancipation, which appealed very strongly to the new President's sense of justice and expediency, would, in the progress of time, by a reversion to the ideas of the Founders of the Republic, have found a safe outlet for both masters and slaves. But whom the gods wish to destroy they first make mad, and when seven States, afterwards increased to eleven, openly seceded from the Union, when they declared and began the war upon the nation, and challenged its mighty power to the desperate and protracted struggle for its life, and for the maintenance of its authority as a nation over its territory, they gave to Lincoln and to freedom the sublime opportunity of history.

In his first inaugural address, when as yet not a drop of precious blood had been shed, while he held out to them the olive branch in one hand, in the other he presented the guarantees of the Constitution, and after reciting the emphatic resolution of the Convention that nominated him, that the maintenance inviolate of the "rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend," he reiterated this sentiment and declared with no mental reservation, "that all the protection which, consistently with the Constitution and the laws can be given, will be cheerfully given to all the States when lawfully demanded for whatever cause—as cheerfully to one section as to another."

When, however, these magnanimous overtures for peace and re-union were rejected; when the seceding States defied the Constitution and every clause and principle of it; when they persisted in staying out of the Union from which they had seceded, and proceeded to carve out of its territory a new and hostile empire based on slavery; when they flew at the throat of the nation and plunged it into the bloodiest war of the nineteenth century—the tables were turned, and the belief gradually came to the mind of the President that if the Rebellion was not soon subdued by force of arms, if the war must be fought out to the bitter end, then to reach that end the salvation of the nation itself might require the destruction of slavery wherever it existed; that if the war was to continue on one side for Disunion, for no other purpose than to preserve slavery, it must continue on the other side for the Union, to destroy slavery.

As he said, "Events control me; I cannot control events," and as the dreadful war progressed, and became more deadly and dangerous, the unalterable conviction was forced upon him that, in order that the frightful sacrifice of life and treasure on both sides might not be all in vain, it had become his duty as Commander-in-Chief of the Army, as a necessary war measure, to strike a blow at the Rebellion which, all others failing, would inevitably lead to its annihilation, by annihilating the very thing for which it was contending. His own words are the best:

"I understood that my oath to preserve the Constitution to the best of my ability imposed upon me the duty of preserving by every indispensable means that Government—that Nation, of which that Constitution was the organic law. Was it possible to lose the Nation and yet preserve the Constitution? By general law, life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the Nation. Right or wrong, I assumed this ground and now avow it. I could not feel that, to the best of my ability, I had ever tried to preserve the Constitution if to save slavery or any minor matter, I should permit the wreck of Government, Country and Constitution all together."

And so, at last, when in his judgment the indispensable necessity had come, he struck the fatal blow, and signed the Proclamation which has made his name immortal. By it, the President, as Commander-in-Chief in time of actual armed rebellion, and as a fit and necessary war

measure for suppressing the rebellion, proclaimed all persons held as slaves in the States and parts of States then in rebellion to be thenceforward free, and declared that the executive, with the Army and Navy, would recognize and maintain their freedom.

In the other great steps of the Government, which led to the triumphant prosecution of the war, he necessarily shared the responsibility and the credit with the great statesmen who stayed up his hands in his Cabinet—with Seward, Chase and Stanton and the rest, and with his generals and admirals, his soldiers and sailors—but this great act was absolutely his own. The conception and execution were exclusively his. He laid it before his Cabinet as a measure on which his mind was made up and could not be changed, asking them only for suggestions as to details. He chose the time and the circumstances under which the Emancipation should be proclaimed and when it should take effect.

It came not an hour too soon; but public opinion in the North would not have sustained it earlier. In the first eighteen months of the war its ravages had extended from the Atlantic to beyond the Mississippi. Many victories in the West had been balanced and paralyzed by inaction and disasters in Virginia, only partially redeemed by the bloody and indecisive battle of Antietam; a reaction had set in from the general enthusiasm which had swept the Northern States after the assault upon Sumter. It could not truly be said that they had lost heart, but faction was raising its head. Heard through the land like the blast of a bugle, the Proclamation rallied the patriotism of the country to fresh sacrifices and renewed ardor. It was a step that could not be revoked. It relieved the conscience of the nation from an incubus that had oppressed it from its birth. The United States were rescued from the false predicament in which they had been from the beginning, and the great popular heart leaped with new enthusiasm for "Liberty and Union, henceforth and forever, one and inseparable." It brought not only moral but material support to the cause of the Government, for within two years 120,000 colored troops were enlisted in the military service and following the national flag, supported by all the loyalty of the North, and led by its choicest spirits. One mother said, when her son was offered the command of the first colored regiment, "If he accepts it I shall be as proud as if I had heard that he was shot." He was shot heading a gallant charge of his regiment. The Confederates replied to a request of his friends for his body that they "had buried him under a layer of his niggers"; but that mother has lived

to enjoy thirty-six years of his glory, and Boston has erected its noblest monument to his memory.

The effect of the Proclamation upon the actual progress of the war was not immediate, but wherever the Federal armies advanced they carried freedom with them, and when the summer came round the new spirit and force which had animated the heart of the Government and people were manifest. In the first week of July, the decisive battle of Gettysburg turned the tide of war, and the fall of Vicksburg made the great river free from its source to the Gulf.

On foreign nations the influence of the Proclamation and of these new victories was of great importance. In those days, when there was no cable, it was not easy for foreign observers to appreciate what was really going on; they could not see clearly the true state of affairs, as in the last year of the nineteenth century we have been able, by our new electric vision, to watch every event at the antipodes and observe its effect. The rebel emissaries, sent over to solicit intervention, spared no pains to impress upon the minds of public and private men and upon the press their own views of the character of the contest. The prospects of the Confederacy were always better abroad than at home. The Stock Markets of the world gambled upon its chances, and its bonds at one time were in high favor.

Such ideas as these were seriously held: that the North was fighting for empire, and the South for independence; that the Southern States, instead of being the grossest oligarchies, essentially despotisms, founded on the right of one man to appropriate the fruit of other men's toil and to exclude them from equal rights, were real republics, feebler to be sure than their Northern rivals, but representing the same idea of freedom, and that the mighty strength of the nation was being put forth to crush them; that Jefferson Davis and the Southern leaders had created a nation; that the republican experiment had failed, and the Union had ceased to exist. But the crowning argument to foreign minds was that it was an utter impossibility for the Government to win in the contest; that the success of the Southern States, so far as separation was concerned, was as certain as any event yet future and contingent could be; that the subjugation of the South by the North, even if it could be accomplished, would prove a calamity to the United States and the world, and especially calamitous to the negro race; and that such a victory would necessarily leave the people of the South for many generations cherishing deadly hostility against the Government and the North, and plotting always to recover their independence.

When Lincoln issued his Proclamation, he knew that all these ideas were founded in error; that the national resources were inexhaustible; that the Government could and would win, and that if slavery were once finally disposed of, the only cause of difference being out of the way, the North and South would come together again and, by-and-by, be as good friends as ever. In many quarters abroad the Proclamation was welcomed with enthusiasm by the friends of America; but I think the demonstrations in its favor that brought more gladness to Lincoln's heart than any other, were the meetings held in the manufacturing centres by the very operatives upon whom the war bore the hardest, expressing the most enthusiastic sympathy with the Proclamation, while they bore with heroic fortitude the grievous privations which the war entailed upon them. Mr. Lincoln's expectation when he announced to the world that all slaves in all States then in rebellion were set free, must have been that the avowed position of his Government, that the continuance of the war now meant the annihilation of slavery, would make intervention impossible for any foreign nation whose people were lovers of liberty,—and so the result proved.

The growth and development of Lincoln's mental power and moral force, of his intense and magnetic personality, after the vast responsibilities of Government were thrown upon him at the age of fifty-two, furnish a rare and striking illustration of the marvellous capacity and adaptability of the human intellect—of the sound mind in the sound body. He came to the discharge of the great duties of the Presidency with absolutely no experience in the administration of Government, or of the vastly varied and complicated questions of foreign and domestic policy which immediately arose, and continued to press upon him during the rest of his life; but he mastered each as it came apparently with the facility of a trained and experienced ruler. As Clarendon said of Cromwell, "His parts seemed to be raised by the demands of great station." His life through it all was one of intense labor, anxiety and distress, without one hour of peaceful repose from first to last. But he rose to every occasion. He led public opinion, but did not march so far in advance of it as to fail of its effective support in every great emergency. He knew the heart and thought of the people, as no man not in constant and absolute sympathy with them could have known it, and so, holding their confidence, he triumphed through and with them. Not only was there this steady growth of intellect, but the infinite delicacy of his nature and its capacity for refinement developed also, as exhibited in the purity and perfection of his language and style of speech. The rough backwoodsman, who had never seen the inside of

a University, became in the end, by self-training and the exercise of his own powers of mind, heart and soul, a master of style—and some of his utterances will rank with the best, the most perfectly adapted to the occasion which produced them.

Have you time to listen to his two minutes' speech at Gettysburg, at the dedication of the Soldiers' Cemetery? His whole soul was in it:

"Four score and seven years ago, our fathers brought forth on this continent a new nation conceived in liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But in a larger sense we cannot dedicate—we cannot consecrate—we cannot hallow this ground. The brave men, living and dead, who struggled here have consecrated it far above our poor power to add or detract. The world will little note, nor long remember, what we say here—but it can never forget what they did here. It is for us, the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve, that these dead shall not have died in vain—that this nation under God shall have a new birth of freedom—and that government of the people, by the people and for the people, shall not perish from the earth."

He lived to see his work indorsed by an overwhelming majority of his countrymen. In his second Inaugural Address, pronounced just forty days before his death, there is a single passage which well displays his indomitable will and at the same time his deep religious feeling, his sublime charity to the enemies of his country and his broad and Catholic humanity:

"If we shall suppose that American slavery is one of those offences which in the Providence of God must needs come, but which having continued through the appointed time, He now wills to remove, and that He gives to both North and South this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if

God wills that it continue until all the wealth piled by the bondsmen's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid with another drawn by the sword, as was said three thousand years ago, so still it must be said, "The judgments of the Lord are true and righteous altogether." "

"With malice toward none, with charity for all; with firmness in the right as God gives us to see the right—let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle and for his widow and his orphan—to do all which may achieve and cherish a just and lasting peace among ourselves, and with all nations."

His prayer was answered. The forty days of life that remained to him were crowded with great historic events. He lived to see his Proclamation of Emancipation embodied in an amendment of the Constitution, adopted by Congress and submitted to the States for ratification. The mighty scourge of war did speedily pass away, for it was given him to witness the surrender of the Rebel army and the fall of their capital, and the starry flag that he loved, waving in triumph over the national soil. When he died by the madman's hand in the supreme hour of victory, the vanquished lost their best friend, and the human race one of its noblest examples; and all the friends of freedom and justice, in whose cause he lived and died, joined hands as mourners at his grave.

CITY OF LONDON COLLEGE

ADDRESS TO THE STUDENTS OF THE CITY OF LONDON COLLEGE, AT THE
ANNUAL MEETING FOR THE DISTRIBUTION OF PRIZES,
DECEMBER 7, 1900

My Lord Mayor, Ladies and Gentlemen: I consider it a great honour to be asked to attend at the City of London College and take part in the distribution of these prizes and certificates. All prize creatures appeal instinctively to the good will and the sympathy of fellow beings; whether they be prize horses, or prize cattle, or prize dogs, or prize men and women, they naturally command the respect and confidence of their fellow creatures; but at the same time I always feel an equal, if not greater, interest in that great army of competitors who are not summoned to the platform to receive prizes. What is the difference between the men and women who win the prizes and those who do not? There may be some great exceptional ability in some cases—no doubt there is in these young gentlemen to-night who have come up here and carried off somewhere from five to twenty prizes, all they could carry without assistance—but this only happens in rare cases; exceptional abilities are necessarily rare, but with the average man, what is it that makes the difference between the prize winner and he who fails to win? I do not think it is a difference of brains, it is simply a difference of grit—the amount of grit they have, the superior tenacity of purpose that keeps the main end in view from the beginning to the end of the year, and inevitably comes in a winner at the goal. It is a great benefit, even to those who have not obtained the prizes; the stimulation has operated upon them all, the little leaven in these 100 prize winners has undoubtedly done something to leaven the whole lot, and then they always have the satisfaction of looking on these occasions and consoling themselves with the conviction of what they might have done, what prizes they might have carried off if they had only had the will and purpose to do it.

There is no subject that appeals more strongly to an American than this of education, because it has been very near to the hearts of our people, from the very foundation of the colonies, and still more from the foundation of the government, when it was once determined that our institutions were to depend for their success upon the intelligence of all the people, maintained by universal suffrage, every man one vote and no man more than one vote (hear, hear),

it became an absolute necessity that the people in all parts of the country, in all callings of life, should have an adequate education, to exercise the suffrage and perform their duties as citizens, as well as adequate for the personal and private business of life, the support of themselves and their families; and so it was one of the main objects which the people had in view from the beginning, and the founding of schools, the establishment of colleges and universities, the furnishing of the people with libraries, has been very near and dear to the hearts of the people of the United States. It has not been deemed enough that children should be educated. We have 15 millions of them now in our public schools, colleges and universities, sustained chiefly at the public charge; but beyond the period of elementary education it has been found essential, it has become one of the great duties of the community in every section of the country, to see to it that means were provided for continuing education after the boy or the girl left the elementary school; and perhaps I can give you no better illustration of that than to take the little State of Massachusetts, which now numbers, I believe, three millions of people. It is divided into 350 or thereabouts of townships, and every township, with the exception of five or six, maintains at the public charge a public library, to which every man, woman and child has the right of free access for the reading of books (hear, hear). Well now, there is no doubt that the furnishing of such facilities to the whole body of the community necessarily has a great influence and effect upon the success, the welfare and the happiness of the whole people, and in my judgment the establishment of public libraries is one of the greatest boons that can happen to any community. When I read here an account of the library of the College of the City of London consisting of about 5,000 books, useful as that is, immensely important as it is, I cannot help hoping that some day the heart of some Lord Mayor or some rich alderman will be stirred and moved to make it 25,000 (hear, hear): then the City of London—even the City of London, with all its charms and all its power—would necessarily be benefitted and improved. This is my first actual acquaintance with the City of London College, but when I have turned over the Calendar which your Principal was good enough to send me the other day, it seems to me that it offers to the people of the City of London, especially to the young working men and business men and women of the City of London, an almost boundless realm of knowledge. Really from the study of this calendar, if I wanted to become a master of all knowledge, I should turn my back upon the gaities and attractions of the West End, and take lodgings in White Street or Moorgate, and make

myself a daily attendant upon the services and exercises of this College. Daily and nightly, just think of it, a reading room open every day in the week, except Saturdays—all day Sunday I hope—till 10 at night, giving the opportunity of reading all these valuable books; there is no end to the good things in the way of learning and knowledge which are furnished by this almost infant institution, if you really settle down and make a serious work of taking advantage of all the privileges offered. In the first place, the English language, which is so largely included in all curriculums of schools and universities; here are courses in the English language, in English history and English literature—the whole range of English literature open to the student. But that is not all, there are five modern languages at the service of the ambitious student; not only will he be accomplished in French, German, Spanish and Italian, but before he completes his course, he will be an accomplished linguist and scholar; and then Latin and Greek, the dead languages, are open to him; all the arts, the mechanical arts, what I may call the household arts; science, building construction, machine construction, elocution, and all sorts of useful studies for enriching the inner man. Now it is difficult to over-estimate and over-state the importance and dignity of an institution like this, which holds out such opportunities to the young man and to the young woman engaged in earning their living, I suppose most of them in the City of London, who are able, in such hours as they can snatch from the peremptory demands of business, after their daily occupation, to come here and acquire adequate instruction from the best instructors in all these branches of knowledge. Of course it is not to be expected that any one student will devote himself to all, that was mere imagination, a dream of mine—how many would like to turn their backs on business and come and drink of the fountain of knowledge; but for every kind of business that can be imagined, to which men devote themselves for the practical purposes of life, here are found courses open to them all, where they can gain new resources, enrich their brains, enlarge their hearts, and really enable themselves to climb the ladder of life with great success (hear, hear).

I have heard it said very often of late years in my own country, and I have heard it repeated here, that there is not so good a chance for young men in the struggle of life now-a-days as there was 25 or 40, or 50 years ago, but I do not believe it. Wherever the complexity of life increases, as it has increased here in England, and especially in London, where commerce has grown with such gigantic strides, where capital has become accumulated in such mighty masses, the op-

portunity for the young man of brains and skill and ambition is better now than ever. Of course it depends upon the man. It is very easy to get lost in the crowd, it is very easy to be submerged by the pressure from above; but in my opinion, as far as I have been able to observe or learn of what is going on in England, especially in the way of business and the mechanical arts, there is a better opportunity now than ever before for young men to win their way to success. The one quality in which all the successful men that I have known agree, and I think you must all have observed it, and will agree with me as to its being the really essential and vital and indispensable element of success—some men are helped by their early surroundings, by fortunate place in life, an unusually happy social condition, by pains and care spent upon them by their parents and teachers and friends; but that is not what gives the sure passport to success, none of those things; it is the will to succeed, it is the power to hold on and to hang on against all obstacles and all difficulties, which distinguishes the successful man from those that are lost in the crowd (hear, hear). I am so glad to see that the clock has been placed right in front of me, I do not know what the limit of time is, or whether I have already approached the limit or not (laughter and no, no). Now it used to be thought, something more than fifty years ago—perhaps the Lord Mayor and I and one or two gentlemen on the platform are old enough to remember it—not many in this audience—it used to be thought, a little over fifty years ago, that the elements of education—elementary education—consisted of reading, writing and arithmetic, and that the boy or the girl was fully equipped for the battle of life who was furnished with a fair amount of reading, writing and arithmetic, with a little bit of that changeable science of geography thrown in (laughter). There is nothing that changes and grows like geography. Take my own country for instance. When I was a boy at school, the inhabited portion of the United States consisted of not a very wide strip of country from the Atlantic running westward, perhaps with 15 or 20 million people upon it, extending from the Lakes on the north to the Gulf of Mexico on the south, and there were perhaps some 20 or 25 States of the Union. Now there are 45 States that cover the Continent from the Atlantic to the Pacific; they are all inhabited by a vigorous and energetic population of 76 millions of people (cheers), while towns and cities have been built up all the way across from one ocean to the other; and if we have accomplished anything in America, it is owing to the devotion the people have paid to the fundamental education of themselves; and of late years our geographical boundaries have ex-

tended still further. Thirty years ago we managed to buy from Russia, Alaska, that extends away to the North Pole I believe, and of late years we have got into warmer regions (laughter) and on the map of the United States is now Porto Rico and the Philippine Islands (applause). During the same period the map of the British Empire has been enlarged. I will ask the Lord Mayor by-and-by to give the original boundaries that he remembers. Geography is an advancing science and it was numbered when I was young among the necessities of elementary education, but that was all. It was thought that for the boy or girl who had learned reading, writing and arithmetic and was leaving school at the age of fourteen, that was equipment enough, and they were turned out from the schools at that tender age into the stores and on to the farms and into the factories, and they left their education behind them; and I will say that the condition of things fifty years ago as to the education of the people of this country was no better. But what has happened in these fifty years in all countries that are desirous of maintaining their dignity and their relative place amongst the nations of the world? There has been a tremendous awaking on this subject of education and there is not a better illustration of it than this college of the City of London, that has grown up here in the midst of and for the benefit of the young working men and women in this great metropolis. The same thing has been going on in the United States, in Great Britain, in France, in Germany—particularly in Germany. Now what is the practical change that has come over the people? What is it that has been resorted to in all these countries alike, and which is now being pressed with greater vigour and force than ever, as they recognise the great rivalry and competition each with the other that is staring them in the face? Well, it is this. What was ordinarily fifty years ago regarded as an adequate preparation for the struggle of life for young people who had got to take care of themselves after they left school, is by no means enough. It has been found that the more education you give to the young business man or young mechanic or the young farmer, or to whatever business he may apply himself, the better are his chances of success and the surer he is of leading a dignified and happy life (hear, hear). So that education must not cease when the elementary school is left; education must not cease when he enters upon the golden opportunity offered, for it is a golden opportunity, and every boy and girl feels it so when he enters upon the business of earning his own livelihood. How can you help them? By creating and continuing a scheme of continued education which shall make them not only remember and profit by what they have

learned in school before they went to work, but should uphold their arm and strengthen their character and improve their brain power in the very work in which they are engaged; and so you find it is well understood by all these methods of supplementary education that have been resorted to in these various States and Kingdoms. Technical education has not only advanced here in the City of London, but see what an advance has been made in that respect in all these great countries. It is not enough to turn a boy loose from school with a certain knowledge of parts of speech, and a certain amount of success in figures and arithmetic, and with power to read a little prose and a little poetry—you cannot live on these things, you cannot wear them, you cannot eat and drink from them, you cannot sleep on them. No; you have got to earn your living in an ever rising scale of competition and of struggle, and technical schools have been resorted to for that purpose with very great success in all the countries that I have mentioned, and any nation that falls behind in that respect will find herself left in the lurch sooner or later by her more enterprising sisters. Now all forms of secondary education and university education are not open, I will agree, to all or to the great body of the workers of the community that fill the stores and the warehouses and the factories and shops, but here is an education for each one, fitted to the calling that each has chosen, and here in such an institution as this, of which this is only a single example—for they exist in all the great countries I have mentioned—where there continues to be an open door—we want the open door in more ways than one (hear, hear)—and especially we want the open door in this matter of knowledge, for the young man or young woman, however he or she is engaged in earning the bread of life. That is what institutions like this are fitted for and do. You saw the successful students come up here to-night, 100 out of 2,000. What an infinite amount of good in the aggregate an Institution like this is doing from year to year. I suppose it is the best investment of money that can be made; in London you hear a great deal about investments. You cannot take up a morning or evening paper without reading column after column intended to be advice to people that have money to invest, but I venture to say that the £5,000 a year that is gathered in and paid out by the trustees of this college of the City of London, is the best money that is spent in this great city of five millions of people (cheers).

It is not only the aggregate gathering in and expenditure. I have been looking in this book, and I hope you have all got a copy of it—take it home and commit it to your memory and you will be all

the wiser—and I notice another point that within the reach of the humblest purse, within the reach of the earnings of the most poorly paid man or woman in business in the City, it is within their power by the payment of a few shillings, as laid down in this programme, to make themselves possessors of an infinitely valuable gift, in the courses of study that are given, in the lectures that are here delivered, in the courses that are prescribed, and those few shillings, paid perhaps out of the hard earnings of these severely taxed young men and women, brings them more, realises more on the road to success and the road to fortune than any other shillings that are spent. Why, for the price of a first-class seat at an opera or a theatre at the West-End, you can here get a course of study which will make you a richer and better and more useful and more valuable man or woman at the end of the year. Now I say that such an Institution as this deserves the applause and the support of all right thinking men and women in a great community like this. It is well-known that this is the centre of the commerce of the world, well, how is that to be sustained? How is it sustained? Now who does the work of this great centre of the commercial world? It is the men and the women, the employés, is it not, in the thousands, I may say the millions of establishments that are here aggregated to make up this mighty Empire, and the better they are equipped, the more adequately they are trained and provided for the business they have in hand, the better and surer is the whole of London of this great and priceless commerce (cheers). Now I see that while I have been talking the hand of the clock has travelled round very considerably. It is a very curious thing how swiftly the hand of the clock moves to the speaker and how slowly to the audience (laughter). I am familiar with this programme and I find that my part in it only reaches about the eighth line of the programme which consists of two entire pages. Speech after speech, already rising I may say upon tongues that are ready to deliver them and waiting to be heard, not only in his Lordship the Lord Mayor to speak again and again, and I think again (laughter) but there are other gentlemen waiting to be heard, and much as it would delight me to continue these random observations until the cock crow (laughter), nevertheless I think I will now thank you very much for the kind attention you have given me, express again my gratitude at having had the opportunity of being present and taking part in the distribution of these prizes, and above all for the great privilege of learning what is going on here in the City—it is not known to everybody—it ought to be made known more broadly what is going on in this Institution, and how the little candle lighted here is shedding a vast light throughout this great country (applause).

THE SUPREME COURT OF THE UNITED STATES—ITS PLACE IN THE CONSTITUTION

PRESIDENTIAL ADDRESS BEFORE THE SOCIAL AND POLITICAL EDUCATION LEAGUE, LONDON, MAY 13, 1903

I invite your attention to a brief study of the Supreme Court of the United States, a cardinal feature of our Federal representative Government, balancing and harmonizing all its parts, a tribunal which has received the general approval and admiration of foreign Jurists and Statesmen, and commands the universal respect and confidence of the people for whom it administers justice.

The Federal Convention of 1787, which framed our Constitution and created this unique Tribunal, was composed mostly of members of the legal profession, which has always in America been the chief nursery of Statesmen; but Washington, the Soldier, presided, and Franklin, the Philosopher, advised at every step. The members of the Convention were undoubtedly chosen from the best qualified men that the country could furnish for the momentous work which was set before them, and their merits have been so universally recognized that I need not repeat any of the emphatic tributes which many great Englishmen have paid to the results of their labours.

Their work was finished in four months' secret session at Philadelphia, but most of them had been in training for it through twenty long years of trial and trouble.

From 1765, the time of the passage of the Stamp Act, which was passed through both Houses of Parliament with little opposition, the Colonists, and especially the lawyers of the Colonies, had been careful and earnest students of the principles of free government.

In 1774, having exhausted in vain all appeals to King and Parliament for a redress of their grievances, they sent delegates to a Continental Congress to deliberate on the state of public affairs, and in this Congress, which lasted for seven years, many of the future framers of the Constitution who were members of it found a most instructive school of statesmanship, and constantly devoted themselves to the social and political education of the Colonists in matters of government and of public law and popular rights.

In 1776, as the representatives of the United States of America in General Congress assembled, appealing to the Supreme Judge of the

world for the rectitude of their intentions, they did, "in the name and by the authority of the good people of the Colonies, solemnly publish and declare that these United Colonies are, and of right ought to be, free and independent States; that they are, and of right ought to be, absolved from all allegiance to the British Crown; and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved." They declared "that as free and independent States they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do," and for the support of this declaration, with a firm reliance on the protection of Divine Providence, they mutually pledged to each other their lives, their fortunes, and their sacred honour.

From the hour of the Declaration, the men who made it, and all the other Statesmen of the Colonies, had to give renewed and constant study to the whole science of government.

As they proved able by force of arms to make good this declaration, the United Colonies became from its date a new Nation, over which Congress, by general consent and acquiescence, exercised the powers of a general Government, for all the purposes of the very serious exigency which had called it into existence. But it was a Government by Congress only, with feeble and undefined powers, without an Executive and without a Judiciary. While the war lasted it barely sufficed, and afforded daily object lessons of its own defects, and of what was required for a better Government when better days should come.

The several individual States, being absolved from the Royal Charters under which they had before practically managed their own affairs, adopted written Constitutions, based in each case upon the Sovereignty of the People, to take the place of the former dominion of Parliament. An epoch of Constitution making set in, during which the principles of representative popular government were discussed and understood. Virginia, the largest of the States, the home of Washington, Jefferson, Madison, and Monroe, who were to be four out of the first five Presidents of the United States, took a leading part. New Hampshire had already framed a temporary form of Government "during," as they said, "the unhappy and unnatural contest with Great Britain." South Carolina and New Jersey had followed, but in the case of the former it was expressly declared that the Constitution established was "established until an accommodation of the unhappy differences between Great Britain and America could be obtained."

Massachusetts, in 1780, with the utmost pains and deliberation prepared and adopted a complete Constitution, in which the powers of Government were carefully distributed, with the solemn declaration that neither the legislative, executive or judicial department should ever exercise the powers of either of the others "to the end that it may be a government of laws and not of men." During the war the other colonies were engaged in the same business of founding States upon the principles of civil and religious liberty, embodied in written Constitutions. Rhode Island alone, founded by Roger Williams, the great apostle of Toleration, having received from Charles the Second in 1663 a Royal Charter, subsisted under it until 1842 without adopting any written Constitution.

But it was not only in the individual States that the Framers of our Constitution were in all those years gathering knowledge and experience in the science of popular Government. From the very date of the Declaration, Congress, conscious of the inadequacy of its powers, even for the purposes of carrying on war and conducting foreign affairs, entered upon the novel and difficult task of arranging a scheme which should enable it more efficiently to conduct those affairs which were of common interest to all the people of the thirteen States, and which no one of them, nor all of them individually, could control. After two years they adopted and submitted to the States what they styled "Articles of Confederation and perpetual Union," but it was not until March, 1781, that the powers of Congress were enlarged by the final ratification of these articles by the delegates of all the States.

But this attempted bond of union—a crude experiment in the formation of a National Government—proved little better than a rope of sand, and utterly failed to accomplish the purposes intended. While the war lasted the tremendous pressure of their common danger and common distress kept the States together, and made them obedient to the requests of Congress which really had no power to command, but as soon as this external pressure was taken off, they fell apart, and each asserted its independent sovereignty.

So jealous were the States, which had just escaped from the dominion of one central power, of anything which should seem to create dominion over them in another, that although upon paper they had laid many restraints upon their own action, and conferred upon Congress extensive powers over their Federal affairs, they had carefully refrained from giving any sanction to those powers, and from granting to Congress the means of compelling obedience to its enactments. The Articles provided for no Federal Executive and for no Judiciary De-

partment, although they authorized Congress to provide for the settlement of boundary disputes between States, and to appoint Courts of prize and for the trial of piracies and felonies on the high seas. Moreover, Congress could not of its own authority raise a dollar of money for revenue, or a single man to recruit its armies. It could only make requisitions for men and money upon individual States, which met them or not as they found it convenient. Nor could it proceed at all in the exercise of the principal powers nominally conferred upon it until nine States assented to the same. One of the leading writers of the time thus describes the powers of Congress under this Confederation:

"By this political compact the United States in Congress assembled have exclusive power for the following purposes, without being able to execute one of them. They may make and conclude Treaties, but can only recommend the observance of them. They may appoint Ambassadors, but cannot defray even the expense of their tables. They may borrow money in their own name on the faith of the Union, but cannot pay a dollar. They may coin money, but they cannot purchase an ounce of bullion. They may make war and determine what number of troops are necessary, but cannot raise a single soldier. In short, they may declare everything, and do nothing."

Judge Story says that, strong as this language is, it has no colouring beyond what the naked truth would justify, and even Washington himself wrote: "The Confederation appears to me to be little more than a shadow without the substance, and Congress a nugatory body, their ordinances being little attended to."

Of course, under such a system our national affairs drifted steadily and rapidly from bad to worse. Interest on the public debt could not be paid, nor the ordinary expenses of government be provided for. The treaties which had been made could not be carried out, and foreign nations would not deal in the way of new treaties with the envoys of a body, which had no head and no power to perform what they should agree to in its behalf. Our external commerce was at the mercy of foreign nations, whose laws contrived for its destruction, Congress could do nothing to counteract. And worst of all, our domestic commerce, which between all the citizens of one nation should be free and equal, was at the mercy of the caprice or selfishness of each individual State. There were many boundary disputes between States which threatened civil war. Federal laws were a dead letter, without Federal Courts to expound and define their true meaning and operation, or an Executive to see that they were properly executed. There was a general failure as yet to realise in actual enjoyment the advantages we had

won by seven years of war, and everything seemed drifting towards bankruptcy, disunion, and anarchy.

But these very defects of the Confederation, and the evils which resulted from them, demanded the constant exercise of the best brains in all the States to understand and to remedy them, and opened a new school for all our Statesmen in the study of Constitutional Government. When Washington had laid down his sword and surrendered his commission to Congress, after the signing of the Treaty of Peace which acknowledged the independence of the United States, he exhorted his countrymen by all they held dear to provide for the establishment of a strong and stable government as the only hope of retaining the liberties they had won; and from that hour until the Federal Constitution was made and ratified, he and Hamilton, and Franklin and Madison, and all the other great Statesmen who made it, or helped to secure its adoption, were engaged in the constant study of the principles of free government, and in enforcing them upon the attention of their fellow citizens, so that they came to the performance of their great duties in the Federal Convention as graduates of the best practical school of Constitutional Law that the world has ever seen.

Their allotted task was to create a National Government which should reach, for its own proper purposes, by its own power, every man and every foot of territory in the whole United States, and should at the same time leave untouched and undiminished the complete control by each State of all its internal and domestic affairs,—which should be entirely adequate without aid from the States, to govern the people effectively in all matters that involved the general interests of all, to deal with foreign nations with the whole power and resources of the entire people behind it, in all the exigencies of Peace and War, and to accomplish all this with the least possible vesting of arbitrary power in any department or officer of the new Government.

They differed in opinion and sentiment on many points, but all agreed in a supreme dread of arbitrary power, whether it should be exercised by the Executive, the Legislative or the Judiciary Department, whether by a single man, or by a majority of all, for they considered that the majority without any restrictions upon its power might become quite as dangerous as any other despot. They did not believe with my Lord Coke that absolute despotic power must in all governments reside somewhere. They carried this distrust of arbitrary power so far that they actually tied the hands of the people, whom they regarded as the source of all political power, and deprived them of the right to consider any amendment of the Constitution, until it should be proposed by a

vote of two-thirds of both Houses of Congress or by a Convention called by Congress, on the application of the Legislatures of two-thirds of the States, and deprived them of the power of voting directly upon any amendment, which could only be ratified by the Legislatures or Conventions of three-fourths of the States.

In other words, the People of the United States who ordained the Constitution, deprived themselves of the power to modify it by the direct vote of a majority or two-thirds or even three-quarters of their own number, whether that number should be three millions or eighty millions. They must act deliberately and indirectly through Congresses, Legislatures, and Conventions. Truly a rare instance of political self-restraint at the basis of free popular government.

One of the best definitions of the objects of such government is contained in the preamble of the Constitution:

"We, the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

It was to "establish justice" for the people of the United States that the Federal Judiciary, with the Supreme Court as its head, was created. It forms the balance wheel by which the affairs of the Nation and its relation to the States are kept in working order, and is itself held in check by the power of the President to appoint its members as vacancies may occur, and by the power of Congress to impeach them for misconduct, to regulate the measure of its appellate jurisdiction, and to increase or diminish its numbers. The permanent stability of the judicial power is assured by its being imbedded in the Constitution, with a jurisdiction co-ordinate with that of the Executive and Legislative Departments, by the extreme difficulty in the way of any amendment that would impair it, and by the universal conviction which the experience of a century has produced, that its continued existence with the full enjoyment of its present functions is absolutely essential to the successful working of our scheme of popular representative government.

The great achievement of the framers of the Constitution, was so to distribute the powers of government between the States and the Nation, as to give the latter supreme control over all subjects that concerned the general interests of all, and reserve to each of the former exclusive control over local affairs which concerned only its own ter-

ritory and people, and to do this in such a way that the State and Federal Administrations should not clash in actual operation.

They knew well the importance of a distribution of the powers of government between the three great departments. They created a Congress on which they conferred legislative powers over 18 enumerated subjects, necessarily involving the general interests of the people of all the States and essential to National Sovereignty, including the levying and collection of taxes for Federal purposes, the borrowing of money, the regulation of commerce with foreign nations and among the several States, the coining of money, declaring war, raising and supporting armies, and maintaining a navy.

They placed such limits upon the exercise by Congress of legislative power as should prevent its interference with legitimate local administration by the States, or with the fundamental rights of the citizens, and put such prohibitions upon the legislative power of the States as should prevent their interference with the general powers and functions of the Federal Government.

They vested the executive power of the Federal Government in the President, who was made Commander-in-Chief of the Army and Navy and of the Militia of the States when called into the service of the United States. He was granted power to pardon offenders against the United States, to make Treaties, provided two-thirds of the Senate concur, to have a veto power over acts of Congress, which could be overridden only by a vote of two-thirds on reconsideration. He was also to nominate, with the advice and consent of the Senate, Ambassadors, Judges, and all the principal officers of the United States, to recommend to the consideration of Congress such measures as he should judge necessary and proper, to commission all officers of the United States, and to take care that the laws should be faithfully executed.

And, finally, to secure the absolute supremacy of the Federal Government over all matters of Federal cognizance, it was expressly provided that "this Constitution and the laws of the United States which shall be passed in pursuance thereof, and all Treaties made under the authority of the United States, shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." This making the Federal Constitution and Treaties made, and laws of Congress passed under its authority, the supreme law of the land is the key of our dual system of Government, as the omnipotence of Parliament is the key of the British Constitution. But the Federal Gov-

ernment, though supreme within the limits prescribed, is not omnipotent; it must keep within those limits.

By the Tenth Amendment, passed immediately after the adoption of the Constitution, to prevent Congress from meddling with the domestic concerns of the States, or exercising powers not granted to them, it was expressly provided that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.

Thus the People of the United States created for themselves two separate and distinct governments, each "of the people, by the people, and for the people," each independent and exclusive of the other within its own scope and sphere, and each able, without aid from the other, to reach for its own purposes, by its own authority, every person and every foot of land within its territory. Complex as it may appear to people living under other forms of government, this dual system has worked very simply, smoothly, and harmoniously from the beginning until now, except for the single occasion when the terrible question of slavery proved to be too much for all the Departments of Government combined, and could only be settled by our long years of Civil War.

But how has this marvellous result been accomplished? How has it been possible for these two Governments, each of prescribed and limited powers, and each department of both similarly defined, to act independently and at the same time harmoniously over the same people? By what magical force has each power, State and Federal, been kept within its own limits? What has prevented constant and hopeless conflict between State functions and officials, and Federal functions and officials, between State and Nation, and between State and State, originally 13 in number and now 45? How has it been possible to secure the due protection of the law to the citizens of one State in each of the other States, and the rights of aliens against local prejudice and discrimination in any State, and how has the faith of Treaties been preserved in every locality?

These, and a thousand other similar questions and doubts as to the successful working of our system, are answered by pointing to the Supreme Court created by the Constitution, and to the Federal Courts inferior to it created by Congress, in which the judicial power of the United States is vested, a power which, as I have said, is co-ordinate and co-extensive with the Executive and Legislative. Over whatever region Congress may attempt to legislate or the President to execute its laws, there the judicial power extends, to pass, if need be, upon the legality of their acts and the validity of their laws. The Consti-

tution, and each of its provisions, is supreme over President, Congress, Courts, and States, and the valid laws of Congress, and Treaties made under the authority of the United States, are the supreme law of the land for all its people, and for the Courts, Legislatures, and Governors of each State.

The Supreme Court is the final judge of the validity of all laws passed by Congress or by the Legislatures of each of the 45 States, when brought to the test of the Constitution of the United States, and of the legality of all official acts when brought to the same test. It and the Federal Courts inferior to it furnish the vehicle by which the judicial power of the United States is carried into the whole of its vast territory, to administer justice within the limits prescribed to it, to enforce the Federal laws and to punish offenders against them.

The third Article of the Constitution is marvellously brief and simple. The Judges, according to that good old rule which has worked so well in England since the days of William and Mary, are to hold their offices during good behaviour, and can only be removed by impeachment, and their compensation shall not be diminished during their continuance in office. The Supreme Court has original jurisdiction only in cases affecting Ambassadors, Public Ministers, and Consuls, and in those in which a State shall be a party. The first branch of this original power has seldom been invoked, but over and over again a great State has been brought to its bar by another State to settle boundary disputes, always the most dangerous to the peace of adjoining States, and in each instance its decree has been submitted to with implicit obedience—a most unique judicial power, and a most convincing example to persuade all nations to settle these most perilous questions by arbitration.

It has been well said "that the provision that the judicial power created by the people shall be the arbiter between the States themselves, in all their controversies with each other, marks the highest level ever attained in the progress of representative government."

Tocqueville says: "In the nations of Europe the Courts of Justice are only called upon to try the controversies of private individuals, but the Supreme Court of the United States summons sovereign powers to its bar."

John Stuart Mill declares it to be "the first example of what is now one of the most prominent wants of civilized society, a real International Tribunal."

In all other matters the Jurisdiction of the Supreme Court is only appellate. The judicial power extends only to cases as they arise be-

tween party and party, and in the Supreme Court as they come to it mostly by appeal from the inferior Federal Courts, or by writ of error to the State Courts.

The Courts of the United States exercise no supervision over, or interference with, the President or Congress, or the Legislatures of the States. They have no veto power. They do not lie in wait for Acts of Congress, to strangle them at their birth. They have no jurisdiction to pronounce any Statute, either of a State or of the United States, void because irreconcilable with the Constitution, except as they are called upon to adjudge the legal rights of litigants in actual controversies. They simply pass upon the rights of parties as they come before them, and if a provision of the Constitution, or of a Federal Statute, or a Treaty is invoked for or against a right claimed or denied, they interpret the Constitution, the Law, or the Treaty, and determine the right.

In this way, and in this way only if an Act of Congress or of a State Legislature is claimed to be invalid, or an official Act is claimed to be illegal under the Constitution of the United States, and the decision of that question is vital and necessary to determine the rights of the parties, they perform the ordinary duty of interpretation, and declare the validity or invalidity of the Act, and so determine the right between the parties before them in that particular case, and for no other purpose, and this may happen months or years after the enactment of the Statute.

The Supreme Court will perform no duties except judicial duties. So, when in 1794 President Washington requested the opinions of the Judges on the construction of the Treaty with France of 1778, they declined to comply, and when an early Congress enacted that certain pension claims should be considered and passed upon by the Federal Courts, the Supreme Court upheld them in refusing to act under it, upon the ground that the power proposed to be conferred was not judicial power within the meaning of the Constitution. Nor will the Court give a hearing to a fictitious or collusive case, contrived to raise a question as to the validity of a Statute.

Keeping strictly within the limit prescribed to it of exercising only judicial power, the Federal Judiciary has steadily refrained from exercising any political power, which belongs exclusively to Congress and the President, and so it has been brought into no collision with the other departments. It will not even indulge in discussions, or express opinions upon purely political questions.

All attempts, for instance, to induce it to interfere either to restrain or compel the President in the exercise of his power to see that the

laws are faithfully executed have failed. In the case of foreign nations, as well as in that of the Sovereign States of the Union, the Government acknowledged by the President, or by the President and Congress, is always recognized by the Supreme Court. In all such questions as are purely political it holds itself bound by the acts of the other departments.

So the question whether and upon what conditions aliens shall be expelled or excluded from the United States, belonging to the political departments of the Government, the Court refused to express any opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over that subject. Thus it constantly sets the example to each of the other departments of the Government of minding its own business, and keeping strictly within its assigned province.

But, careful as the Judges are to confine the exercise of the Federal judicial power to cases as they arise, that power does extend to "all cases of law and equity arising under the Constitution, the laws of the United States, and Treaties made under their authority, to all cases affecting Ambassadors, other public Ministers and Consuls, and to all cases of Admiralty and Maritime Jurisdiction"; and whenever any such case does come before the Supreme Court it must take cognizance of it, and it cannot shrink, and never has shrunk, from determining the question of private right so arising. It is under these clauses that its unique and peculiar function of testing the validity of State Laws and Constitutions and of Federal Statutes, and the legality of the acts of State and Federal officers arises.

The remainder of the Federal judicial power depends wholly upon the character of the parties to the controversy. It extends "to controversies to which the United States shall be a party." This enables the Federal Courts to enforce the Acts of Congress, civil and criminal, against all persons within the realm; "to controversies between two or more States," the purpose of which I have already indicated, as making the Supreme Court the Arbitrator and Peacemaker between Sovereign States; to "controversies between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects." It was wisely concluded that in all such cases justice would be safer and surer, against State or local interest, prejudice or passion, in Courts representing and vested with the authority of the whole nation, than in the Courts of the State of an interested party, and that foreigners es-

pecially should have the right to have their causes heard and decided by National Tribunals.

These clauses, which make jurisdiction dependent upon the citizenship or character of the parties, have been a prolific source of litigation in the Federal Courts, have opened to them the entire field of law and equity; have extended their adjudications to the whole body of jurisprudence, and have given to the decisions of the Supreme Court, by reason of the weight and force of character of the Court and its members, a commanding authority with the State Courts, and persuasive influence with foreign tribunals. But in this department of its functions the Supreme Court does not differ, in the scope of its powers and duties, from the Courts of last resort of other nations, and its distinctive and peculiar character is not involved.

The power of the Court to declare State and Federal Statutes, and the acts of the National and State Executive officers invalid, as being in violation of the Constitution of the United States, naturally attracts the attention of foreign observers.

In the 112 years of its existence the Court has pronounced 21 Acts of Congress, and more than 200 State Statutes, to be in conflict with the Federal Constitution, and therefore invalid, and in each instance there has been complete and peaceful acquiescence in the decision. So that instead of being a disturbing element, the exercise of this power confirms the peaceful relations between the States and the Nation, and between the States as among themselves, protects foreign nations from the breach of Treaties, and conserves the right of property and contract, and the fundamental rights of personal liberty.

I may not, perhaps, do better than to give you several examples of the exercise of this wholesome, beneficial, and altogether conservative power.

The Constitution provides that "no State shall pass any law impairing the obligation of contracts," and the aid of the Court has often been invoked for protection against the attempts of States to violate this prohibition.

The framers of the Constitution believed, and the people of the United States, in view of the successful operation of this prohibition for more than a century, believe that the States ought not to be permitted to intervene between the parties to a contract, to destroy or impair the binding force of terms by which they have agreed to be bound, and that such intervention is contrary to the principles of popular government.

It is true that in the days that tried men's souls before the adoption of the Federal Constitution many attempts had been made by States to intervene for this purpose, which doubtless led to the adoption of this clause.

Mr. Hamilton, in the *Federalist*, classing such laws with bills of attainder and ex post facto laws, which are prohibited by the same clause, says:

"Laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation. They are prohibited by the spirit and scope of the State Constitutions. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the Convention added this constitutional bulwark in favour of personal security and private rights. And I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of Society."

In the celebrated Dartmouth College Case the protection of this clause was invoked by the Trustees of the College to recover its property from a person who held it for new Trustees under the authority of a law of the State of New Hampshire.

In 1769, King George the Third by Royal Charter incorporated twelve persons, therein named as "the Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the Trustees who were to govern the College to fill up all vacancies which may be created in their own body. The application by the Founder, who had already established the College, was for a Charter to incorporate a religious and literary institution, and stated that large contributions had been made for the object, which would be conferred upon the Corporation as soon as it was created, and

on the faith of the Charter the property was conveyed to it. After the revolution, in 1816, the Legislature of New Hampshire passed an Act increasing the number of Trustees to 21, giving the appointment of the additional members to the Governor of the State, and creating a Board of Overseers with power to inspect and control the most important acts of the Trustees.

Admitting that the provision of the Constitution embraced only contracts which respect property or some object of value, and which confer rights which may be asserted in a Court of Justice, and did not refer to grants of political power or to acts creating institutions to be employed in the administration of Government or of public property, or in which the State as a Government was alone interested, the Court after most mature consideration reached the conclusion, that the Charter was a contract which secured to the Trustees the property and control of the College—a contract made upon valuable consideration—for the security and disposition of property, and on the faith of which real and personal property had been conveyed to the Institution, and therefore a contract, the obligation of which could not be impaired without a violation of the Constitution of the United States.

It held that the Statute of New Hampshire did impair it, and was therefore void, and rendered judgment restoring the property and control of the College to the Trustees who represented the Founder. The opinions of Chief Justice Marshall and Judge Story are masterpieces of judicial reasoning, and the principles laid down by them have ever since prevailed. In 56 cases decided by the Court, Acts of State Legislatures have been declared invalid in accordance with these principles, because they impaired the obligation of contracts, and it is not too much to say that, instead of having a disturbing or disintegrating effect upon civil society, these decisions have done more than any other single cause to inculcate a reverence for the law, and for the sanctity of the right of private property, which is one of the chief objects of free government.

It is true that the constitutional prohibition against laws impairing the obligation of contracts does not expressly apply also to Congress. In the Convention Mr. Gerry, a prominent delegate from Massachusetts, made a motion that Congress ought to be laid under the like prohibition, but found no seconder. But in the amendments which were proposed by Congress at its first session, almost as conditions on which many of the States had adopted it and which were quickly ratified, other restraints were laid upon Congress which had the like effect. It was expressly declared that no person shall be deprived of life, liberty, or

property without due process of law, nor shall private property be taken for public use without just compensation, and Congress is bound by these prohibitions. No matter what the emergency, it cannot violate these fundamental principles of personal rights.

The Court has held that the United States cannot, any more than a State, interfere with private rights except for legitimate governmental purposes, that they are as much bound by their contracts as are individuals, that if they repudiate their obligations it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State, a Municipality, or a citizen.

But strict and earnest as the Court has been in enforcing this constitutional prohibition against laws impairing the obligation of contracts, it has been ready to recognise and give full force and effect to the Statutes of other nations which imposed no such prohibition on the law-making power.

The Canada Southern Railway Company, under its Charter granted by the Dominion of Canada, had issued its bonds at a high rate of interest, and had sold them in New York to citizens of the United States, but getting into difficulties the Company devised a scheme of arrangement, which was enacted by the Dominion Parliament, by which the interest on the bonds outstanding was scaled down to a lower rate without the consent of the bondholders, a clear case of impairing the obligation of a contract. The bondholders appealed to the Supreme Court, which held that the "Arrangement Act" was valid in Canada, and bound non-assenting bondholders there by force of the scheme; that as it did have that effect in Canada, the Courts of the United States should give it the same effect, even as against citizens of the United States whose rights accrued in the United States before its passage; that there was no constitutional prohibition in Canada against the passing of laws impairing the obligation of contracts, and that, under these circumstances, the true spirit of international comity required that schemes of this character, legalized at home, should be recognized in other countries.

• The clause of the Constitution giving Congress the power to regulate commerce with foreign nations, and between the States, has been another fruitful source of business in the Supreme Court in the way of testing the validity of State laws.

At the outset of steam navigation, the State of New York undertook to reward Robert Fulton for his invention and enterprise by an Act giving him the monopoly of navigating by fire or steam all the waters within the jurisdiction of the State. Under this Act the Assignee of Fulton had commenced running a line of boats between certain ports of

New Jersey and New York, and obtained from the State Courts of New York an injunction to restrain the owners of an opposition line of boats, put on between the same ports, from entering the waters of New York State with their boats. But the Supreme Court held, upon appeal, that the New York enactment was in conflict with the power of Congress to regulate commerce, and with its Acts in relation to commerce, and upon this ground vacated the injunction and established the right of all vessels to enter the port of New York under the authority of Congress. It was held that by virtue of the constitutional clause referred to, Congress had exclusive authority to regulate commerce in all its forms in all the navigable waters of the United States, their bays, rivers, and harbours, and to make navigation free to all without any restraint or interference from any State Legislature.

By a long series of decisions that followed under the commerce clause the Court, with inflexible firmness and far-reaching sagacity, established the absolute supremacy of the nation over the whole subject of commerce, navigation, travel, and intercourse between the States, which went far to strengthen the power of the Union. At the same time they secured to the citizens of every State the full enjoyment of the privileges and immunities of citizens in all the other States, and also that absolute freedom of internal trade throughout the country which has so vastly promoted the prosperity of the people.

The influence of the Court in maintaining the faith of Treaties has been powerful and far reaching. By the Treaty of Peace with Great Britain, in 1783, it was agreed that British creditors should "meet with no lawful impediments" in the collection of their claims; and the Constitution said that Treaties, like laws, made under its authority, should be the supreme law of the land. Various attempts had been made by several States, before the adoption of the Constitution, to impede or prevent the collection of such claims. The subject provoked bitter and exciting controversies, but the Court, against the contention of John Marshall himself, then at the Bar, held that the Treaty was supreme, and equal in its effect to the Constitution itself, in overruling all State laws upon the subject, and that its words were as strong as the wit of man could devise to override all obstacles directed against the recovery of such debts. Of course, any such law passed by a State after the Treaty contrary to its terms would be void.

Perhaps the most striking illustration of the power of the Court to declare Acts of Congress itself invalid, as contrary to the Constitution, was the celebrated Income Tax case. Congress in 1894 had passed a General Revenue Law, certain sections of which imposed an Income

Tax upon all incomes exceeding a certain amount named. This tax was levied indiscriminately upon all incomes alike, from whatever source derived, whether from rents of real estate, the income of invested personal property, or from earnings. But the Constitution had ordained that direct taxes should be apportioned among the several States according to the numbers of their respective populations, in contradistinction to duties, imposts, and excises, which should be uniform throughout the United States.

It was contended by those who challenged the validity of the law, that taxes on rent, and taxes on the income derived from invested personal property, were direct taxes within the meaning of the Constitution, and that instead of being levied uniformly, man for man, throughout the United States, they should have been apportioned among the several States according to population. The difference was very considerable and substantial. The effect of the Act, if sustained, would be to throw the principal burden of the Tax upon a few large States, in which the relative proportion of wealth was in excess of the relative proportion of population, and to exempt the other States proportionally from their constitutional share of the Tax. The opponents of the Income Tax also insisted that any inequality, which should arise from its being apportioned among the States according to population, was an inequality contemplated by the framers of the Constitution, and was intended to prevent an attack upon accumulated property by mere force of numbers.

The Court, against vehement and powerful opposition at the Bar, and from a formidable minority of the members of the Court itself, took this view, and declared the Tax to have been laid unconstitutionally, so far as it affected incomes from rents and from invested personal property. And as the invalid portions constituted so large a proportion of the whole Income Tax levied by the Act, that Congress could not be deemed to have intended to impose the rest without them, it further adjudged that all the Income Tax provisions of the Act, which constituted a single and entire scheme, must be held void.

There were some popular protests against the decision, and direful prophecies that it would disable the nation in future emergencies from raising the revenue it needed, but no such results have yet appeared. Congress, in its subsequent enactments, has conformed to the decision, and when the war with Spain came on, and an immensely enlarged revenue was needed at once, it found no difficulty in imposing taxes constitutionally and so successfully that, the year after the war closed, the Treasury was found to be burdened with so great a surplus that the entire body of war taxes had to be repealed at once.

The same case contains a fine illustration of the power of the Court to protect the States in the exercise of their legitimate power to manage their own affairs from interference by the Federal Government. The Income Tax was levied also upon income derived from the interest upon bonds issued by Municipal Corporations, which were but civil divisions of the States, and the Court held that as a tax upon the income of Municipal bonds tended to cripple the power of the local authorities to raise money for the purposes of local government, it was not within the power of the Federal Government to impose it, any more than it would be constitutional for the States to impair the power of the Federal Government to raise money for Federal purposes by taxing its bonds.

By the adoption of the Fourteenth Amendment, to meet the conditions resulting from the abolition of slavery at the close of the Civil War, new restraints were imposed upon the States, the consideration of which has largely occupied the attention of the Supreme Court.

It provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Doubtless this amendment was primarily intended for the protection of the newly emancipated slaves, especially in the States where they had so long been held in bondage, but in its language there is no distinction of race or colour, and the Court held that it could make no such distinction in its application, which must be made alike to all cases and subjects that came within the scope of its language in its natural meaning.

It must not be thought, however, from these numerous restraints imposed by the Constitution upon the power of the States, and the very considerable number of cases (exceeding 200 in all) in which the Supreme Court has pronounced their Statutes invalid, that the Court is biased against the States, or inclined unduly to enforce the limits imposed upon them. On the contrary, it has been quite as jealous and careful to uphold and maintain the reserved rights of the States in all matters of local and domestic concern, and to protect them from violation by the Federal Government, as it has been to maintain the exclusive province of Congress in national concerns against intrusion by the State Legislatures.

It has endeavoured, with success, to maintain the just and exact balance of power between them as prescribed by the Constitution. As

against the 200 cases in which State laws have been invalidated by its judgments, vastly more numerous cases will be found, in its reports, in which State laws have been maintained by it against attack on the ground that they involved a violation of the Federal restraints. If, then, it be asked—why has it only pronounced 21 Acts of Congress invalid on constitutional grounds, while 200 State laws have been condemned? the answer is that there are 45 States and only one Congress, and that the members and Committees of Congress are much more familiar with the Federal Constitution than those of a State Legislature, who naturally look first to that of their own State. It is notable, too, that the legislators of some States must be much more studious of the Federal Constitution than others, for while Louisiana, which became a State in 1812, and from its French origin has retained the civil law instead of the common law, has had 20 of its laws pronounced invalid for violation of the Constitution, Massachusetts, one of the original thirteen States, has only suffered twice in this way in her whole history.

Congress is, of course, in the first instance the judge of the constitutionality of its own Acts, and its members being mostly lawyers, are familiar with the letter and spirit of the Constitution. The cardinal and wholesome rule of the Court has been, not to pronounce either a State or Federal law invalid on constitutional grounds unless the violation is clearly established, that the presumption is in favour of the validity of a Statute, and that this continues until the contrary is shown beyond a rational doubt.

The Supreme Court has felt that one branch of the Government cannot encroach on the domain of the other without danger, and that the safety of our institutions depends in no small degree on a strict observance of this salutary rule. It speaks volumes for the wisdom and caution of the Court which is vested with this remarkable and fascinating power, that in so great a mass of State legislation, some of it crude and undigested, consisting of thousands of volumes, it has not found it necessary to exercise the power much more frequently.

It has been a source of frequent wonder to foreign observers that a written Constitution, which was framed in the 18th century for thirteen feeble States, with three millions of people of substantially uniform wealth or poverty, scattered along the Atlantic seaboard, and for whose government it was regarded as a precarious experiment, should be found to answer as well in the 20th century for the needs of a great nation of eighty millions in forty-five States, occupying the breadth of the Continent, with gigantic accumulations of individual and corporate

property, with conflicting interests and sentiments, and wide differences of social condition.

There was much debate in the discussions which resulted in the adoption of the Constitution, whether the Government which it called into being could reach and control even a people that was expected to occupy the territory which the Treaty of Peace of 1783 secured to the United States, which extended only from the Atlantic to the Mississippi River, and from the lakes to the northern boundary of Florida. Since that time our territory has expanded more than four times, and now embraces insular possessions of vast extent, at enormous distance from the seat of Government and half way round the globe.

The fundamental difficulties of time and space have been overcome by the triumphs of steam and electricity, wholly unforeseen and unexpected in 1787, but which now, in the case of the United States and Great Britain alike, have rendered possible the administration of Government from London or from Washington on any portion of the earth's surface. At the time of the adoption of our Constitution it took about as long to travel the length or breadth of the then United States as it does now to go from New York to Manila, or from London to Peking, and orders of either Government which then would have taken months to transmit, now reach their destination so as to be put in execution at the other end of the world in a few hours, and sometimes in a few minutes.

But in our case, we can account for the fact that a written Constitution, instead of being torn asunder and left by the way as the Nation expanded, as new and wholly unexpected conditions arose, has grown with the growth of the Nation, like the hide of an animal from its birth to its maturity, so that it still embraces and covers the whole of our vast national life. We owe it, first, to the wisdom of its framers, who inserted in it only fundamental rules and principles, generally and briefly expressed, leaving it always to Congress to fill in and provide for all details; and secondly, to the vigorous and masterly manner in which the Supreme Court has exercised its essential and lawful function of construction. By this it has applied the whole instrument and each of its parts to new conditions as they arose, and has developed and strongly asserted the inherent powers of sovereignty intended to be vested in the Government of the United States, and necessarily resulting from their existence as a Nation. It was our happy fortune that for 34 years, in that critical period of our history which was to determine whether we were to be a great and powerful Nation, adequate for all the needs of a first-class Power in the world, or only a league of

States like the old Confederation, we had the benefit of the broad and robust intellect of Chief Justice Marshall, to enforce the liberal principles of construction which the genius of Hamilton had laid down.

In a single paragraph he states the whole theory upon which the Court has administered the Constitution, and fitted it to the growing wants and changing conditions of the Nation :

"The Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist. The powers of the Government are limited, and its powers are not to be transcended. But the sound construction of the Constitution must allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in a manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional."

Hamilton, in the *Federalist*, declared that "the judiciary is beyond comparison the weakest of the three departments of power ; that it can never attack with success either of the other two ; and that all possible care is requisite to enable it to defend itself against their attacks." Montesquieu, whose works, with Blackstone's, were the text-books of constitutional liberty which the framers had constantly in hand, declared that "the judicial power is next to nothing." And it was said by another French publicist, "It has no guards, palaces, or treasures, no arms but truth and wisdom, and no splendour but the justice and publicity of its judgments." But the Supreme Court, sustained generally by the confidence and affection of the people, has more than held its own. Keeping carefully within its own limits, it has for the most part laboured to keep the other departments of Government within theirs, and the powers of the States and of the Nation from coming into conflict. In its hands the judicial power has been the force of gravitation which has kept each member of our federal system in its proper orbit, and maintained the essential harmony of the whole.

The closing scene in the Federal Convention, which made the Court in a way the guardian of the Constitution, will be ever memorable. After months of discussion, sometimes violent, more than once ap-

proaching the very brink of dissolution, in hopeless despair of coming to any agreement, at last the grand triumph of compromise and mutual concession was accomplished, and the members met to affix their names to the instrument. Hamilton, one of the youngest, acted as scribe, and after Washington had signed first as "President and Deputy from Virginia," inscribed on the great sheet of parchment the name of each State, as the delegates came forward in geographical order to add their names. When all had signed, Franklin, the oldest and most famous of them all, pointing to the sun emblazoned behind the chair in which Washington had presided through the whole struggle, said to those about him, "In the vicissitudes of hope and fear, I was not able to tell whether it was rising or setting. Now, I know that it is the rising sun." After more than a century's trial of their work, the sun which Franklin saw is not yet near the zenith—much has been done, but vastly more remains to be accomplished, and it is still morning with our young Republic.

RALPH WALDO EMERSON

ADDRESS DELIVERED AT THE PASSMORE EDWARDS INSTITUTE, LONDON,
JUNE 15, 1903

We come to-day, in these congenial surroundings of the Passmore Edwards Settlement, to unveil the bust of a great American, certainly one of the greatest of them all, Ralph Waldo Emerson, the centenary of whose birth, on the 25th of May last, was celebrated with reverence and enthusiasm throughout his own country and in many distant lands. Hundreds of speakers and writers have been discussing his merits, and I have absolutely nothing new to offer on a subject so freshly familiar. I would much rather set him before you in his own words than in any of my own.

His claims to distinction as poet, philosopher and prophet have been warmly advanced by his disciples, and as freely contested by the critics, but whatever controversy there is about him seems to me to be really a war of words and a contest of definitions. It is generally agreed that he was one of the great intellectual lights of the nineteenth century; that, as a result of his forty years of wide and almost universal reading, profound contemplation, brilliant writing, and enlarged discourse, he came to be recognized as one of the wisest of men, a great and efficient teacher of his own generation, and of that which came after it, and far in advance of his age on many important questions.

He certainly had a vivid and fertile imagination, a wonderful power of idealizing the facts of nature and the events of life, and a quick sympathy with all that concerned and interested humanity, which enabled him to produce some poems which still live after half a century, and which are likely to find many readers in coming generations.

His neighbors assembled at Concord Bridge to celebrate the completion of the monument which marked the spot where the plain farmers of New England offered the first armed resistance to British troops. There bloodshed on both sides began the long conflict which divided the British Empire into two independent nations,—nations which now at last happily vie with each other in words and acts of mutual friendship, and in efforts to advance the best interests of mankind. In a single stanza he told the thrilling story in words that still echo like the sound of a trumpet:

“By the rude bridge that arched the flood,
Their flag to April’s breeze unfurled,
Here once the embattled farmers stood,
And fired the shot heard round the World.”

Recalling his visit to Rome, and what he had seen of the work of Michael Angelo, as an architect, upon the great cathedral with its soaring dome, he apostrophized architecture as the Divine Art, directly illuminated by the Spirit of God, in words that ought to be immortal:

"The hand that rounded Peter's Dome,
And groined the aisles of Christian Rome,
Wrought in a sad sincerity;
Himself from God he could not free;
He builded better than he knew:
The conscious stone to beauty grew."

He had absolute faith in the close relation between the living God and the spirit of the individual man, and in the boundless possibilities of human nature as its direct result.

Listen to another single verse which ought to live as long as the language lasts, expressing this idea. He was showing how noble youth, brought up, it may be, in luxury and ease, in sport and idling, prove to be heroes when the trumpet sounds and their names are called; and turning their backs on all they have prized before, on home and love itself, risk life and limb and happiness to save or serve the cause of their country:

"So nigh is grandeur to our dust,
So near is God to man,
When Duty whispers low 'Thou must,'
The youth replies, 'I can.'"

Nor are these utterances isolated and exceptional in their style and character. Much of his poetry breathes the same lofty spirit, the same living imagery. And sometimes he was master of a lighter vein, full of sparkling wit and genial fun.

Witness his fable of the quarrel between the squirrel and the mountain:

"The Mountain and the Squirrel had a quarrel,
And the former called the latter 'little Prig.'
Bun replied:
'You are doubtless very big,
But all sorts of things and weather
Must be taken in together
To make up a year
And a sphere,
And I think it no disgrace
To occupy my place.
If I'm not so large as you,
You are not so small as I,
And not half so spry.
I'll not deny you make
A very pretty squirrel track.
Talents differ: all is well and wisely put,
If I cannot carry forests on my back
Neither can you crack a nut.'"

Whether he is justly to be called a great poet or is destined to an immortality of centuries or not, he gave us much delightful poetry, and the lovers of poetry, who form but a small part of the readers of the English language, will always find much to cherish in what he has written.

You all know the main facts of his simple and uneventful life. He was a Puritan of the Puritans, or if there be such a thing as a Puritan of the Puritans of the Puritans, he was exactly that. He was descended from a long line of dissenting clergymen, beginning with the original immigrant who had fled from persecution at the hands of Archbishop Laud. Being silenced for Non-conformity he had escaped to New England, and founded a church at Concord, the little village fifteen miles from Boston, which was to be Emerson's home for life.

Graduating at Harvard College at the age of 18, Emerson studied theology, and, under the influence of Dr. Channing, he became a Unitarian minister, a Protestant of the Protestants, and soon found himself the pastor of a church in Boston; but even the gentle trammels of that mild communion could not long contain his independent soul. He gave up the sacred office, and all the difficulties which it involved for his gentle spirit, and retired to his ancestral village of Concord, where for forty years he devoted himself to plain living and high thinking, to deep reading and writing and lecturing, by which he obtained his livelihood, for he had been born and bred in poverty and received nothing by inheritance.

To two successive generations of his countrymen, in his lectures, addresses and published writings, he gave, from time to time, the rich fruits of his reading, study, and contemplation. He read everything good, but Shakespeare, Plato, Plutarch, Goethe, Bacon, Swedenborg and Montaigne seem to have been his favorite authors. He remembered what he read as few people do, and made notes of whatever impressed him, which furnished the material for those copious and apt illustrations of which his works are full.

Though he severed his connection with the churches he certainly had a religion of his own which exalted and spiritualized him. Dr. Holmes, who knew him well and is one of his most appreciative biographers, says: "His creed was a brief one, but he carried it everywhere with him. In all he did, in all he said, and, so far as all outward signs could show, in all his thoughts, the indwelling spirit was his light and guide: through all nature he looked up to Nature's God; and if he did not worship the man Christ Jesus as the Churches of

Christendom have done, he followed His footsteps so nearly that our good Methodist, Father Taylor, spoke of him as more like-Christ than any man he had known."

The great influence which, by his wisdom and spotless life, he rapidly acquired and maintained to the end, certainly had a marked effect in mitigating the rigid tone of dogmatism from which he revolted. Dean Stanley, on his return from America, is said to have reported that "religion had there passed through an evolution from Edwards to Emerson, and that the genial atmosphere which Emerson had done so much to promote is shared by all the churches equally."

The same Father Taylor, a great apostle of Methodism, was so impressed by his pure and exalted spirit, that when some of his Methodist friends took him to task for maintaining his friendship with Emerson, on the ground that, being a Unitarian, he must go to a place not to be mentioned in good society, he replied, "It does look so, but I am sure of one thing; if Emerson does go to—that place—he will change the climate there, and emigration will set that way."

Of his prose writings, how is it possible to say more than was said by Matthew Arnold, who judged him very critically, and cannot be said to have exaggerated anything in his favor? What he says is this:

"As Wordsworth's poetry is in my judgment the most important work done in verse in our language during the present century" (the nineteenth, of course), "so Emerson's Essays are, I think, the most important work done in prose."

His busy brain was never still, his driving pen was never idle, his eloquent voice, in lectures and discourses, profound, entertaining and instructive, was heard by his countrymen with ever increasing delight and satisfaction. Self-reliance, absolute trust in his own conscience and convictions, and a fearless following of these in conduct and action, wherever they might lead, were the constant guides of his own life; and he never failed to urge upon his hearers and readers to pursue the same path.

He appealed always to the higher, the highest, motives, instincts, passions of our nature, moral, intellectual and spiritual, and was never content to discover and repeat what other men had said and thought on the subject in hand, except to illustrate his own thoughts and conclusions, which he evolved fearlessly from his own inner light, to which alone he looked for inspiration. The wide scope of subjects which he treated embraced the whole range of human life, conduct and

aspirations. His mission was to arouse, to stimulate and elevate the public and private life of America to a higher and nobler plane.

He began to answer Sydney Smith's cynical question "In the four quarters of the globe who reads an American book?" and led the way in rescuing American literature from the sluggish and torpid stream in which it had long been confined. He lived to see it flowing in a broad and ever widening current, which refreshed and animated the whole of our national life. It was his peculiar gift and function to stimulate and inspire those who labored with him or followed after him in the field of letters, and before he died the real question came to be "In the four quarters of the globe, who does not read American books and recognize American ideas?"

As time went on his books found many sympathetic and admiring readers among thoughtful men and women in England, and in foreign countries into whose many languages they were translated, and the Emerson cult became very widely spread. Herman Grimm wrote to him from Berlin: "Whenever I think of America I think of you," and I have no doubt that to many serious and earnest souls in many lands, the name of our young Republic suggests first the image of this profound thinker and stimulating teacher.

I confess that of all the authors with whom I have become familiar, I turn always first to him for light and leading, and find him more suggestive, more instructive, more awakening than any other; there are but few subjects dealing with the conduct of life, or the duties of man, or the study of nature, of which he has not treated more or less directly; and anyone who has to take up such a subject for the first time, cannot begin better than by turning to his pages to see what he has said about it.

President Eliot, of Harvard, in a carefully prepared essay, quite worthy of Emerson himself, read in Boston on the centennial of his birth, has demonstrated that Mr. Emerson was far in advance of his time on many moral, social, and political questions, and that he indicated, with singular sagacity and foresight, the course of their future development—as the same actually occurred—so that although the ranks of the prophets are closed against him, we may well describe him as the forerunner of American thought.

He rarely took part in any controversies, although many were raised in the path of his advancing progress, but left them to be fought out by others, while he kept the even tenor of his way, thinking and teaching still. He cherished with unfaltering hope and confidence the noblest aspirations for his country, and uniformly predicted its ultimate

success and triumph in those better things that constitute true civilization; but he never hesitated to scourge his countrymen for their shortcomings, which stood in the way of their reaching the final goal of his high ideal. This he could always do with effect and authority, because he stood aside from politics, and because his courage and virtue commanded universal reverence.

He lent the generous and telling influence of his character and opinion to the cause of reform, but sometimes turned rather a cold shoulder to practical reformers, whose rough and tumble methods were at variance with his gentle and retiring spirit. In great crises, however, his soul was stirred, and his voice rang out like a megaphone across the land.

In his address at Concord in commemoration of Emancipation in the West Indies he concluded with these prophetic words:

"The sentiment of Right, once very low and indistinct, but ever more articulate because it is the voice of the Universe, pronounces Freedom. The Power that built this fabric of things affirms it in the heart; and in the history of the First of August has made a sign to the ages, of His will."

Within twenty years from that utterance, Lincoln had signed the proclamation which freed all the slaves in America, and the vast Empire of Russia had no longer a slave within its borders.

When Sumner was struck down in the Senate for words spoken in debate, he declared:

"The events of the last few years and months and days have taught us the lessons of centuries. I think we must get rid of slavery or we must get rid of freedom."

When the attempt was made to force slavery upon Kansas by armed might, he said:

"I wish we could stop every man who is about to leave the country. Send home every one who is abroad lest they should find no country to return to. Come home and stay at home while there is a country to save. When it is lost, it will be time enough for any who are luckless enough to remain alive, to gather up their clothes and depart to some land where Freedom exists."

When the Proclamation of Emancipation was actually signed, he said:

"The first condition of success is secured in putting ourselves right. We have recovered ourselves from our false position and planted ourselves on a law of Nature."

"If that fail,
The pillared firmament is rottenness,
And Earth's base built on stubble."

"The Government has assured itself of the best constituency in the world. Every spark of intellect, every virtuous feeling, every religious heart, every man of honor, every poet, every philosopher, the generosity of the cities, the health of the country, the strong arms of the mechanic, the endurance of farmers, the passionate conscience of women, the sympathy of distant nations, all rally to its support."

When Lincoln was struck down he said of him:

"By his courage, his justice, his even temper, his fertile counsel, his humanity, he stood a heroic figure in the centre of a heroic epoch. He is the true history of the American people in his time. Step by step he walked before them; slow with their slowness; quickening his march by theirs; the true representative of this continent, an entirely public man, father of his country; the pulse of twenty millions throbbing in his heart, the thought of their minds articulated by his tongue. Only Washington can compare with him in fortune."

Scouted at first as a mystic and a dreamer, Ralph Waldo Emerson lived long enough to receive the general homage of the confidence and affection of his countrymen. They honored him for his dauntless courage, his sublime devotion to what he believed to be the truth and the right, his clear and controlling conscience, his wisdom of which they garnered the ripe fruits, and his life-long endeavor to elevate the standard of their literature, morals, and manners. They admired his unfaltering patriotism, and his ardent sympathy with human nature, which no time could limit and no continent could bound. They loved him for his sweet and simple nature and life, his serene and spotless character, his modest and unassuming manners, and, most of all, because he loved them, and spent his life in thinking and working for their highest welfare. Heart and soul he was full of sunshine; he shed its beams all about him and saw and revealed only the bright side.

I rejoice that this striking image of him has found an abiding-place in this noble building, the home and centre of a great and good work. I congratulate Mr. Passmore Edwards and Mrs. Humphry Ward on acquiring this bust as a fitting ornament of this Institute, on the shelves of whose Library his books will be found. I am sure that they will reach many readers, and know that they will exercise on their minds nothing but a wholesome, elevating and inspiring influence. It all depends on what you read for. If you read only for dissipation of thought, or for oblivious languor, don't touch Emerson. But if you seek for ideas and information, for light and leading, for real inspiration, for love of country, and faith in God and faith in man, you will find them all in him.

Three years ago, when "The Hall of Fame for Great Americans" was established in the University of New York by the lavish generosity of a citizen, the name of Emerson came out from the public election, confirmed by the votes of the council, as the eighth among famous native-born Americans of all the past. The seven who preceded him were Washington, Lincoln, Webster, Franklin, Grant, Marshall, Jefferson, all men of affairs, of the greatest affairs. But Emerson, as a pure man of letters, stood first in the hearts of his countrymen, and there we may be content to leave him to the judgment of posterity.

EDUCATION IN AMERICA

INAUGURAL ADDRESS AT THE OPENING OF THE OXFORD UNIVERSITY
EXTENSION COURSE OF SUMMER LECTURES, AUGUST 1, 1903

In responding to the flattering invitation of the Vice Chancellor to open this Course of Summer Lectures by an Inaugural Address, it was with no presumption on my part that I could say anything that would instruct the instructors, or educate the educators. He would be a vain man indeed who would dare to come to Oxford with any such idea as that. The only service that I can render is to open the way for those public spirited and self-denying teachers, who for the coming month will guide your studies by unfolding the rich stores of their ample learning.

In casting about for a subject—if I required a subject for this occasion—I appealed to the tried experience of the Secretary, who kindly suggested that as the principal course of the season was to be upon the Middle Ages, I should take that vast subject for my theme. But America has no place in the Middle Ages. I see by the programme that the year 1485 is assigned as the terminus of that period of modified darkness, but surely there must be a mistake of seven years, for Columbus did not discover America till 1492. Then it was that there was a new creation—a new adjustment of the little world which we inhabit. Up to that time one half of the earth was still waste and void. It had been lost since the beginning of time. It was buried in that darkness which was upon the face of the deep; but the spirit of God moved upon the face of the waters, and opened the new hemisphere to the yearning eyes of the brave Genoese—and again He said Let there be Light, and there was Light.

But however you may bound the Middle Ages, America contributes nothing to the studies and discussions which await you. I have carefully examined your programme and find not the remotest allusion to the Western Hemisphere. From ocean to ocean, from the North Pole to the South, it was—except for the barbaric civilization of Mexico and Peru—a trackless wilderness, whose wild inhabitants afforded no lessons for modern society, unless indeed it be for that very minute section of it, on either side of the water, the mere sportsmen—who do nothing but sport—for they spent their whole lives through the entire Middle Ages in hunting, shooting, fishing and canoeing. There never was such splendid sport, although nothing ever came of it but more sport. They were indeed our leisure class, the only leisure class Amer-

ica ever had—dating back to an unknown antiquity, certainly before the Conquest, perhaps before the Flood. Possibly our Pilgrim and Puritan Fathers took warning from their example when they resolved to found a new civil society which should consist, like More's Utopia, of working classes only, and established the Commonwealth on the gospel of hard work, as it continues to this day. And so, perhaps, after all, America in the Middle Ages has contributed something to the sources of modern history.

I will therefore, if you will allow me, confine myself to the very modest endeavor to give you a mere glimpse of Education, of Universities, and University Extension in America, which may suggest to you their relation to the same great things in this country, without exposing me to the peril of commenting at all upon matters purely domestic here. A breeze from the West may sometimes be at least refreshing.

For 130 years from the great Discovery, while England was advancing by leaps and bounds, while Erasmus and Colet and More were doing their momentous work for the revival of learning in England, while Elizabeth's marvellous reign was perfecting the English language and literature, culminating in Shakespeare and Bacon—the whole Western Hemisphere remained undisturbed and undeveloped, except as the boundless enterprise and ambition of Spain invaded its tropical regions, and the energetic rivalry of Jacques Cartier and his successors led them to explore the St. Lawrence as the Pioneers of New France.

The first great act of the English Colonists after the landing of the Pilgrim Fathers at Plymouth in 1620, and the more important Puritan Emigration under Endicott and Winthrop in 1628-9, was the first and a very signal example of University Extension—the foundation of Harvard College as a nursery of godly ministers for the service of the Colonies. The new College was the direct child of Cambridge: the leaders of the Colony were Cambridge men, with a very little Oxford leaven, and John Harvard, born in Southwark, and baptized in St. Saviour's Church, who gave his name, his library, and the half of his fortune to the new foundation, was a graduate of Emmanuel, the distinctly Puritan College at Cambridge. Its nurture and discipline were all drawn from Cambridge sources, and for the first few decades it was a small counterpart, but in extreme poverty and littleness, of one of the Colleges of the ancient University from which it sprang.

While the Colonies still formed an integral part of the British Empire, eight more Colleges were founded after the same type, of which

Yale, Pennsylvania, Princeton, and Columbia, still maintain their ascendancy. As their limited and very scanty endowments would permit, these all followed the English types exemplified in Oxford and Cambridge. They rendered great service to the Colonies and the Empire by training men, according to the approved classical and scholastic model, for the learned professions and for public life, and adequately answered the very moderate demands of the community for higher education.

It was nearly two centuries from the foundation of Harvard in 1636, before the inadequacy of the Universities to supply the intellectual needs of the world, and to lead its advancing movements, was suspected, and another generation still before it was fully found out and exposed. So long as they were only expected to furnish for the service of the nation the necessary supply of lawyers, doctors and ministers, of teachers, scholars and public men, and to lead and promote the growth of its literature, the old routine, the old curriculum of the Colleges and Universities embracing Latin, Greek and Mathematics, with a little philosophy, metaphysics and history, were supposed to constitute the essential elements of the higher education which had sufficed for many generations.

But a new era was at hand. Probably there never has been such a revolution in social and civil life, as was produced by the application of steam and electricity to the practical use and service of man, which began in the lifetime of men standing here to-night, and ushered in an epoch of material development and progress such as the world never witnessed before, and which has by no means reached its culmination yet. The growth of the population of the United States from ten millions to eighty millions, the reduction of a virgin Continent to their use, the creation of a vast system of transportation by railroads that occupied every corner and reached every town in the country, the adaptation of all the applied arts to the construction, equipment and decoration of public and private buildings, the rapid advance of science, the multiplication of inventions, the unparalleled growth of manufactures, and the consequent extension of commerce and trade,—all combined to create a new and enlarged civilization, which had outgrown the old Colleges and Universities, and threatened to leave them out, or at any rate far behind. This rapid and unbounded material and intellectual progress demanded and employed an amount and variety of education and brain power, which neither their numbers, their resources, or their system of training enabled the old Universities to furnish. Probably a very small proportion of this mighty work, which

characterized and marked the 19th Century, had been done or devised by the graduates of our old institutions of learning. While they had been filling the professions, the halls of legislation, the great public offices, the chairs of the teachers and men of letters, the nation had looked for and found a great army of men of brains and men of action to attend to its construction, its transportation, its manufactures, its commerce, and business of every kind.

It was found then that our higher education must be adapted to this startling and violent change in our national life, and that if our Colleges and Universities would hold their own, they must greatly increase their numbers, change their methods, and assume new and closer relations with the people whom they still aspired to instruct and lead.

In the first place their numbers were multiplied. At the beginning of the century there were only twenty-six Colleges and Universities in the whole territory of the United States, and many of these were in an infant and undeveloped state. They are now numbered literally by hundreds, bringing the higher education home to the people everywhere, many of them richly endowed, most of them furnishing to the youth of the surrounding community an adequate and varied training, adapted to qualify them for business and for any public or private duty to which they may be called, although it may be far below the standard now set by Harvard or Columbia, Yale or Princeton.

These new Colleges were not all on the same model, but afforded a wide choice of courses of study, to suit the varied necessities of a greatly diversified community.

With the exception of a few of the older States which were already well provided with them by private means, each State in the Union has, by the use of public funds and lands, created a State University;—and it has been the laudable ambition of several of our multi-millionaires to create Universities by the generous application of portions of their vast fortunes. It has been interesting to see how by this means powerful and most useful institutions of learning could be created all at once as it were. I mean of course in a very few years. Of these, the University of Chicago, founded in 1892, endowed chiefly by the generosity of one man, now numbering over 3,000 students, and with an equipment approximating to that of its oldest sisters, is the leading example and compares favorably with the best.

The origin and foundation of the Stanford University, which owes its entire endowment to the lavish generosity of Mr. and Mrs. Stan-

ford, is full of pathetic interest. Travelling in Europe they had the unspeakable misfortune to lose their only child, a youth of great promise, Leland Stanford, junior. Returning to America they considered how they might best perpetuate his beloved memory, and conceived the noble idea of creating a great University that should bear his name to a distant posterity. They were not much versed in University traditions, and had no special knowledge as to how to create an institution of learning. But they cherished and fostered the happy idea that had come to them. They consulted the best experts that could be found;—they visited Harvard and Yale and studied their history and methods, estimated the cost of value of their entire plants, and concluded that by an original investment of five million dollars, and a further five millions for equipment and maintenance, they might bring into existence a school of learning that should rank with the best, and be worthy of their highly honorable purpose.

They put their noble design into immediate execution, and on a splendid estate in one of the most beautiful regions of California, erected buildings that would be quite worthy of Oxford or of Cambridge, and in a very few years the Stanford University took its place among the valuable seats of learning in the United States, richly endowed and equipped, commanding the services of distinguished professors and instructors, and thronged with many hundreds of students. Not only has it received the liberal amounts originally designed, but Mrs. Stanford surviving her husband has actually devoted to it the whole of their vast fortune, and thus they have indeed created a University which will be a lasting monument not to their lost son only, but to their own unstinted benevolence.

The Johns Hopkins University in Baltimore is another magnificent instance of private endowment, and is unique in its character among American Universities. It is mainly a post-graduate institution and embraces schools of Medicine, Science, and Physics, and is a nursery of original research, publishing from time to time the results of researches of professors and students. It has well fulfilled the hopes expressed for it by Mr. Huxley in his splendid address at its opening in 1876.

By far the most signal advance in University Extension yet made in America is the latest in date—the creation of the Carnegie Institute of Research at Washington—with an endowment of ten million dollars, to be devoted absolutely to original research. Whoever believes that there is no more truth to be found, no new law of nature to be discovered, may as well join the ranks of those deluded ones who believe the end of the world is at hand. So long as ideas rule the world, this

Institute will occupy a foremost place among institutions of learning, and bring lasting fame to its generous founder.

I ought not to pass from this part of my subject without a reference to the source from which some of our oldest and most prominent Universities, like Harvard and Yale and Columbia and Princeton, derive the means of their maintenance and development, to enable them to meet their ever-increasing needs, and the enlarged demands of the present day. They receive no aid from the public funds; they have been built up and sustained by private contributions; and their increased means of usefulness are chiefly due to the loyalty and gratitude and generous enthusiasm of their own graduates and their friends—which are found to be an unfailing support. It has come to be a common saying that no rich graduate can live or die without giving something to his University.

It goes without saying also that technical, professional, and trade schools of great importance and value, and in considerable numbers hold a high place among our modern educational establishments.

The Massachusetts Institute of Technology stands at the head of the whole system of technical education in the United States. It is primarily a school of industrial science. At the same time it finds room for the humaner studies. Mr. Mark, whose essay on "Education and Industry in the United States" has been published by the Board of Education, says of it:

"Over and above the engineering courses of various kinds, there are courses in architecture, chemistry, biology, physics, geology, and there is a general course for those students who wish to secure an education based upon scientific study and experiment, but including a larger amount of philosophical study in history, economics, language, and literature, than would be consistent with the technical requirements of other courses."

Lord Bacon says that every man owes a debt to his profession, and many of these technical, commercial and professional schools in America owe their high character, their great success and their munificent endowment to the loyalty and zeal of men who, without such advantages, by sheer force of brains and character, have succeeded in their various callings. Every man is naturally proud of the profession, business or art, in which he has himself succeeded, and it is to the eternal honor of many of our captains of industry that they manifest their gratitude by thus smoothing the footsteps to success of those who would follow where they have led.

The Drexel Institute in Philadelphia, the Pratt Institute in Brooklyn, the Armour Institute in Chicago, are conspicuous examples of the generous sympathy of successful men—with the struggles and necessities of those who come after them.

The founders, Mr. Drexel, Mr. Pratt, and Mr. Armour were very active and prominent men of business. Magnificent success had crowned their own efforts, and each of them determined to leave a memorial that should bear his own name, and spread through a wide circle the benefits of his great fortune. Nothing is more natural than that the founders of such institutions should desire to attach their own names to them, and so enjoy a certain earthly immortality—a privilege that cannot fairly be denied to them. They cherished ideals and aspirations far nobler than the material success which had come to them. One couplet of the Psalm of Life had for them a practical meaning:

"Lives of great men all remind us,
We may make our lives sublime,
And departing leave behind us
Footprints on the Sands of Time."

There are no more enduring memorials than these "footprints on the sands of time." It was a "footprint on the sand" that, by the aid of the magic touch of De Foe's genius, has immortalized the name of a naked savage on a desert island; and geologists tell us that the surface of the earth is marked with "footprints on the sand" that have lasted for countless ages, and are to-day as distinct and clear as when they were first implanted. What better footprints, what nobler memorial can any man leave behind him than to give his name to one of these new creations, which shall carry the light of knowledge to the youth of distant generations?

You will perfectly well understand that our older Universities began as single Colleges, devoted to a strictly academic course, but as time went on there grew up about them and under their government, professional schools, each with its own separate and special faculty, of which the President of the University was the head. Taking Harvard only as an example, it has its Schools of Divinity, Medicine and Law, each distinct from and independent of the old academic department, Harvard College proper. For admission to each of them something equivalent to a degree of Bachelor of Arts already obtained is in general required. So widespread is the repute of these schools that students resort to them from all parts of the country, bearing the Diplomas of the most approved Colleges—and we now hear that certain

eminent English Jurists are advising their sons to go over to the Harvard Law School, as the best foundation for legal studies.

Harvard also maintains, under the supervision of its Faculty of Arts and Sciences, a Scientific School crowded with students upon whom after a full course of study it confers the degree of Bachelor of Science. It also maintains, under the same supervision, a Graduate School, which is yearly growing in strength and importance, and is already one of the most interesting departments of the University. It provides advanced courses of study for the Graduates of Harvard and other approved colleges, and enables them to qualify for the higher degrees in Arts, Science and Philosophy.

Thus have we endeavored to accomplish the first and not the least important part of our University Extension, by increasing the number of our schools of learning, and enlarging and varying the branches of knowledge and instruction to which they are generally or specially devoted.

No adequate idea can be formed of the importance and utility of this enlarged system of Universities, Colleges, and Professional and Technical Schools, without a knowledge of the broad and firm foundation on which they rest—the common schools of the United States, which from the beginning have been the peculiar care of the people. It is not too much to say in this regard that Education has been the chief industry of the nation. The Constitution of the State of New York declares that the Legislature must provide for the maintenance and support of a system of free Common Schools, wherein all the children of the State may be educated. And this is but a single application of the general policy, that each State owes to all of its children of both sexes, an education at the public expense, up to the point at which they may be able to sustain themselves in the struggle of life. Without this it was deemed that our Institutions, resting as they do upon universal suffrage, could not be safe or enduring. According as the condition in life of its parents permits, every child may, without expense to them, pass through the successive grades of primary, grammar, and high schools, and be prepared not merely for its narrow vocation in life, but also for the discharge of that public duty which the possession of the suffrage involves.

Of course only a small proportion of the children of the State can avail themselves of the full benefit of secondary education provided, and a much smaller percentage can advance to a University training, but in the aggregate education is so generally diffused among the people, that the average laborer, mechanic, farmer or clerk, knows much

more than enough to qualify him for his narrow and peculiar occupation, and can understand, and act, with some intelligence upon the public questions on which he is called upon to vote. Upon this broad and deep foundation our Universities rest, out of it they have grown, and with it they form one entire and co-ordinated system, upon which a Government depending wholly upon the sum of public opinion of all its citizens may safely abide.

It is difficult to present the simplest statement of the magnitude of our common school system, without seeming to be guilty of gross exaggeration. According to the latest available statistics, the whole number of pupils enrolled exceeds 16,000,000, of whom fifteen and a half millions are in the primary and grammar schools, and 600,000 in the high schools and academies. It was to these common schools that the nation looked, when the Universities failed, for the supply of that brain power, energy and enterprise, which the making of the nation demanded. From this great mass the accidents of birth, fortune and circumstance select the few, about 120,000 in all, who can avail themselves of the College and University training. But the combined intellectual force of the country is in the Common Schools, and out of it by a process of natural selection have been eliminated the effective genius, talent, and faculty which the exigencies of the age required for the expansion of modern life. To these in chief measure we owe the engineers, the inventors, the mechanicians, the practical scientists, who have directed our material development.

In the same way those who have read that fascinating book, Smiles's "Lives of British Engineers" must have been struck with the fact that men who did so much for the making of England, for the most part enjoyed but little of the advantages of the higher education, but sprang from the people, and seemed by the mere force of natural faculty to educate themselves for their great and responsible work. But, school or no school, college or no college, Genius will work its way to the front.

A single word more about our common schools, to me always a fascinating subject. Of the teachers whose numbers amount to about half a million, it is safe to say that much more than two-thirds are women—who here find a field of usefulness and honor, which lies at the foundation of our national prosperity and distinction. By general consent, the conscience, the sympathy and the superior patience of women are deemed to qualify them in the highest degree for the wise and tactful instruction of the youth of both sexes. At any rate with us their general employment as teachers has proved a complete success.

I freely acknowledge my great obligations to the accomplished and faithful women who taught in the common schools of Massachusetts which it was my good fortune to attend. But since that remote day the scientific training of women in the fine art of teaching has advanced in a sort of arithmetical progression in normal schools, in colleges for women which fairly rival in dignity and equipment the best colleges for men, and in such institutions as the Normal College for Women in the City of New York. So that to-day great numbers of women, thoroughly qualified for the service of the State in the common schools and even in higher education, are to be found in all parts of the Union, and they exercise a wide-spread and powerful influence in elevating, refining and humanizing the youth of the Nation.

But however much we may multiply the number of our seats of learning, we cannot adapt them to the demands and exigencies of modern life, without a wide and radical departure from the ancient curriculum, which aimed only at qualifying youth to prepare for certain limited professions, or to take part in the administration of public affairs. Whatever special calling a man is to follow after leaving the University, he ought to start with a generous and liberal education such as every gentleman should have. But if we want our Universities to fill the full measure of their usefulness in the grand action of the world of to-day, and to be responsible for the leaders in such great occupations as those of the Engineer, the Architect, the Manufacturer, the Merchant, the Banker, the Railroad President, the Journalist, the man of Science, and those who apply science to the useful arts on the grand scale upon which those callings are now pursued, cannot some system be evolved on a broader scale than that which prevailed in all the Universities before this tremendous expansion of modern life began? Can we not attain the desired object of a liberal education upon which we insist for them all, without binding them all down to that system of training which once sufficed for candidates for the older professions, for public service and for the cultivated life of the leisure class? Cannot a scheme be devised which will enable every man who enters the University, to get the most out of himself, to begin to prepare for the life occupation for which he is best fitted, and to serve the community by the best exercise of the faculties with which he is by nature endowed?

These questions have been answered in the United States by the adoption of the second form of University Extension to which I have referred, the broadening and expansion of the courses of instruction, and by the introduction of the open door for the human mind into the

University curriculum. What is known as the elective system, which was practically unknown fifty years ago, has now, against great opposition, and in the face of inveterate prejudice, been steadily gaining ground, and promises to prevail in our principal seats of learning. President Eliot, who is well entitled to be called the author of this system in the United States, explains it thus :

"The state of society at large under freedom is perfectly illustrated by the condition of things in a University, where the choice of studies is free and every student is protected and encouraged in developing to the utmost his own gifts and powers. In Harvard University for example, thousands of students enjoy an almost complete liberty in the selection of their studies, each man being encouraged to select those subjects in which he most easily excels and consequently finds most enjoyment and most profit."

It is not, however, to be supposed that because this wide liberty of choice is allowed to the individual student a less amount of work is required of him; on the contrary, a full and equivalent measure of study is prescribed and exacted as under the old system, and the same degree is given for both.

I would not undertake to judge how far such a system could be adopted with wisdom or success, under the totally different social conditions which prevail here, but a glance at the programme of this Eleventh Summer Meeting prepared by the Delegacy for the extension of teaching would seem to show that it has already made considerable progress, and I believe that at Oxford there is practical freedom of choice for each student, without regard, of course, to degrees or honors.

You must not suspect for one moment that Harvard, or any of the other American Universities which have adopted the elective system, are being converted into Technical Schools or Commercial Colleges. Far distant be the day when the first step in that direction shall be taken. On the contrary, they adhere rigidly in their academical course, to the orthodox theory, that special study for professional or business life should be postponed, till a broad and general education has developed the faculties and character, and that only upon such a foundation can education in specialties safely rest. But many men have many gifts and different faculties. They are not all run in one mould, or all capable of making the most of themselves by studying the same things. The old classical course is still always open to all who desire to follow it, and is maintained in a high degree of excellence. No preferential tariff is imposed on the humaner courses, an equal amount of duty and performance is exacted from the others; and the modern languages,

natural history, science and the many other studies that have been added to the curriculum, are accepted only as equivalents and substitutes for the more ancient requirements.

You are too familiar with the other forms of University Extension in which the United States have faithfully followed the lead of Oxford and Cambridge, to require me to enlarge upon them.

Chautauqua, with its 10,000 students; the fourth quarter or the summer term at the University of Chicago, where academic work goes right on throughout the year (48 weeks), like any other business, drawing students and professors from nearly all the other American Universities; the Harvard and Columbia Summer Schools, each gathering hundreds of students from all parts of the United States and from foreign lands; the splendid and effective work done by the Extension Society of Philadelphia,—are but examples and illustrations of what is going on for the promotion of higher education in many parts of the country.

Among them all the Chautauqua summer assemblage has done more than any other to stimulate and satisfy the desire for knowledge, and an earnest purpose to acquire something like a University education, among those to whom fortune denied a regular college training. You should read Mr. Herbert B. Adams's account, of which I can only give you an abstract. It is really a University itself in session for the summer months, with schools of English language and literature, of modern languages, of classical languages, of mathematics and science, of pedagogy, of religious teaching, of music and the fine arts, of expression, of physical education, of domestic science, and of practical arts, instructed by learned professors, and by volunteers from the educated men and women of the land, and attended by thousands from every State and from foreign parts. It is really the pioneer of summer schools, having held its regular sessions for nearly thirty years, and has constantly increased in the extent and power of its influence. It lays out courses of home study and reading for four years. "Work begun under competent direction at Chautauqua, may be continued, at home, by correspondence with the head of the 'school' throughout the year." In very rare cases, after very searching tests and examinations, such work may be rewarded by the degree of Bachelor of Arts or Bachelor of Science, which the Regents of the University, the highest educational authority of the State of New York, are empowered to confer. The number of local reading circles in all parts of the country, inspired and guided from Chautauqua in the last twenty years, has been about 10,000, and its total enrollment of readers in

that time has been about a quarter of a million. This is really bringing higher education home to the people in earnest. Chautauqua stands for hard study and high thinking, and its votaries are almost entirely the people of plain living. It is hard to measure its influence and power for good. President Roosevelt, who has long been known as a historical lecturer and writer, visited the assemblage in 1899, when he was Governor of New York. Welcomed by 10,000 people in the great amphitheatre, he said that he came to preach the gospel of intelligent work, that this Chautauqua did not come by chance, that it was the result of years of hard work, and that now there is no institution more fraught with good to the nation than this.

The Regents of the University of the State of New York have had great success in promoting Extension Lectures in connection with the State Library at Albany, with the combined aid of travelling libraries, travelling pictures, extension lectures, and State examiners, all working harmoniously and efficiently together under one central guidance at Albany. The Library is the great foundation of extension work in New York. To bring books to the people, to teach them what books to read and how to read them, and to bring the best books within their reach in connection with the living voice of the lecturer, is the cardinal object and means of stimulating the love of study, and the thirst for knowledge.

In some of the States, notably in Massachusetts, travelling libraries are hardly needed, and but few Carnegie Libraries are to be found. In that State, which consists of 350 townships, all but five had, at last accounts, established each for itself a free public library open to the use of all citizens, and maintained at the public expense; but even in such States, what to read and how to read it are still very serious questions, upon which great light ought to be shed by the Summer Lectures.

Emerson, whose name has been on all tongues lately in connection with the centennial of his birth, and who was one of the greatest readers of his time, and got more out of his reading than almost any other man, laid down some cardinal rules for his own selection of books.

"Be sure," he says, "to read no mean books. Shun the spawn of the press on the gossip of the hour. Do not read what you shall learn without asking, in the street and the train. The scholar knows that the famed books contain first and last the best thoughts and facts. In the best circles is the best information."

"The three practical rules," he says, "which I have to offer are: 1. Never read any book which is not a year old. 2. Never read any but famed books. 3. Never read any but what you like." Thus out of

the tens of thousands of books that issue from the press every year, he would let the world first winnow for him the chaff from the wheat, and from the hundreds of good books that were so eliminated he would have each student select for himself what his own necessities and his own taste required. At all events, one of the greatest services which your lecturers can render, is to guide you in the choice of the books in your selected course.

But enough of our American methods. By substantially the same means the two countries are pursuing the same end of popularizing the higher education—of bringing it home to the people—and securing its benefits not only to those whom fortune or circumstance enables to spend four years at the University—but to that vastly greater number, whose thirst for knowledge and desire to make their working lives more useful and more happy, lead them to seek and avail themselves of the great privileges which the various methods of University Extension supply. To continue in after life the delights and profit of those studies, which the great majority of University men leave behind them when they take their degrees—to extend them in generous measure to the less fortunate, who have had to enter upon the struggle of life without them—and to apply the systematic methods of College training to many general and popular subjects, for which no place is found in the established curriculum, are the three great objects which these and other summer courses of lectures and reading have successfully attained.

To come for these high purposes to Oxford—this most ancient seat of education known to the English race—about whose venerable Halls and Libraries, quadrangles and walks, cluster all the history, traditions and memories of many centuries of learning and study, whose very air is redolent of knowledge and wisdom, seems to me to be the highest reward and privilege of the earnest seeker after truth.

One supreme advantage you enjoy, which will make the month you spend here more rich and profitable than a whole year to the ordinary University student. He who comes here because he is sent, because it is the fashion to come, because his parents know not what else to do with him in the four years which separate youth and manhood, often carries away, I fear, very little to show for his time. But you who are in dead earnest, who come because you cannot stay away, and with the firm resolve to make the most of the opportunity, will go home bearing your sheaves with you, and fruits of study which will enrich and gladden all your days.

Upon one thing I must especially congratulate you—the presence of women on an absolutely equal footing in attendance upon all the courses that are offered here. Here in conservative Oxford, and in the Summer School of Harvard which on other occasions equally ignores the idea of co-education, these men and women, earnest and ardent seekers after truth, sit on the same benches, hear the same lectures, pursue the same studies, and live the same lives, while this ideal month lasts. The young daughter of Somerville or Girton, of Radcliffe or Barnard, who is in search of more light and the higher life, finds here her full and equal opportunity.

And this brings me to the last point I wish to make, that these Summer Meetings are not only an opening of the doors of the University to those who have been shut out—not merely an exchange of learning between different Universities and Colleges and Schools, but they constitute a real international exchange of knowledge and opportunity. I see in this audience visitors from all the Continental nations, all bound on the same glorious errand, and what I rejoice in still more, men and women from my own country, who having acquired what our own Universities had to give, have crossed the seas for the sole purpose of spending a month in this congenial company, in these sympathetic and inspiring surroundings, in this Oxford, the historic and perpetual home of the scholar.

It is such intercourse as this—the exchange of ideas, of sentiments, of hopes and aspirations, that will be of priceless benefit to both countries. Cecil Rhodes, that great Englishman,—“great empire builder,” as the Times calls him—great citizen of the World as I prefer to call him, for so his will attests him,—with the most comprehensive and exalted view of the unity of the race to which he belonged,—has provided that henceforth forever, there shall at all times be at Oxford 100 American youth selected from all the States, here to receive and enjoy, and to carry home, the best fruits of her nurture and instruction, which this ancient nursery of scholars and wise men has to bestow. We shall try to give you our very best—picked men on whom no opportunity will be wasted—men who will be ambitious to win your highest honors and rewards—and I am sure they will carry home with them what is of more value than all that, a better knowledge of our own country and of yours—a better understanding of the relations which should exist between them, a more generous sympathy of race with all who speak the English tongue.

And now will not some rich American—there are plenty of them who could do it without feeling it—I could name scores of them—will not

some broad-minded and patriotic American respond to Mr. Rhodes's challenge, and in his lifetime—now—straightway—make a similar and equal provision for one hundred young Britons—English, Scotch and Irish—to be maintained at all times at such Universities in the United States as they may select—the best men you can give us—who would study England from the American point of view, while they are studying America from the English point of view—and learn that the two peoples, in spite of their different methods and usages, are very much alike, and in pursuit of the same ends and objects.

I know both peoples pretty well now, but I do not know which Country, or which set of young men, would be the greater gainer by the exchange. I am sure that it would put an end for ever to that provincial spirit which still lingers on both sides, and especially among the young men of both sides, and would establish an endless chain of intercourse and sympathy, which it would be to the perpetual interest of both countries to preserve.

What I mean by the provincial spirit which still exists among the young men of both countries, is that national prejudice born of intense love of country, which refuses to see or believe that anything can be done quite as well abroad as it is at home, and which looks with condescension and patronage upon the best efforts and achievements of other nations. This prejudice, though traceable to a very noble motive, does certainly stand in the way of the highest national development, and I know of no cure for it so effectual as would be the constant interchange of students in large numbers, between the great Universities of the two nations. And if the movement lately inaugurated, for a more intimate relation and interchange of ideas and students between the Universities of English-speaking countries is to proceed in earnest, the Universities of the United States must not be left out.

In a matter so vital and far-reaching as Education, on which the supreme interests of both nations so absolutely depend, England and the United States cannot stand apart. They must each study the methods, motives, and results of the systems pursued by the other, and in a spirit of generous rivalry strive each to promote the moral, intellectual and spiritual welfare of its own people—being sure that in so doing they will best advance the cause of civilization, and co-operate for the general welfare of mankind. I know of no more notable compliment ever paid by one to the other, than when your Board of Education published last year, for the information of the British public, in its Special Reports on Educational subjects, those two great volumes upon Education in the United States—so expressive of the sympathy

and interest of this kindred people in all our experiments, mistakes and successes—and you may be sure that all the friends of Education in America, including every intelligent and public spirited citizen, are watching with equal sympathy and attention the great work which is being done here in the same direction.

If the moral courage and intellectual achievements of the English race the world over are to keep in advance, or even to keep pace with its material and industrial progress, it can only be done by maintaining at its highest level the standard of Education on both sides of the water, and especially by extending the higher education as broadly as possible among the men and women of both countries. And so I say let us stand together, and learn from each other and help each other all that we can.

As Mr. Lowell well said: "*The measure of a nation's true success is the amount it has contributed to the thought, the moral energy, the intellectual happiness, the spiritual hope and consolation of mankind.*"

The more strenuously we contend for that success, the stronger and warmer will be our friendship, our sympathy, and our mutual confidence and respect.

BENJAMIN FRANKLIN

INAUGURAL ADDRESS, AS PRESIDENT OF THE BIRMINGHAM AND MIDLAND INSTITUTE, OCTOBER 23, 1903

Education is now in all civilized countries the question of the hour, and the unsolved problems of secondary, technical, and university education are engaging universal attention. As a diversion from this general discussion, it may not be uninteresting to study the lives of those great and rare men who, without any of these extraneous aids, achieve undying fame and confer priceless blessings on mankind. For them schools, colleges, and universities are of little account, and are not required for their development. The world is their school, and necessity is often their only teacher, but their lives are the world's treasures. It is in this view that I ask your attention for a brief hour to the life, character, and achievements of Benjamin Franklin of Philadelphia.

His whole career has been summed up by the great French statesman who was one of his personal friends and correspondents in six words, Latin words of course:

"Eripuit cœlo fulmen, sceptrumque tyrannis," which, unfortunately for our language, cannot be translated into English in less than twelve:

"He snatched the lightning from the skies and the sceptre from tyrants."

Surely the briefest and most brilliant biography ever written. He enlarged the boundaries of human knowledge by discovering laws and facts of Nature unknown before, and applying them to the use and service of man, and that entitles him to lasting fame. But his other service to mankind differed from this only in kind, and was quite equal in degree. For he stands second only to Washington in the list of heroic patriots who on both sides of the Atlantic stood for those fundamental principles of English liberty, which culminated in the independence of the United States, and have ever since been shared by the English-speaking race the world over.

You must all be familiar with the principal facts in Franklin's life. He was born a British subject at Boston in Massachusetts, then a village of about 12,000 inhabitants, in 1706, the year in which Marlborough won the battle of Ramillies and made every New Englander very proud of being a subject of Queen Anne. He was the fifteenth child in a family of seventeen, a rate of multiplication enough to frighten the life out of Malthus, and more than sufficient to satisfy the extreme demands

of President Roosevelt. His father, born at Ecton in Northamptonshire, came of that ancient and sturdy Saxon yeomanry which has done so much for the making of England. Having followed the trade of a dyer for some years at Banbury, he emigrated in 1685 to Boston, where, finding little encouragement for his old trade, he engaged in the business of tallow chandler and soap boiler. The boy could never remember when he learned to read and write, and at eight years old he was sent to the Boston Grammar School, one of those free common schools then and ever since the pride of the Colony and the State. But in two years, at the age of ten, his school days were over for ever. His father finding that with the heavy burden of his great family he could afford him no more education, took the child home to assist in his business, and the next two years the future philosopher and diplomatist spent in cutting candle wicks, filling moulds, tending the shop and running errands.

That he highly valued the little schooling that he had, meagre as it must have been, appears from his last will made sixty-two years afterwards, in which he says that he owed his first instruction in literature to the free grammar schools of his native town of Boston, and leaves to the town one hundred pounds sterling, the annual interest to be laid out in silver medals to be distributed as honorary rewards in those schools, and to this day the Franklin Medals are striven for and valued as the most honorable prize that a Boston boy can win.

But how did this particular boy, without an hour's tuition of any kind after he was ten years old, come to be the most famous American of his time, and win his place in the front rank of the world's scientists, diplomatists, statesmen, men of letters, and men of affairs? It was by sheer force of brains, character, severe self-discipline, untiring industry and mother-wit. His predominant trait was practical common sense amounting to genius. God gave him the sound mind in the sound body, and he did the rest himself. He soon revolted at the vulgar duties of his father's business, and at the age of thirteen was apprenticed till his majority to his elder brother, who was a printer and bookseller, and the publisher of the *New England Courant*, one of the earliest newspapers in the Colonies.

From this time forward the printing office was his school and his university, and probably did more for him than Oxford or Harvard could then have done. With a raging thirst for knowledge he developed a keen and unfailing observation of things and of men, and, above all, a constant study of himself, of which he was a very rare example. He denied himself every pleasure but reading, and robbed his body of food and sleep that he might find time and food for his mind, reading every

good book on which he could lay his hands. He soon mastered the art of printing as it was then known, and very early developed a faculty for the use of his pen which gave his brain a vent. He began with two ballads—"The Lighthouse Tragedy" and "Blackbeard the Pirate"—and hawked them about the town. The first, he says, sold wonderfully, but his father discouraged him by ridiculing his performances, and telling him verse makers were generally beggars, and "So," he says, "I escaped being a poet; most probably a very bad one."

So precocious was his literary faculty that very soon he began contributing leading articles to the *Courant*, and when he was sixteen, his brother having been placed under an interdict for criticizing the authorities, he became himself the publisher and editor, and of course the circulation increased. But he was still only an apprentice, and his manly and independent spirit found it as hard to brook the indignities and blows to which his master, though he was his brother, subjected him, as he had found it before to ladle the tallow and fill the moulds in his father's shop, and so at seventeen he took to his heels, shook the dust of Boston from his feet, and ran away to Philadelphia.

He landed in the Quaker City with but one dollar in his pocket, and as he had often dined on bread, he bought three rolls, and marched up Market Street, his pockets stuffed with shirts and stockings, eating one roll and with another under each arm. His future wife saw him in this guise as he passed her father's door, and thought he presented a ridiculous appearance, as he certainly did. But he had thoroughly learned his trade, and soon found employment as a journeyman printer. He would have gone on very well had he not been sent to London by the Governor of the Province on a promise of business which totally failed. He found himself in that great city without a friend, and with little money in his pocket. But he soon found employment at good wages in the best printing offices at thirty shillings a week, lodged in Little Britain at three and sixpence, and so managed to keep his head above water for eighteen months, but lived an aimless and somewhat irregular life.

However, he worked hard at his trade, and made some ingenious acquaintances, among them Sir Hans Sloane, the founder of the British Museum, and Sir William Wyndham, once Chancellor of the Exchequer—the former by selling him a curiosity which he had brought from America; the latter by his skill in swimming, in which he had from boyhood been a great expert. His own account of his last acquaintance is not a little diverting. He had visited Chelsea with a party of friends,

and on the return by water was induced to give them an exhibition of his skill in this manly art. He swam all the way from Chelsea to Blackfriars, performing many feats of agility both upon and under water that surprised and pleased the spectators. Sir William, hearing of this, sent for him, and offered if he would teach his two sons to swim to set him up in that business, and so he might have spent his life in London as the head of a swimming school, and never have lived to snatch the lightning from the clouds or the sceptre from tyrants, or to change the map of the world.

Before leaving London he accepted from a reputable merchant who was returning to Philadelphia an offer of a clerkship, and in a few months, he learned much of the business, but was thrown out of it by the death of his employer, and by a terrible illness, from which he barely recovered. Referring to this illness he wrote his own epitaph, which, fortunately for the world, there was no occasion to use:

The Body
of
Benjamin Franklin
(Like the cover of an old book,
Its contents torn out
and stripped of its lettering and binding),
Lies here, food for worms.
Yet the work itself shall not be lost,
For it will, as he believed, appear once more
In a new
And more beautiful Edition,
Corrected and Amended
By
The Author.

Soon after this illness he turned over a new leaf, with firm resolve to train himself for a successful and honorable life by the practice of every virtue. He returned to his old business of printing, which for twenty years he followed with the utmost diligence, and became very prosperous.

About this time he conceived the bold and arduous project of arriving at moral perfection, and rigidly schooled himself in the virtues of temperance, order, resolution, frugality, industry, sincerity, moderation, and cleanliness. By constant reading, study, and observation he made the very best of the great mental capacity with which he had been endowed by Nature. He set to work deliberately and with conscientious

fidelity to improve to the best advantage all his faculties, not for his own good and happiness only, but for the benefit of the community to which he belonged. From an odd volume of the *Spectator* which fell into his hands he modelled his style, training himself more rigorously than any school could have trained him, and thus acquired very early in life that power of clear and lucid expression which made all his subsequent writings so effective.

A brilliant modern writer, Hugh Black, has said that "culture is the conscious training in which a man makes use of every educational means within his reach, feeding his inner life by every vital force in history and experience, and so adjusting himself to his environment that he shall absorb the best products of the life of his time, thus making his personality rich and deep."

It was this self-culture that Franklin sought to attain, and he never lost sight of his object. Self-control once achieved, enabled him in large measure to control others. No wonder, then, that in Philadelphia, at that time already a large city, he not only rapidly achieved success in his business, but became before long a marked figure in Pennsylvania and throughout the thirteen Colonies. He never wasted time, and so time never wasted him, and at the age of forty-two he was able to withdraw from the active management of his business, and to devote himself to public affairs and to scientific studies in which his soul delighted.

In the meantime, and always in the way of business, he had engaged in two literary ventures, which at the same time exercised his active brains, and extended his reputation very widely. He purchased the *Pennsylvania Gazette* when it was on the verge of ruin and collapse, and it became under his editorship the best newspaper in America, and by means of it he exercised vast power and influence throughout the Colonies. And *Poor Richard's Almanac*, which he started when he was twenty-six years old, and continued to publish for twenty-five years, proved to be a splendid vehicle for the exercise of his wonderful common-sense, lively wit, and keen interest in all sorts of affairs. He was very human, and nothing human escaped his searching interest. It was an almanac designed for the general diffusion of knowledge among the people. Where there were few or no books, it found its way with the Bible into every household in the land. Every number was full of worldly wisdom, proverbial philosophy, inculcating the practice of all the homely virtues, such as honesty, frugality, industry, temperance, and thrift as the sure guides to success and happiness, and with all this a generous sprinkling of the liveliest wit and fun. Its circulation

rapidly multiplied, and Poor Richard, as a pseudonym of Benjamin Franklin, made him and his personal traits, which it so fitly displayed, familiar in every household, and the influence which he wielded by it was simply unbounded.

In later years he published "Father Abraham's Speech," which was a comprehensive summing up of all Poor Richard's good things, ransacking all literature for proverbs of wit and wisdom and inventing many of his own, touching the conduct of life at all points, so far as utility and worldly advantage are concerned. The world greedily seized it and still cherishes it, for it may now be read, not in English only, but in French, German, Spanish, Italian, Russian, Dutch, Bohemian, Modern Greek, Gaelic, and Portuguese. Under the title "*Science du Bonhomme Richard*" it has been thirty times printed in French and twice in Italian, and as "*The Way to Wealth*" twenty-seven times in English in pamphlet form, and innumerable times as a broadside. It is by far the most famous piece the Colonies ever produced. No wonder, for if any man would follow its precepts as faithfully as Franklin did himself, he was sure to become healthy, wealthy, and wise. A cheerful temperament that was worth millions, and irresistible good humor, pervaded all he wrote. Sydney Smith, another example of the same traits, by way of playful menace, said to his daughter "I will disinherit you, if you do not admire everything written by Franklin."

From the time that his circumstances permitted him to do anything but work solely for daily bread, Franklin manifested and cultivated a constant interest in public affairs, and his unerring instinct for public service was as keen as if he had been specially trained to that end at Oxford or at Cambridge. His fellow citizens, recognizing his capacity and efficiency, eagerly availed themselves of his leadership in every public movement. Thus he became the founder or promoter of the first debating society for mutual culture and improvement in Philadelphia, the first subscription library, the first fire club, of the American Philosophical Society, and of what finally became the University of Pennsylvania, which still holds a deservedly high rank among institutions of learning. Under his inspiring lead Philadelphia became better lighted, better paved, better policed, and better read than any other city on the continent. As Clerk, and for many years a Member of the Assembly, Postmaster of Philadelphia, and Deputy Postmaster-General for the Continent, he rendered great service, and came to know the affairs of his own and the other Colonies, and thus became known himself better than any other man in the land.

In 1754 he was the leading spirit in the Convention held at Albany,

to form a plan for the common defence of the Colonies and the Empire against the French and Indians. It was Franklin who devised the broad and comprehensive scheme which the Convention adopted, many features of which subsequently appeared in the Constitution of the United States. But it was rejected by the Colonies because it gave too much power to the Crown, and by the British Government because it gave too much power to the Colonies—a sure proof of that wise moderation which always characterized its author. In the following year he rendered great services to General Braddock, who had entered on his ill-fated expedition for the capture of Fort Duquesne without proper supplies or means of transportation, and after his calamitous defeat Franklin actually took the field with a considerable military force, and commanded on the frontier, building stockades and forts, and protecting the panic-stricken Colonists from the threatened onset of the enemy.

Carlyle thus describes Franklin's services to Braddock:

"About New Year's Day, 1755, Braddock with his two regiments and completed apparatus got to sea; arrived 20th February at Williamsburg, Virginia; found now that this was not the place to arrive at; that he would lose six weeks of marching by not having landed in Pennsylvania instead; found that his stores had been mispacked at Cork; that this had happened and also that—and, in short, found that chaos had been very considerably prevalent in this adventure of his, and did still in all that now lay round it prevail. Poor Braddock took the Colonial militia regiments; Colonel Washington, as aide-de-camp, took the Indians and appendages, Colonel Chaos much presiding; and, after infinite delays and confused haggings, got on march—2,000 regulars, and of all sorts say 4,000 strong.

"Got on march, sprawled and haggled up the Alleghanies—such a commissariat, such a wagon service as was seldom seen before. Poor General and Army, he was like to be starved outright at one time, had not a certain Mr. Franklin come to him with charitable oxen with £500 worth provisions, live and dead, subscribed for at Philadelphia. Mr. Benjamin Franklin, since celebrated over all the world, who did not much admire this iron tempered general with the pipe-clay brain."

Thus, by the time he reached middle life, Franklin had become the best known and most important man in the Colonies; but with all his varied work he had never lost sight of science and its practical application to the service of man, which was really his first love. His vast reading had made him a living encyclopædia, and he had managed to acquire some knowledge of French, Italian, Spanish, and Latin, which then and afterwards stood him in great stead. His inventive genius was

called into constant play, and he made from time to time many new and useful inventions, for no one of which would he ever take a patent or any personal advantage to himself, for he said that as we enjoy great advantages from the inventions of others, we should be glad to give the world the benefit of our own.

But his discoveries and inventions finally culminated in his studies and experiments in electricity, and their startling and marvellous result made him as famous in all other countries as he already was in his own, and placed him in the very front rank of living men. The story of Franklin and his kite drawing the lightning from the clouds, and making positive practical proof of its identity with electricity, has been too often told to need to be repeated here. It was no lucky accident. It was seven years since the Leyden Jar, the first storage battery of electricity, was made, and during the whole interval Franklin and all the other scientists in the world interested in the subject had been studying and experimenting to find out what this mysterious substance was. He had been writing from 1747 to 1751 the results of his investigations to his friend Collinson in London, by whom they were read at the Royal Society, at first, as he says, *only to be ignored or laughed at*.

In May, 1751, came Franklin's masterly but very modest paper declaring the identity of electricity and lightning, and suggesting how by pointed iron electricity might be actually drawn from a storm cloud, and buildings and ships protected from its danger. It was soon translated into French, German, and Latin, had great sales, and made a tremendous sensation. But Franklin's fame reached the highest point when D'Alibard, a French philosopher, following the suggestions in his pamphlet, constructed an apparatus exactly as Franklin had directed, and made actual demonstration of the truth of his theory, a month before the great discoverer himself flew his kite in his garden in Philadelphia.

Franklin took the universal applause that followed as quietly and modestly as he had put forth his suggestions. It was all fun to him from the beginning. Dr. Priestley says that at the close of the first summer of his experiments, when it grew too hot to continue them, the Philosopher had a party on the banks of the Schuylkill, at which spirits were first fired by a spark sent from side to side through the river without any other conductor than the water, a turkey was killed for their dinner by the *electrical* shock and roasted by the *electrical* jack, before a fire kindled by the *electrified* bottle, when the health of all the famous *electricians* in England, Holland, France, and Germany was drunk in *electrified* bumpers under a discharge of guns from the

electrical battery. Honors and distinctions now crowded upon him: the Royal Society, as if to make quick amends for its previous neglect, by a unanimous vote made him a member, exempting him from the payment of all dues, and the next year with every circumstance of distinction awarded him the Copley Medal, and Yale and Harvard conferred their honorary degrees upon him.

However much the people of Pennsylvania appreciated and enjoyed his growing fame, they were not willing to give him up to science, but enlisted his services and insisted upon his leadership in every great political question. When the dispute between the Penns as Proprietors and the people of Pennsylvania, on the claim of the former that their estates should be exempt from taxation, reached a crisis in 1756, the Provincial Assembly decided to appeal to the King in Council for a redress of their grievances, and who but Franklin should go to represent them?

This vexatious business, finally ending in a compromise which was on the whole satisfactory to his constituents, detained him in England for upwards of five years—from the summer of 1757 till 1762. Times and the man had changed since the stranded journeyman printer took lodgings in Little Britain at three and sixpence a week, and won his chief distinction by swimming in the Thames from Chelsea to the City.

The houses of the great were now thrown wide open to him, and the modest house in Craven Street, where he took up his residence, and which is still marked by a tablet to commemorate the fact as one of the notable reminiscences of London, was thronged by great scientists to congratulate him on his triumphs, and to witness at his own hands his scientific experiments. Congratulatory letters reached him from all parts of Europe. He made the acquaintance and friendship of such men as Priestley, Fothergill, Garrick, Lord Shelburne, Lord Stanhope, Edmund Burke, Adam Smith and David Hume, Dr. Robertson, Lord Kames and David Hartley, with all of whom he enjoyed delightful intercourse. He witnessed the Coronation of George the Third, and revelled in the meetings of the Royal Society, where his welcome was very warm. Pitt, who had vastly weightier things upon his mind than Franklin's errand—Pitt, who afterwards as Lord Chatham was, as we shall see, one of his staunchest friends and admirers, he found inaccessible.

At this time Franklin was a most intensely loyal British subject, and gloried in the anticipation of the future greatness and power of the British Empire, of which the Colonies formed no mean part. In this respect, the Colonists whom he represented were all of the same mind.

Green, in his "History of the English People," says of them at this time: "From the thought of separation almost every American turned as yet with horror. The Colonists still looked to England as their home. They prided themselves on their loyalty, and they regarded the difficulties which hindered complete sympathy between the settlements and the mother country as obstacles which time and good sense could remove."

He freely lent the aid of his powerful pen while in England to the maintenance of British interests. In his pamphlet, to which great praise was awarded, on the question whether Canada or the sugar islands of Guadeloupe, both of which had been conquered, should be restored to France in the event of peace, and in which he stoutly maintained the retention of Canada, he declared that a union of the Colonies to rebel against the mother country was impossible. "But," he added, "when I say such a union is impossible, I mean without the most grievous tyranny and oppression. People who have property in a country which they may lose, and privileges which they may endanger, are generally disposed to be quiet, and even to bear much rather than to hazard all. While the Government is mild and just, while important civil and religious rights are secure, such subjects will be dutiful and obedient. The waves do not rise but when the winds blow. What such an administration as the Duke of Alva's in the Netherlands might produce I know not, but this I think I have a right to deem impossible." When Mr. Pratt, afterwards Lord Camden, a stalwart friend of America through all her troubles, said to him, "For all that you Americans say of your loyalty and all that, I know that you will one day throw off your dependence on this country, and notwithstanding your boasted affection for it, you will set up for independence," he answered, "No such idea was ever entertained by the Americans, nor will any such ever enter their heads unless you grossly abuse them." "Very true," replied Pratt, "that is one of the main causes I see will happen, and will produce the event."

But Franklin was more than a staunch loyalist. He was an Imperialist in the most stalwart sense of the word, and on a very broad gauge. His biographer, Parton, truly says: "It was one of Franklin's most cherished opinions that the greatness of England and the happiness of America depended chiefly upon their being cordially united. The 'country' which Franklin loved was not England nor America, but the great and glorious Empire which these two united to form."

And Franklin himself wrote to Lord Kames on this visit: "No one can more sincerely rejoice than I do on the reduction of Canada, and

this is not merely as I am a Colonist but as I am a Briton. I have long been of opinion that the foundations of the future grandeur and stability of the British Empire lie in America; and though, like other foundations, they are low and little now, they are nevertheless broad and strong enough to support the greatest political structure that human wisdom ever yet erected. I am, therefore, by no means for restoring Canada. If we keep it, all the country from the St. Lawrence to the Mississippi will in another century be filled with British people. Britain itself will become vastly more populous by the immense increase of its commerce; the Atlantic Sea will be covered with your trading ships, and your naval power thence continually increasing will extend your influence round the whole globe and awe the world."

Again he wrote, in 1774: "It has long appeared to me that the only true British policy was that which aimed at the good of the whole British Empire, not that which sought the advantage of one part in the disadvantage of the others; therefore, all measures of procuring gain to the Mother Country arising from loss to her Colonies, and all of gain to the Colonies arising from or occasioning loss to Britain, especially where the gain was small and the loss great. * * * I in my own mind condemned as improper, partial, unjust, and mischievous, tending to create dissensions, and weaken that Union on which the strength, solidity, and duration of the Empire greatly depended; and I opposed, as far as my little powers went, all proceedings, either here or in America, that in my opinion had such tendency."

This first protracted stay in England was evidently one of the happiest periods of his long and useful life. For the first time he enjoyed abundant leisure, and the opportunity to indulge to the full among congenial and sympathetic friends his joyous social disposition and love of the best company. He made many delightful country visits, and excursions to Scotland, France, and Holland, and greatly enjoyed the recognition he received in the degrees of LL. D. at Edinburgh, and D. C. L. at Oxford. He sought out the humble birthplace of his father at Ecton, and worshipped in the ancient church around which his rude forefathers slept. In 1762 he returned to America with regret, apparently almost wishing to come back and spend the rest of his days here. For not long after his return he wrote to Mr. Strahan, one of the friends he left behind him: "No friend can wish me more in England than I do myself. But before I go everything I am concerned in must be so settled here as to make another return to America unnecessary;" and again, "I own that I sometimes suspect my love to England and my

friends there seduces me a little, and makes my own reasons for going over appear very good ones."

So there was at least a possibility that he might become a resident of England for the rest of his life, and thus the wheels of Time might have been set back awhile, in fixing the date of the final separation of the American Colonies from Great Britain, which sooner or later was obviously inevitable.

But, wholly unexpectedly to himself, Franklin was destined to spend ten years more in England, years equally momentous to himself, to the Colonies which he represented, and to the Mother Country of which he was so loyal and devoted a son.

Hardly had he reached Philadelphia on his return from his five years' sojourn here, when there was a new outbreak of the old trouble between the people of the Province and the Penns as Proprietaries of Pennsylvania as to their claim to exemption of their property from taxation. Worse still, the ominous news came from London that George Grenville had determined upon the passage of the dreaded Stamp Act, and thereby to impose taxes upon the Colonies by Act of Parliament, in defiance of what they claimed as their immemorial right and usage to pay only such internal taxes as their own provincia^l governments should impose. They did not dispute or seek to shirk their obligations to grant aid to the King, and make their just contribution to the common cause, but insisted upon their right to do it in what they claimed to be the only constitutional way, by the vote of their own representatives, and that taxation without representation—without their consent—was an injustice to which they would not submit.

No sooner did these dismal tidings reach Pennsylvania, than Franklin was again dispatched to London to do the best he could to prevent the disastrous measure. And what was now of much less importance, to present to the King the petition of the people of Pennsylvania, that he would take the government of that Province into his own hands, they making such compensation to the Penns as should be just. But of course the question of the injustice of taxation without representation and contrary to ancient usage, which affected all the Colonies alike, swallowed up all local issues. Franklin arrived only in time to find that the immediate passage of the odious measure was inevitable. He joined with the agents of the other Colonies in an appeal to Grenville, but all their efforts were fruitless. "We might," said Franklin, "as well have hindered the sun's setting. Less resistance was made to the Act in the House of Commons than to a common turnpike Bill, and the

affair passed with so little noise that in town they scarcely knew the nature of what was doing."

Having done all that he could to prevent the passage of the Act, Franklin was inclined to counsel submission. But public opinion in the Colonies was obstinate, and by unanimous action they refused to obey it, or to take the stamped paper on any terms. To the great disgust of his constituents, by whom he was denounced as a traitor, he went so far, at the request of the Government, as to nominate a stamp distributor under the Act for Pennsylvania. But he and all the other officials under the Act were compelled by the anger of the colonists to decline or resign. Agreements were signed everywhere not to buy any British goods imported, and English trade fell off to such a degree that the new Administration under Lord Rockingham, who had opposed the Act, very quickly considered its repeal.

One of the most celebrated incidents of Franklin's career was his examination by a Committee of the House of Commons, which was considering the question of repeal. He was summoned before it to give evidence respecting the state of affairs in America—a subject on which he was better informed than any other man in the world.

Without passion, with perfect coolness and absolute knowledge, he demonstrated that the Act was unjust, inexpedient, and impossible of execution, and gave convincing proof that it should be immediately repealed.

His testimony is one of the most memorable pieces of evidence in the English language, and some of his answers can never be forgotten. Being asked what was the temper of America towards Great Britain before 1763—(it will be remembered that the Stamp Act was passed in 1765)—he said:

"The best in the world. They submitted willingly to the Government of the Crown, and paid in their Courts obedience to the Acts of Parliament. They had not only a respect but an affection for Great Britain, for its laws, its customs, and manners, and even a fondness for its fashions that greatly increased the commerce. Natives of Britain were always treated with particular regard. To be an Old England Man was of itself a character of some respect, and gave a kind of rank among us. * * * They considered the Parliament as the great bulwark of their liberties and privileges, and always spoke of it with the utmost respect and veneration. Arbitrary Ministers, they thought, might possibly at times attempt to oppress them, but they relied on it that Parliament on application would always give redress."

"Q. Can anything less than a military force carry the Stamp Act into execution?

"A. I do not see how a military force can be applied to that purpose.

"Q. Why may it not?

"A. Suppose a military force sent into America, they will find nobody in arms. What are they then to do? They cannot force a man to take stamps who chooses to do without them. They will not find a rebellion: they may indeed make one.

"Q. If the Act is not repealed, what do you think will be the consequences?

"A. A total loss of the respect and affection the people of America bear to this Country, and of all the commerce that depends on that respect and affection.

"Q. If the Stamp Act should be repealed, and the Crown should make a requisition to the Colonies for a sum of money, would they grant it?

"A. I believe they would.

"Q. Why do you think so?

"A. I can speak for the Colony I live in. I had it in instruction from the Assembly to assure the Ministry, that as they had always done, so they should always think it their duty to grant such aids to the Crown as were suitable to their circumstances and abilities, whenever called upon for that purpose in the usual constitutional manner.

"Q. Would they do this for a British concern, as suppose a war in some part of Europe that did not affect them?

"A. Yes, for anything that concerned the general interest. They consider themselves a part of the whole.

"Q. Don't you know that there is in the Pennsylvania Charter an express reservation of the right of Parliament to lay taxes there?

"A. I know there is a clause in the Charter by which the King grants that he will levy no taxes on the inhabitants unless it be with the consent of the Assembly or by Act of Parliament.

"Q. How then could the Assembly of Pennsylvania assert that laying a tax on them by the Stamp Act was an infringement of their right?

"A. They understand it thus—By the same Charter and otherwise, *they are entitled to all the privileges and liberties of Englishmen.* They find in the Great Charters and the Petition and Declaration of Rights that one of the privileges of English subjects is that they are not to be taxed but by their common consent. They have, therefore, relied upon it from the first settlement of the Province that the Parliament never would, nor could, by color of that clause in the Charter, assume a

right of taxing them till it had qualified itself by admitting representatives from the people to be taxed, who ought to make a part of that common consent."

So clear, convincing, and irresistible was Franklin's testimony, that the repeal of the Stamp Act followed immediately. His evidence before the Committee closed on the 13th of February. On the 21st, General Conway moved for leave to introduce in the House of Commons a Bill to Repeal—which was carried. The Bill took its third reading in that House on the 5th of March. It passed the House of Lords on the 17th, and on the 18th of March, only five weeks after Franklin had been heard, the King signed the Bill.

The debates on that critical occasion, which promised for the moment to reconcile England and her Colonies for ever, have been but scantily reported, but Pitt, in support of the repeal, in one of his last speeches as the Great Commoner, is said to have surpassed his own great fame; and Burke's renown as a Parliamentary orator was established. Macaulay says: "Two great orators and statesmen belonging to two different generations repeatedly put forth all their powers in defence of the Bill (for repeal). The House of Commons heard Pitt for the last time and Burke for the first time, and was in doubt to which of them the palm of eloquence should be assigned. It was indeed a splendid sunset and a splendid dawn."

Franklin's own personal way of celebrating the joyous event of the Repeal of the Stamp Act was peculiarly characteristic of that spirit of fun and good humor which pervaded his whole life. He made it the occasion of sending a new gown to his wife. He wrote her: "As the Stamp Act is at length repealed, I am willing you should have a new gown, which you may suppose I did not send sooner, as I knew you would not like to be finer than your neighbours unless in a gown of your own spinning. Had the trade between the two countries totally ceased, it was a comfort to me to recollect, that I had once been clothed from head to foot in woollen and linen of my wife's manufacture, that I never was prouder of any dress in my life, and that she and her daughter might do it again if it was necessary. I told the Parliament, that it was my opinion, before the old clothes of the Americans were worn out, they might have new ones of their own making. I have sent you a fine piece of Pompadour satin, fourteen yards, cost eleven shillings a yard, a silk negligée and petticoat of brocaded lute-string for my dear Sally, with two dozen gloves, four bottles of lavender water, and two little reels. The reels are to screw on the edge of the table when she would wind silk or thread."

The repeal, following so closely as it did on the close of Franklin's examination as its necessary sequence, raised to a very high point his reputation in England, where he already commanded universal respect and esteem, and roused the Colonies to the wildest enthusiasm over his name. His constituents in Philadelphia, quite ashamed of their recent criticism upon him, gave him the whole credit of the great result.

Everybody on both sides of the water, except the King and the "household troops," as Burke called them, hoped with him that "that day's danger and honor would have been a bond to hold us all together forever. But alas! that, with other pleasing visions is long since vanished."

The attempt to impose taxation by Act of Parliament on the Colonies was almost immediately renewed, and ushered in that long and unhappy controversy which finally resulted in the accumulation of oppressive measures on the one side, and acts of resistance on the other, that brought the Colonists to an appeal to arms in defence of what they deemed to be their rights and liberties.

We will not undertake to rake over the ashes of the memorable contest, to measure out praise or blame to one side or the other. Historians are now happily agreed that the leaders on both sides in the great struggle were actuated by honest intentions and patriotic motives. It was impossible for them to see in the same light the great questions of right and of policy which divided them, and which nothing but the final separation of the Colonies from the Crown could solve.

It might be claimed with some show of reason that, at the outset at least, it was not a contest between the English people and the American people, but between the King with a submissive Ministry and Parliament here and his subjects beyond the sea, and that a great part of the English people had very little to do with it. If we may accept the statements of your own most approved historians, large portions of the English people were no more represented in the Parliament than the Colonists themselves.

I may be permitted to quote once more in this connection from Green's "History of the English People." He is speaking of Parliament between 1760 and 1767, the very time we have been considering:

"Great towns like Manchester and Birmingham remained without a member, while members still sat for boroughs which, like Old Sarum, had actually vanished from the face of the earth. * * * Some boroughs were 'the King's boroughs,' others obediently returned nominees of the Ministry of the day, others were 'close boroughs' in the hands of jobbers like the Duke of Newcastle, who at one time returned a

third of all the borough members in the House. * * * Even in the counties the suffrage was ridiculously limited and unequal. Out of a population of eight millions of English people, only a hundred and sixty thousand were electors at all!"

What would be thought to-day of great questions of national policy being decided by a House of Commons in which neither Birmingham nor Manchester had a representative, and in the election of whose members only one person out of fifty of the English people had a vote!

At any rate, we may, I think, exchange congratulations to-night, that with our great struggle the good people of Birmingham had literally nothing to do, and at least a considerable portion of the people of England hardly more.

But you get an idea of the vast difficulties with which Franklin, who gallantly remained at his post in London, through all those weary years from 1766 to 1775, had to contend, as the representative of the United Colonies, for, besides Pennsylvania, he was presently made the agent of Massachusetts, New Jersey, and Georgia. "His great powers," says John Fiske, "were earnestly devoted to preventing a separation between England and America. His methods were eminently conciliatory, but the independence of character with which he told unwelcome truths made him an object of intense dislike to the King and his friends, who regarded him as aiming to undermine the Royal authority in America." But it is not to be forgotten that Chatham, Burke, Fox, Barré, and Conway, all champions of the cause of the Colonists, were regarded in the same light by the same party.

And strange to say, down to this time Franklin had no suspicion that the obnoxious measures of the Ministry had their origin or chief backing in the Royal closet. "I hope nothing that has happened or may happen," he wrote in the spring of 1769, "will diminish in the least our loyalty to our Sovereign, or affection for this nation in general. I can scarcely conceive a King of better dispositions, of more exemplary virtues, or more truly desirous of promoting the welfare of his subjects." "The body of this people, too, is of a noble and generous nature, loving and honoring the spirit of liberty, and hating arbitrary power of all sorts. We have many, very many, friends among them."

No doubt, however, he did in the end incur the King's hearty displeasure; and a story that has long been current would seem to indicate that the royal mind at last opposed even his views on electricity, of which it might have been supposed that Franklin was himself king. The substance of Franklin's discovery was that sharp points of iron would draw electricity from the clouds, and he recommended lightning

rods with such sharp points. The story is that in the heat of his animosity against the Americans and Franklin the King insisted, on political grounds, that on Kew Palace they should have blunt knobs instead of sharp points. The question between sharps and blunts became a Court question, the Courtiers siding with the King, their adversaries with Franklin. The King called upon Sir John Pringle, President of the Royal Society, for an opinion on his side in favour of the knobs, but Pringle hinted in reply that the laws of Nature were not changeable at the Royal pleasure. How far the story in detail is true can only now be guessed from a well-known epigram that was actually current:

"While you, great George, for safety hunt,
And sharp conductors change for blunt,
The empire's out of joint.
Franklin a wiser course pursues,"
And all your thunder fearless views,
By keeping to the point."

During these ten years in London Franklin kept up a lively fire of pamphlets and communications to the newspapers, advocating with all the resources of his wisdom, wit, and satire the integrity of the Empire and the cause of the Colonists. Two of these—"Rules for reducing a great Empire to a small one," and "An Edict of the King of Prussia"—had a tremendous circulation, and became, and continued for many years, very famous. He continued his philosophical investigations, and was also the most popular dinner-out in London, where the charms of his conversation made him a universal favourite. He maintained his intimate association with the most distinguished men of science and learning, and a most loving and constant correspondence with his wife, daughter, and sister, from whom his protracted separation was to his great and tender heart a source of constant anxiety and privation.

But at last, as the prolonged contest waxed hotter and hotter, as the representative of all the Colonies he became the very storm centre round which all the elements of discord and growing hatred gathered in full force, and was often the target for the attacks of both sides. In England the Ministry regarded him as too much of an American, and the most ardent patriots at home as too much of an Englishman. He evidently thought that both sides were in fault. Here he constantly exerted all his great powers to justify his countrymen and uphold their cause. To them by every mail he urged patience and moderation, begging them to give the Ministry no ground against them. As Mr. Parson truly says, "His entire influence and all the resources of his mind

were employed from the beginning of the controversy in 1765 to the first conflict in 1775, to the one object of healing the breach and preventing the separation."

But at such times, when the air is charged with mutual suspicion and hatred, when forebodings of war are agitating the public mind, what Hamlet says is more true than ever :

"Be thou as chaste as ice, as pure as snow, thou shalt
not escape calumny."

The Court party professed to regard him as the embodiment of all the alleged sins and offences which they imputed to the entire body of Colonists, and they determined at all hazards to make an end of him. The news was on the way of the famous Boston tea party, in which a body of leading citizens of the New England capital in disguise boarded the ships that brought the tea, on which the obnoxious duty had been imposed, and emptied it all into salt water. The whole harbor of Boston became a seething cauldron of East India Company's tea on which no duty had been paid. Passive resistance was at last breaking out into open rebellion. Probably the frenzy of excitement on both sides had never reached such fever heat—and in January, 1774, the storm burst on the head of the devoted Franklin.

I shall not attempt to describe the scene in the Cockpit at the meeting of the Committee of Lords of the Privy Council, met to pass upon the Petition of the Assembly of Massachusetts Bay for the removal of the Governor and Lieutenant-Governor. Franklin had transmitted to the Speaker of the Assembly, as in duty bound, their letters showing, as he believed, a studied purpose on the part of the colonial Royal officers to bring down more stringent measures upon the Colonists and to abridge their liberties, and he had sent them, as he was expressly authorized to do, for the avowed purpose of mitigating the wrath of the Colonists against the Government at home which, as they believed, had initiated and was solely responsible for those measures.

The hearing before the Committee of the Privy Council, on the petition of the people of Massachusetts to remove these officers because of the letters, was made the occasion of a ferocious attack upon Franklin, who had presented the Petition. The Solicitor General overwhelmed him with vituperation, while the Lords of the Committee applauded with jeers, and cheers, an attack universally condemned ever since. His calm self-command and unruffled dignity, as he stood for an hour to receive the pitiless storm of calumny, in such marked con-

trast to the conduct of his assailant and his titled applauders, is striking evidence of his conscious innocence. Upon the canvas of history he stands out from that ignoble scene a heroic figure, bearing silent testimony to the cause of the Colonists for whose sake he suffered—not a muscle moved, not a heartbeat quickened—and casting into the shade of lasting oblivion all those who joined in the assault upon him. He said to Dr. Priestley next day that “he had never before been so sensible of the power of a good conscience; for that, if he had not considered the thing for which he had been so much insulted as one of the best actions of his life, and what he should certainly do again in the same circumstances, he could not have supported it.” An eyewitness who watched him closely says, “He stood conspicuously erect without the smallest movement of any part of his body. The muscles of his face had been previously composed so as to afford a tranquil expression of countenance, and he did not suffer the slightest alteration of it to appear during the continuance of the speech.”

He has been blamed by several writers of high repute, but on what exact ground is not definitely specified. From whose hands he received the letters is not known. He did receive them confidentially “from a gentleman of character and distinction,” but who he was was a secret which, at any cost to himself, Franklin was bound to keep, and he carried it to the grave with him at the cost of all the dust and obloquy that has been thrown about the matter. Having come honorably into possession of the letters, he could not have withheld the knowledge of them from the leaders of the Colony to whom he was responsible for his conduct, without a breach of trust towards them, and his countrymen, who justly regarded the assault upon him as an affront to themselves, accepted his own view and statement of the matter.

There is no doubt that the powerful invectives of Wedderburn, which were extremely eloquent and ingenious, and became the talk of the town, did seriously impair the prestige of Franklin during the rest of his stay in London. On the following day he was summarily dismissed from his office of Deputy Postmaster-General. But all this did not deprive him of the respect and esteem of the distinguished friends whom his character and commanding abilities had gathered about him.

“I do not find,” he wrote a fortnight after the assault, “that I have lost a single friend on the occasion. All have visited me repeatedly with affectionate assurances of their unaltered respect and affection, and many of distinction, with whom I had before but slight acquaintance.”

In demonstration of his own fidelity to Franklin, Lord Chatham not long afterwards, on the occasion of a great debate on American affairs

in the House of Lords, invited him to attend in the House, being sure that his presence in that day's debate would be of more service to America than his own, and later, in reply to a fling of Lord Sandwich at Franklin, he took occasion to declare "that if he were the first Minister of this country, and had the care of settling this momentous business, he should not be ashamed of publicly calling to his assistance a person so perfectly acquainted with the whole of American affairs as the gentleman alluded to, and so injuriously reflected on: one, whom all Europe held in high estimation for his knowledge and wisdom, and ranked with our Boyles and Newtons; who was an honor not to the English nation only, but to human nature."

Franklin continued his efforts at conciliation as long as he remained in London. He actually advised Massachusetts to pay for the tea which had been destroyed, for which again he was rudely blamed by the leaders in Boston. He even offered, without orders to do so, at his own risk, and without knowing whether his action would be sustained at home, to pay the whole damage of destroying the tea in Boston, provided the Acts against that Province were repealed, and to his last hour in London he labored without ceasing to heal the growing breach. Hostile critics have insinuated doubts of his sincerity in all his efforts for peace and union, but the evidence of his fidelity is overwhelming.

Speaking of Franklin in London from 1764 to 1774, the *Encyclopædia Britannica* says, "He remitted no effort to find some middle ground of conciliation. * * * With a social influence never possessed probably by any other American representative at the English Court he would doubtless have prevented the final alienation of the Colonies, if such a result under the circumstances had been possible. But it was not."

Let me cite another witness out of a host that might be called: the *Annual Register* for 1790 announcing Franklin's death says "Previous to this period (the affair at the Cockpit) it is a testimony to truth and bare justice to his memory to observe that he used his utmost endeavor to prevent a breach between Great Britain and America."

Dr. Priestley, who spent with him the whole of his last day in England, says of the conversation, "The unity of the British Empire in all its parts was a favorite idea of his. He used to compare it to a beautiful china vase, which if ever broken could never be put together again, and so great an admirer was he of the British Constitution that he said he saw no inconvenience from its being extended over a great part of the globe."

Professor Tyler, in his "Literary History of the American Revolution," describes Franklin at the date of the Battle of Lexington as "a man who having been resident in England during the previous ten years had there put all his genius, all his energy of heart and will, all his tact and shrewdness, all his powers of fascination, into the effort to keep the peace between these two kindred peoples, to save from disruption their glorious and already planetary empire, and especially to avert the very appeal to force that had at last been made."

But Franklin's efforts were of no avail. His mission of mediation and conciliation had failed, his dream of an imperial and perpetual union of England and the Colonies, as an Empire, one and inseparable, had vanished. The measures taken on both sides rendered any reconciliation impossible, and in March, 1775, he sailed for home, to throw in his lot with his own countrymen—arriving at Philadelphia two weeks after they had drawn the sword and thrown away the scabbard, and the Battle of Lexington had begun the actual War of Independence.

I have now brought Franklin to the great parting of the ways, to the point where he ceased to be a British subject and became an American citizen, bound now to secure and maintain the cause of the Colonies with all his might, and as loyally as he had thus far sought to reconcile the Colonies and the Mother Country.

I may not on this occasion pursue further the narrative of his life, except to indicate how clearly it displayed his astounding abilities and capacity for public service, his enlightened patriotism and his rare devotion to duty. No sooner had he arrived in Philadelphia after his ten years' absence than his fellow citizens deeming him more than ever the indispensable man, made him a member of the Continental Congress, where he was one of the Committee of five appointed by the Congress to prepare the famous Declaration of Independence, the other four members being Jefferson, John Adams, Sherman, and Livingston. The declaration drawn by Jefferson was only slightly amended by Franklin, who signed it with the other members of Congress. It will presently be seen that eleven years afterwards he also signed the Constitution of the United States, which he had a hand in making. To have signed both of these historical instruments is equivalent in American history to the highest patent of nobility, only five others sharing the honor with Franklin.

But, in spite of the Declaration of Independence, the cause of the Colonists was in danger of becoming hardly better than hopeless unless they could secure foreign aid and alliances—and, who again but Franklin, the printer's apprentice, the veteran diplomatist, the scientist

of world-wide fame, the accomplished linguist, the one man of letters whose works had been translated into many languages, and the most experienced man of affairs on the Continent, could be chosen for that arduous and delicate service? He was almost immediately dispatched to Paris for that purpose. Although he had now passed his seventieth year, and was already beginning to feel the infirmities of age, he consented to serve, and there for nine years more of exile he discharged his diplomatic duties with such wisdom, energy, pertinacity, and tact, and such marvellous shrewdness that the much needed supplies of money and military stores were from time to time obtained and the Colonists enabled to maintain their footing in the field. After the Battle of Saratoga, which has been justly described as one of the decisive battles of history, the Treaties of Commerce and Alliance were signed which powerfully assisted the Colonists to make good their Declaration.

This brilliant achievement was chiefly due to the skill and sagacity of Franklin, and it was largely aided by his marvellous personal popularity among all classes of the French people. His arrival in Paris was the signal for a tremendous outburst of popular enthusiasm, which met with a hearty response throughout Europe, and it extended at once to the fashionable world and to the philosophers and scholars as well as to the populace.

"His virtues and renown," says Lacretelle, "negotiated for him; and before the second year of his mission had expired no one conceived it possible to refuse fleets and armies to the countrymen of Franklin."

The German, Schlosser, says:

"Franklin's appearance in the Paris Salons, even before he began to negotiate was an event of great importance to the whole of Europe. Paris at that time set the fashion for the civilized world, and the admiration of Franklin carried to a degree approaching folly produced a remarkable effect on the fashionable circles of Paris. His dress, the simplicity of his external appearance, the friendly meekness of the old man, and the apparent humility of the Quaker procured for freedom a mass of votaries among the court circles. * * *"

Pictures of him appeared in every window, and portraits, busts, medallions, medals, bearing his familiar head were in every house and every hand.

A French writer of the day, in his description of Franklin at the Court, says: "Franklin appeared at Court in the dress of an American cultivator. His straight unpowdered hair, his round hat, his brown coat formed a contrast with the laced and embroidered coats, and the powdered and perfumed heads of the courtiers of Versailles. This

novelty turned the enthusiastic heads of the French women. Elegant entertainments were given to Dr. Franklin, who to the reputation of a philosopher added the patriotic virtues which had invested him with the noble character of an Apostle of Liberty. I was present at one of these entertainments when the most beautiful woman of three hundred was selected to place a crown of laurels upon the white head of the American philosopher, and two kisses upon his cheeks."

An American Ambassador of to-day still affects similar simplicity of dress by Act of Congress, but he would hardly know how to take such a reception as was thus accorded to the venerable philosopher.

But all this incense did not turn his head, which he kept level for the important affairs that he had in hand.

The amount and variety of business which fell upon him would have taxed the energies and capacity of the strongest man in middle life, and his health was already beginning to decline. He was obliged to act not only as Ambassador, but in lieu of a Board of War, Board of Treasury, Prize Court, Commissary of Prisoners, Consul, and dealer in cargoes which came from America. When Peace happily returned he took an active and important part in negotiating the final Treaty with Great Britain, and no one in the world rejoiced more heartily than he in the restoration of friendly relations between Great Britain and the United States. It would be impossible to describe in anything short of a volume the activity, the brilliancy, and the success of his long years in Paris.

It was exceedingly fortunate for both countries at this time, that in spite of the intervening contest of so many years, Franklin in his important post of Ambassador in Paris still retained the esteem and friendship of many distinguished Englishmen whose acquaintance he had made during his fifteen years' residence in London. To two of these—Lord Shelburne and David Hartley—are posterity indebted for much of the wisdom, moderation and statesmanship on the part of Great Britain which contributed so largely to the Treaty of Peace. The first overtures came from Franklin to Lord Shelburne, afterwards the first Marquis of Lansdowne, Minister of the Colonies, who responded by sending a confidential mission to Franklin, with a letter which concluded, "I wish to retain the same simplicity and good faith which subsisted between us in transactions of less importance."

Presently Mr. Fox, as Minister of Foreign Affairs, sent Thomas Grenville over to represent him in the negotiations. Great Britain then had no diplomatic representative at the French Court, and so it came about, as Bancroft says, that Franklin, the Deputy Postmaster Gen-

eral, who had been dismissed in disgrace in 1774, now as the envoy of the rebel Colonies at the request of Great Britain introduced the son of the author of the Stamp Act to the representative of the Bourbon King.

The final negotiations of the Treaty on the part of England were entrusted to Franklin's lifelong friend, Mr. David Hartley, in whose apartments in the Hotel de York the definitive Treaty was signed. The credit and honor of the negotiation on the American side must be divided between Franklin, Jay, and Adams, to whom, for this great service, their countrymen owe an incalculable debt of gratitude.

At the signing of one of the Treaties in Paris Franklin is said to have worn the same old suit of spotted Manchester velvet which he had last worn on the fatal day at the Cockpit years before, when Wedderburn attacked him, showing how deeply, on that occasion, the iron had entered into his soul.

In view of his fifteen years' service in England and ten in France, of the immense obstacles and difficulties which he had to overcome, of the art and wisdom which he displayed and the incalculable value to the country of the Treaties which he negotiated, he still stands as by far the greatest of American diplomatists.

In his eightieth year, quite worn out by his labors and infirmities, he returned to his "dear Philadelphia" to spend the brief remnant of his days, as he hoped, in rest and retirement, but that was not to be. He was immediately elected President of Pennsylvania—an office of great responsibility, in which he continued for three years.

"I had not firmness enough," he said, "to resist the unanimous desire of my country folks; and I find myself harnessed again in their service for another year. They engrossed the prime of my life. They have eaten my flesh, and seem resolved now to pick my bones."

In 1787, at the age of 81, he was a member of that remarkable body of men who met to frame the Constitution of the United States, and it was most fortunate for the nation that he was so. In spite of his great age, he attended all the sessions five hours a day for four months, and took an active part in the discussions and committees. He it was who proposed the amendment by means of which the States came together to form a more perfect union. The small States had been contending most vehemently and persistently for absolute and entire equality. The large States were equally tenacious for a proportional representation. Agreement seemed impossible until Franklin in Committee proposed the simple compromise, which was adopted, and on which the Constitution has thus far safely rested, that in the Senate all States,

great and small, should have an equal vote, but in the House of Representatives each State should have a representation proportioned to its population, and that all Bills to raise or expend money must originate there.

He gave close attention to all the great questions discussed in the Convention, which sat in secret session. As he was too infirm to stand and speak he was permitted to write out what he had to say to be read for him by a fellow member, and so it came about that his are the only speeches reported entire, and they are very brief and pithy. On one occasion, when there seemed no prospect of any further progress because of hopeless dissensions, he moved that prayer be resorted to at each day's opening of the Convention as the only remedy.

"I have lived, Sir, a long time," he said, "and the longer I live, the more convincing proofs I see of this truth: that God governs in the affairs of men. And if a sparrow cannot fall to the ground without His notice, is it probable that an Empire can rise without His aid? We have been assured, Sir, in the sacred writings that 'except the Lord build the house, they labor in vain that build it.' I firmly believe this; and I also believe, that without His concurring aid we shall succeed in this political building no better than the building of Babel."

When the great Compact of Concessions and Compromises was finished it probably suited no member exactly, so much had each been obliged to yield of his own cherished opinions in the cause of harmony. But Franklin threw the whole weight of his influence in favor of an unconditional signature of the great instrument by all the delegates.

"I consent, Sir, to this Constitution," he said, "because I expect no better, and because I am not sure that it is not the best. The opinions I have had of its errors I sacrifice to the public good. I have never whispered a syllable of them abroad. Within these walls they were born and here they shall die."

He carried his point and all the members signed.

It can hardly be doubted that it was the combined personal weight and influence of Washington and Franklin that prevailed with the people in all the thirteen States in favor of the adoption of the famous Constitution, which they had done so much to devise and perfect.

He lived to see Washington, who had been his close friend and fellow laborer since the days of the Braddock disaster, elected unanimously the first President of the United States, and to see the new Nation, which he had been so potent to create, fairly launched upon its great career. He lived long enough to see the youthful Hamilton at the age of thirty-two installed as Secretary of the Treasury, and to read the

first report of that marvellous genius on the Public Credit of the new-born Nation. His last public act only twenty-four days before his death, was a powerful appeal for the abolition of slavery, full of his old wisdom, wit, and satire, and of the spirit which animated the sublime proclamation of Lincoln three-quarters of a century later. And then at last, utterly worn out by his long years of public service, but rejoicing in their grand result, he "wrapped the drapery of his couch about him and lay down to pleasant dreams."

His grateful country honors his memory and cherishes his ever-growing fame as one of its noblest treasures, and transmits from generation to generation the story of his matchless services. His autobiography, written near the end of his wonderful career, is valued by all readers of the English language as one of the most fascinating contributions to its literature. And the lessons of honesty, temperance, thrift, industry, and economy, which he inculcated and practised with such brilliant success in his own person, have been of priceless value to his countrymen, and contributed very largely to their social, material, and intellectual well-being. So that, taking him for all in all, by general consent they class him with Washington and Hamilton and Lincoln in the list of illustrious Americans.

ALEXANDER HAMILTON

INAUGURAL ADDRESS, AS PRESIDENT OF THE ASSOCIATED SOCIETIES
OF THE UNIVERSITY OF EDINBURGH, MARCH 19, 1904

Revolutionary periods produce, if they do not create, men of genius whom the exigencies of the times demand. Whether they are bred out of the conditions which create the Revolution, or always exist in every community, waiting for the supreme summons to call them forth, seems little to the purpose to inquire. The appointed hour strikes and the man appears.

Napoleon, the most consummate individual force in modern history, evolved out of years of terror and anarchy to rescue a great nation from chaos, will occur to every one as the most striking example. Lincoln, of happier destiny, rising above the bloody carnage of civil war to save his divided Country, by striking the shackles from four millions of slaves, and so converting the doubtful war for Empire into a sublime and triumphant contest for Freedom, seems to have been providentially created for that awful crisis. Going back to the very beginning of our young Republic when, after all hope of conciliation with the Mother Country was abandoned, the Continental Congress appointed Washington as the Commander-in-Chief of the American Army, to withstand the overwhelming power of the mightiest of nations, and by his matchless patience, skill, and valor, to achieve the Independence of the Colonies, they appear to have found and selected the one man in all history best qualified for that most critical task.

In the subsequent making of the new nation, which the success of Washington and his companions-in-arms at last rendered possible, there appeared a considerable body of statesmen, trained in political discussion, tried by seven years of war, aroused by the four years of anarchy that succeeded, whose combined wisdom and foresight framed the Constitution of the United States, and set in motion the Government which it called into being, in a way that to-day challenges the admiration and approval of all thinking men. Foremost among these in intellectual brilliancy, individual force, constructive capacity, and personal influence was Alexander Hamilton, to whose character and achievements I would briefly invite your attention.

Just a hundred years ago, in the full career and triumph of vigorous middle life, he was wantonly slain in a duel that was forced upon him, and which he accepted in the spirit of false chivalry that then prevailed;

but the work of his hands and his brain has all the time been growing and his fame has steadily advanced, until to-day he stands, as I think, next to Washington and Franklin among the celebrated Founders of the American Republic. At last even fiction has been busy with his name, as if by a sort of mystical birth a miraculous genius had been created to be a conqueror among the men of his time. But truth is stranger than fiction, and the plain facts of his life constitute a romance almost as thrilling and fascinating as the pen of the novelist has ever painted.

I shall not attempt a biography of this extraordinary man—only a brief series of biographs, rapidly shifting, within the limits of the prescribed hour. Nor shall I try to solve the mysterious problem of his birth and pedigree. We know that he was born in the little West India island of Nevis, and that his father was a Scotch merchant who soon fell into bankruptcy, and had little part in his training. His mother was a brilliant Creole lady of Huguenot descent, noted for her beauty and wit, who died in his early childhood. Whatever their own misfortunes, their union was blest by the birth of this son, whose nature combined the national characteristics of both most felicitously blended—a keen and powerful intellect, of marvellous precocity, a tropical and fiery energy which sustained a soaring ambition, and an endless and untiring capacity for labor.

His early training and education were most accidental and desultory, and at the age of twelve he found himself working for his daily bread as clerk in a local counting house. But his talents were not to be thus hidden under a bushel. They were discovered and known to a few friends of his family, who provided the means for sending him to New York to be educated in a way worthy of his high promise—and so he was rescued from the threatened doom of obscurity in a remote corner of the world, and transferred to what was soon to be the theatre of great events, a fit arena for the exercise of his marvellous faculties.

At King's College, known to-day as Columbia University, he more than made up for all past deficiencies by intense application and prodigious labor, and, at the same time, he studied the course of passing events, quite as ardently as the prescribed curriculum. It was a day of stirring action; the prelude of a historic political drama. The quarrel between the American Colonies and the Mother Country was reaching its crisis. The destruction of the taxed tea in Boston Harbor had been quickly followed by the Act of Parliament closing the Port of Boston, and the other punitive measures designed to bring to terms the rebellious State of Massachusetts. These measures had the directly

contrary effect, to rouse and unite all the Colonies in a determined rally to the defence of their distressed brethren in Boston. New York alone held back; her Assembly controlled by the Tories and by the home Government, declined to send delegates to the first Continental Congress, and the patriots, as we now justly call them, convened a great meeting in the fields near the City to give voice to the popular sentiments. It was the first opportunity for Hamilton, a stripling in the middle of his eighteenth year, and he seized it with startling avidity. A handsome youth of comely figure and of classical countenance, intensely absorbed in the question of the hour, he listened in the crowd with breathless attention, and as the meeting drew towards its close, leaving untouched the thoughts that were burning within him for utterance, he mounted the platform amid the inquiring glances of its occupants, who wondered who this bold young stranger might be. He proceeded at first with faltering voice, but with ever growing courage and ardor to address the excited audience, who soon recognized him with shouts as "the Collegian! the Collegian!" and listened with constantly increasing attention and delight to his bold and eloquent exposition of the rights and grievances of the Colonies, of which he had made a special study. When that meeting adjourned, the young West Indian, utterly obscure and unknown before, was head and shoulders above his fellows, already famous, and marked as a future leader of the Colonial Cause.

From this time he lost no opportunity to hold and increase the advantage he had gained, and to impress himself upon the anxious and interested community. In the following year he wrote and published anonymously two political tracts: "A full Vindication of the Congress" and "The Farmer Refuted," dealing with the great questions of the day, and in reply to a distinguished Tory pamphleteer, to whom he administered telling blows and a signal defeat. His style was so clear and forcible, his grasp of the principles involved so comprehensive, and his modes of thought so mature, that the pamphlets were attributed to various members of the Colonial party, most eminent for wisdom, experience and commanding authority. When it came out that they were really the work of young Hamilton who had so recently made the famous speech at the meeting in the fields, the impression of that first performance was greatly strengthened, and men's minds turned to him as a leader already. These papers showed much knowledge of history and of the true principles of Colonial Government, and are worth reading to-day by the students of political science.

The actual outbreak of hostilities in 1775 found him already a de-

voted student of the military art, and the Captain of an Artillery Company, which he drilled with such success as soon to attract the attention of leading generals to his capacity in this new direction. Before long he came within the observation of Washington himself, who made him one of his own Aides-de-Camp, his Private Secretary, and a member of his military family, and so for the four years from March, 1777, to February, 1781, which covered a very decisive period of our great struggle, he was in daily and hourly contact with Washington as the most trusted member of his staff.

I know of nothing more ennobling, more inspiring, more precious for an ambitious and aspiring youth, in the formative and still plastic period of life from twenty to twenty-four, than such constant and intimate personal association with a truly great man; and when the young man was the ablest of his time, and his master the greatest man of the age, perhaps of many ages, the conjunction was supremely fortunate, and here Hamilton acquired a training, discipline, and education, such as no University could ever give. He was in close touch with every important event of the period. He enjoyed the entire confidence and shared in large measure the designs, anxieties, and hopes of his great master, and especially his broad, comprehensive, and far-seeing view of the future of the Colonies in the event of success.

We may not linger on his military record, which was highly creditable. One incident of it cannot be omitted. He was on the spot at the time of Arnold's treasonable attempt to surrender West Point, and took part in the hopeless pursuit. He was brought into close contact with that accomplished soldier John André, the unfortunate victim of Arnold's perfidy, and exhibited the most touching and tender sympathy with his unhappy fate, laboring in vain to the last moment to mitigate the dread severity of his sentence. At the time of his death Hamilton wrote of him: "Among the extraordinary circumstances that attended him, in the midst of his enemies, he died universally esteemed and universally regretted," a sentiment echoed by many of Hamilton's countrymen to-day at the sight of his tomb in Westminster Abbey, where he sleeps among brave and great Englishmen. His latest biographer well says: "A sadder tragedy was never enacted, but it was inevitable, and no reproach rests upon any person concerned except Arnold." André displayed the truly chivalric spirit of self-sacrifice in the message that he sent in his last hours through Hamilton, that even in the presence of death, he could not bear the thought, that his beloved Commander-in-Chief, Sir Henry Clinton, to whom he was bound by every obligation and tie of affection, should reproach himself, or that others

should reproach him on the supposition of his having conceived himself obliged by Clinton's instructions to run the fatal risk he did.

Hamilton's close connection with Washington came to an abrupt and untimely end. Like his great chief he was a man of towering passion, generally held under strict control, but on one unhappy occasion the sorely tried commander administered a sharp reproof for some real or supposed delinquency, which the inflammable temper of the subordinate resented, and on the spot he resigned his appointment, declining the courteous overtures of Washington to re-enter his personal service. But he continued in the army and served with distinction to the end of the war, conducting with great gallantry and success one of the principal assaults at Yorktown, which won him conspicuous honor. Nothing shows more grandly the superior magnanimity of Washington than his treatment of Hamilton after the ill-judged conduct of the latter at the time of their quarrel. He had thoroughly studied the masterly character and great qualities of the young man, who was less than half his own age at the time, and had learned to rely upon him with absolute trust, which he continued ever afterwards to do, looking always to him more than to any other for political counsel and support, in all the great duties and responsibilities which were heaped upon him.

And now the war which had lasted for seven years was over. The Independence of the United States was achieved. But never was a great nation, with boundless resources and possibilities of wealth and power, in such a hopeless and helpless condition—and all for the want of a strong and stable Government, fit to command obedience at home and confidence and respect abroad. The loose-jointed and inefficient Confederation of the States, which had held together under the pressure of war, and had managed to conduct it to a triumphant issue, was found when peace returned to be little better than no Government at all. It was represented by a Congress of delegates without definite powers, without an executive, without a Judiciary, and without authority to collect a dollar of taxes or raise a single soldier. It could only make requests of the States, each one of which might at its pleasure or convenience disregard the demands of their common agent.

For the five years that preceded the adoption of the Federal Constitution the whole country was drifting surely and swiftly towards anarchy. The thirteen States freed from foreign dominion claimed, and began to exercise, each an independent Sovereignty, levying duties against each other and in many ways interfering with each other's trade. European nations finding that Congress had no power to protect Amer-

ican trade, proceeded to impose fatal restrictions upon it. They also refused to enter into treaties with the United States because they could not tell whether they were dealing with thirteen nations or with one. This only was sure, that Congress could carry no treaty into effect. Commerce was completely paralyzed. Paper money had done its worst and most perfect work by driving specie out of the country, and then had itself become worthless. The people, impoverished by long years of war, were subjected to cruel sufferings, and were taking the law into their own hands, closing the courts by mob violence, and at times defying all constituted authority. American ships were being burned by Barbary pirates, and their crews sold into slavery, for the want of a Government that commanded respect on the high seas.

"It is clear to me as A, B, C," said Washington, who, from his retirement at Mount Vernon, watched the course of affairs with the utmost anxiety, "that an extension of Federal Powers would make us one of the most happy, wealthy, respectable, and powerful nations that ever inhabited the terrestrial globe. Without them we shall soon be everything that is the direct reverse. I predict the worst consequences from a half-starved, limping Government, always moving upon crutches and tottering at every step." And as yet the States and State Governments, jealous of each other and of any central authority, hesitated and refused to confer any adequate power upon Congress, which remained without the means of paying even the interest on the loans due to its generous allies, and bankruptcy, public and private, threatened to fall like a blight on the whole land. The national resources were ample, but there was no power to call them into action, and American credit was dead.

Meanwhile Hamilton had married the daughter of General Schuyler, of New York, and had vastly bettered his position by this alliance with one of the oldest and most distinguished families of the country. He had studied law, and had been called to the Bar, always in America the recognized nursery of Statesmen. With his known abilities, and aided by the personal distinction he had already acquired, he was making rapid advancement in his chosen profession and in civil life, where his courage was as conspicuous as it had been in the field. A signal instance of this occurred in his early professional career. The legislature had passed some severe laws against those who had remained loyal to the British Crown, among others a law, giving a right of action to those whose property, abandoned by its owners, had been in the occupation of loyalists during the war, under the authority of the British Commander. A great part of the city of New York had been

so occupied for many years. Under this statute suit was brought by a widow, who had been ruined by the war, against a rich merchant who had occupied her house during British domination, and Hamilton, amidst the most tumultuous clamor for the widow's cause, took a brief for the defence, and threw himself into it with all the ardor and ability at his command. He placed his case on the broad ground of public law and the faith of Treaties, and fairly persuaded the conscience of the Court, against the tremendous weight of popular pressure, to set the Act aside. In spite of the temporary odium which this manly act brought upon him, his forensic triumph placed him in the front rank of the profession—and there he remained to the end of his life.

But no other interests could keep his active and patriotic mind from political thought, and from the day of his first association with Washington they had both been of but one opinion, that nothing but a powerful Federal Government, with all the sanction of National Sovereignty, could save the afflicted people from the fearful dangers that menaced them. He lost no chance by voice, pen or personal influence to inculcate this fundamental truth, and many a fierce battle he fought in defence of it.

At last his great opportunity came, in 1786, when Virginia called a Conference of her sister States to meet at Annapolis to consider the commercial situation. Only five of the thirteen States responded, but Hamilton with a single colleague was there from New York, and, although the immediate object of the Conference failed, the real business done by this little band of delegates was to issue an address written by Hamilton, and sent to all the States, strongly setting forth the existing mischiefs and the only remedy. It urged that Commissioners be appointed by all the States to meet in Convention at Philadelphia in May, 1787, "to devise such further provisions as shall appear to them necessary, to render the Constitution of the Federal Government adequate to the exigencies of the Union."

Thus this young and untried Statesman, in his thirtieth year, was foremost in the propitious movement for assembling that remarkable body of men, who met at Philadelphia to rescue their country from the terrible and almost hopeless evils by which it was encompassed, and who accomplished this great result by framing and adopting the Constitution of the United States. It has been well described as "one of the most memorable assemblies the world has ever seen," and of its work Mr. Gladstone, a not too friendly critic, has said that "as the British Constitution is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most

wonderful work ever struck off at a given time by the brain and purpose of man."

The States responded to the call with varying degrees of alacrity. Virginia led the way by appointing delegates with Washington at their head, which in itself went far to secure the success of the movement. After a severe struggle, which was carried in favor of the Convention by his own overwhelming energy and persuasive power, Hamilton was returned by the reluctant State of New York. But he was handicapped by two colleagues who were hostile to the whole purpose of the Convention, and as the vote there was by States, each State casting a single vote by the majority of its delegates, his voting power was nullified.

Although Hamilton's work in the Convention was limited, it was of a most interesting and important character. He formulated and proposed a scheme of Government, which in many details was followed in the plan actually adopted, but which in two important features differed radically from that.

He proposed a scheme much more closely assimilated to the British Constitution, which he declared to be the best model then in existence. In the place of a Constitutional Monarchy he would have had a republic indeed, but an aristocratic republic based upon the property of the country, and would have made it supreme over the States to the extent of a practical extinction of their Sovereignty. The course of events since the close of the war had given him a great distrust of pure democracy, and a settled conviction that a continuance of the independent Sovereignty of the States, to whose jealousy he attributed a large share of the impending disasters, would be inconsistent with the creation of a strong central Government adequate to maintain the dignity and safety of the nation.

To this end he proposed that the Congress should have power to pass any laws it thought necessary for the general welfare, that the President, who was to have an absolute veto, and the members of the Senate, should be elected by the votes of property owners only, and should hold their offices for life or during good behavior, being removable only by conviction upon an impeachment for some crime or misdemeanor, and that the governor of each State should be appointed under the authority of the United States, and have a veto upon all laws passed by the State.

This novel scheme he supported in a powerful address. With all his logic and eloquence, however, he won no support for the special features of his plan. Probably he did not expect to do so, but undoubted-

ly his earnest appeal did much to confirm his associates in the determination to develop a strong and stable Executive and a Federal Government which, in all affairs that concerned the common welfare, should be actually independent of the State Governments. His scheme would, however, have annihilated the Sovereignty of the States, the preservation of which within its proper limits was an object very precious in the sight of the Convention. The moral effect upon his associates of his appeal for a strong and self-sufficient government was undoubtedly great. Indeed, Guizot says of him that, "there is not in the Constitution of the United States an element of order, of force, of duration, which he did not powerfully contribute to introduce into it, and to cause to predominate." And the Cambridge History of the United States, the latest authority, truly says, "Every great undertaking has its master-spirit, the Master-Spirit of the Convention that framed the Constitution and of all that led to it was Alexander Hamilton. There were other strong leaders who played a greater part in the long series of debates, but Hamilton, present or absent, was chief among them. Hamilton had already thought out the idea of a Constitution, clear, definite, and strong to withstand domestic feuds and foreign greed. He had thought out, and he laid before the Convention, a form of instrument which he considered better than any likely to be adopted; but if he knew that the mark was too high, it was still to be the mark. A Nation was to be created and established, created of jarring Commonwealths, and established on the highest level of right."

The Constitution as it was adopted by the Convention, has safely stood the test of a century, and was the happy result of four months' hot discussions behind closed doors, and of successive great compromises between sections, States and individuals. Hamilton, in his enthusiasm for a powerful centralized Government which should dominate the States, had pronounced the Executive too weak, and had declared that two sovereignties could not possibly co-exist within the same limits; but the combined wisdom of the whole body proved greater than that of any one member. The Executive created by the Constitution has proved to be strong enough for every emergency, and exercises in times of foreign war or civil strife an actual power quite as great and efficient as that of Kings or Emperors in monarchical states. A dual sovereignty was successfully established, by means of which the Federal Government within its sphere is supreme and absolute in all Federal matters, and for those purposes able to reach by its own arm without aid or interference from the States every man, every dollar, and every foot of soil within the wide domains of the Republic, leav-

ing each State still supreme, still vested with complete and perfect dominion over all matters domestic within its boundaries. Harmony between the two independent sovereignties is absolutely secured by the judicial power vested in the United States Supreme Court, to keep each within its proper orbit by declaring void, in cases properly brought before it, all State Laws which invade the federal jurisdiction, and all Acts of Congress which trespass upon the Constitutional rights of the States.

But Hamilton, like Washington and Franklin, and all the other great patriots of the Convention, subordinated his own views to the united judgment of his colleagues, and accepted the result as the best that could possibly be got. Although as he said, "No man's views were more remote from the plan than his own were known to be, yet it was not possible to deliberate between anarchy and convulsion on one side, and the chance of good to be expected from the plan on the other." Franklin urged the same thing with equal earnestness, and with success. So that when the doors were opened, and the members reappeared with the instrument which was the result of their long labors, signed by all, it appeared as their unanimous act, supported by the combined influence and character of all, while all the heated and angry discussions and differences out of which it had grown were left behind and not disclosed for half-a-century afterwards, all the members having been sworn to secrecy as to what took place within the walls of Independence Hall.

It was one thing, however, for the Convention to frame and recommend the Constitution, and quite another to secure its adoption by the people of the several States, which were called upon to surrender so much of their power to the Federal Government for the general welfare of all, for it was to be the Act of the people of the whole United States. Its preamble, which is said to have been written by Hamilton and is the best statement of the objects of free government to be found in any language, declares "We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

It was in this business of convincing and converting a reluctant people to the acceptance and support of the new plan of Government, that Hamilton performed those prodigious services, and displayed that surpassing genius, which established his fame as the greatest Constitu-

tional Lawyer and Statesman of that eventful era, and commanded the everlasting gratitude of his country and of mankind. For to him, more than to any other one man, we owe the grand result of the adoption of the Constitution, which brought our young Republic into being with organized powers and internal resources, that have enabled her to take the place which she now occupies in the family of nations. The immense weight of character of Washington and Franklin inclined public opinion to the support of the measure which they had helped to frame, but the voice and pen of Hamilton carried home to the hearts and consciences of the people the conviction that the adoption of the new Constitution was necessary to their welfare.

When the plan of Government proposed by the Convention was announced, the general sentiment of the people was against it, and a hostile majority in many of the States was outspoken. It encountered the fixed prejudice in favor of State Sovereignty and against any external government, as it was called, which in the case of British dominion had proved so unpopular and disastrous. Men's passions as well as their interests were appealed to, and a bitter and violent anti-federalist party was organized in every State, pledged to defeat the Constitution by all honorable means if possible. New York, though only the fourth or fifth State in wealth and population, was by its position, which completely separated New England from the Southern States, absolutely indispensable to the new Union, and her people, led by a Governor "with consummate talents for popularity," were more emphatically opposed to it than those of any other State.

But the choice was between the new Constitution and anarchy, and Hamilton conceived the idea of a regularly organized campaign of education, to open the minds and to instruct the consciences of the people on the great question which involved their rights and liberties as well as their interests. This should be done by a consecutive and incessant series of papers addressed to the people, presenting the general constitutional principles involved, discussing and analyzing the new Constitution, chapter by chapter, clause by clause, and pointing out, as to each, the defects of the existing confederation, the consequent evils and mischiefs under which they were laboring, and the remedies offered by the work of the Convention.

He enlisted the willing and sympathetic aid of Madison, who had had much more to do than himself with the framing of the plan proposed, and of Jay, the acknowledged leader among American jurists, who afterwards became the first Chief Justice of the United States. They contributed many of the papers, and their reputation, character,

and experience gave great authority to the work, but a major portion of it was indisputably from Hamilton's own pen. The combined result is known as "The Federalist," the book which is thought by many competent authorities to be the greatest book that America has given to the world, and which certainly ranks very high among works on constitutional law and principles the world over. It remains to this day the highest authority in the Courts of the United States, and of other countries, on the construction and meaning of the Constitution, and the intentions of its framers, and should be read by every student who wishes to understand the principles which lie at the foundation of popular government.

Hamilton wrote the first paper by the light of a candle, while floating down from Albany to New York in the cabin of the primitive passenger schooner of those days, and the other numbers followed in quick succession, one in every two or three days. They covered the whole field of constitutional and public law, and the meaning and purpose of every clause was made clear to the people. The writers spoke from full minds and full hearts. The papers were widely circulated and universally read, and are pronounced by competent historians to have had more to do than any other cause with convincing the people throughout the country that their safety and welfare depended upon the adoption of the new form of Government proposed. For clear and cogent reasoning, plainness and simplicity of thought, earnestness of purpose, and purity of diction and literary style, I know of no American book that surpasses "The Federalist," and no student of constitutional or public law can do without it. The chief credit of the work, for its origin, its successful prosecution and its great merit may, without any detracton from the valuable contribution of his associates, be awarded to Hamilton.

The Edinburgh Review, No. 24, says: "The Federalist, written principally by Hamilton, exhibits an extent and precision of information, a profundity of research, and an accurateness of understanding, which would have done honor to the most illustrious statesmen of ancient or modern times."

But New York, his own State, still hung back, and New York was still the pivot on which the whole of this political enterprise turned, and there the chances seemed desperate indeed. The Opposition Party supported by the most formidable interests were in a large majority, and determined to defeat it at all hazards. They preferred that New York should stand alone, and enjoy, to the exclusion of its sister States, the immense advantages of its splendid harbor and its prospective com-

merce. Hamilton and Jay and their associates succeeded in forcing the calling of a Convention to consider the matter. But when it met forty-six out of the sixty-five members present were pronounced anti-federalists, with the stalwart and hard-headed Governor at their head, and in the chair. Hamilton, leading the forlornly hopeless minority of nineteen, had an opportunity to show his points as a debater, and after a protracted struggle he won a parliamentary victory such as has rarely been heard of in the annals of any legislative body. Day after day and week after week, he maintained the contest almost single handed. He was superbly equipped for such a hand-to-hand fight. His experience with Washington, and subsequently in Congress, in the two Conventions, in the legislature and at the Bar, his strong and penetrating intellect, his fiery energy and absolute conviction, made him an irresistible champion at close quarters. Clearness, force, and earnestness were the characteristics of his eloquence; he had an answer for every objection, and made every blow tell. And at last he carried the enemy's works by assault, just as he had stormed the battery at Yorktown.

The leader of the Governor's party ran up the white flag, and announced on the floor of the House that Hamilton's arguments had convinced him, and the victory was won—the Convention ratifying the Constitution by a vote of 30 to 27. Thus New York was the eleventh State to ratify, nine only being required. By this time the whole country was convinced, for nothing succeeds like success. Rejoicing was universal, and Hamilton's name was on every tongue. In the great procession in New York to celebrate the glad event, the great Ship of State, the emblematic Federal Ship, which was drawn through the streets, was emblazoned all over with the name of "Hamilton" in his honor. This universal recognition of his service and triumph must have made him the happiest and proudest man in America, and he was still but thirty years old.

Great as was the service rendered by Hamilton in securing the adoption of the Constitution, it was, however, equalled in importance by the part which he took in organizing the new Government under it, in restoring the public credit, and in devising the policy which was to shape the future fortunes of the infant nation, and here he developed a versatility of talent, and a constructive capacity, almost without a precedent.

The first Presidential election had resulted in the unanimous election of Washington, "first in war, first in peace, and first in the hearts of his countrymen." No greater responsibility ever rested upon any ruler than that of organizing the machinery of the new administration,

so as to secure success to the novel experiment of free government. Of all the famous statesmen in the land, whom should he choose as his most confidential adviser and chief assistant in this arduous work? Whom but the still youthful Hamilton, who, at the age of thirty-two, was made the first Secretary of the Treasury of the United States, with the approval of the whole country, for his thorough fitness in character, capacity, power of sustained labor and generous enthusiasm were universally recognized. The appointment was more than justified, for he still stands by far our greatest Finance Minister, with whom we may safely challenge any comparison. It was not mere language of rhetoric, but literal truth when Webster, borrowing the imagery of two famous miracles, said of him, "He smote the rock of our national resources and abundant streams of revenue gushed forth. He touched the dead corpse of public credit and it sprang upon its feet."

The labors of Hercules were light in comparison with those that fell upon the new Secretary. He came to an empty Treasury, with literally not a penny in the till. There was no credit, public or private. There were as yet no laws providing for the exercise of the powers conferred by the Constitution. There had been no attempt as yet to develop the resources of the country, which have since proved to be so inexhaustible—business was at a standstill waiting upon events. Above all, and casting a heavy cloud, a fearful incubus upon the hopes and prospects of the new Government just struggling into life, there was a vast national debt of eighty million dollars—an insignificant sum to our modern view, but then of appalling dimensions, and there were no means at hand with which to pay the principal or even the interest upon it.

After organizing the necessary financial machinery of the Treasury, in a way that has lasted to the present time, he produced in rapid succession his three able reports on Public Credit, on National Banking and on Manufactures, and thereby laid the deep and solid foundations, upon which the public credit, the financial system, and the public and private prosperity of the United States were built up. They contained the germs from which have been developed our distinctive American method of government, which still bears the stamp of Hamilton's strong intellect and personality.

He based his scheme of public credit upon absolute good faith, upon a punctual performance of every obligation, on which alone he insisted the prosperity of the Nation could safely rest. "States, like individuals," he said, "who respect their engagements are respected and trusted, while the reverse is true of those who pursue an opposite conduct."

And he stated the object of his policy to be: "To justify and preserve the confidence of the most enlightened friends of good government; to promote the increasing respectability of the American name; to answer the calls of justice; to restore landed property to its due value; to furnish new resources both to agriculture and commerce; to cement more closely the Union of the States; to add to their security against foreign attack; to establish public order on the basis of an upright and liberal policy."

For these sacred purposes he insisted upon sufficient revenue by taxation to provide for the prompt payment of all public obligations, and to furnish an adequate currency—upon a Funding System which should embrace the whole of the existing debt, recognized as to be paid in full however depreciated, to the lawful holders—and upon the assumption by the Nation, of all the debts that had been incurred by the States in carrying on the war which brought the Nation into being.

These important measures were not carried without violent and formidable opposition, and required the exertion by Hamilton of all his power and influence, both as Minister and politician. The public debt, which was large, and had been accumulating from the beginning of the War of the Revolution, was of three classes. First, that which was due to Foreign Nations—to France, Spain, and Holland, for loans and advances. This it was generally agreed must be paid in full, principal and interest. Second, that which was due to domestic creditors, represented by bills or obligations issued from time to time, and which had greatly depreciated, as the paper money had done. So that the first taker, who had received it from the Government at its face value, had parted with it at a discount, and the last taker, who was the present holder, had paid but a small percentage of its par value. As to these there was a violent controversy, the opponents of Hamilton's plan insisting that the present holder should be paid only what he gave for it, and any further payments go to the previous holders. But Hamilton stoutly and successfully insisted that as the agreement of the Government in each case had been to pay the whole amount to the first taker or his assignees, the credit of the Nation required that this agreement should be kept in the strictest good faith and the actual holder receive the whole.

On the question of the assumption by the new Nation of the outstanding debts of the States there was a still more bitter controversy, which involved the jealousy existing between the States;—but Hamilton, who believed that the stability of the new Government depended very much upon enlisting the capital and the capitalists of the country

in its support, insisted successfully upon Assumption, and by this and the previous measure he rallied to the support of the Government those who, as he believed, could render it the most efficient aid and influence, and established its credit on a lasting foundation. Its new funded debt, into which these obligations were converted, rose to par and more, and was always met at maturity.

In his report on Banking, which was a very great and powerful constitutional and legal argument, he laid the foundations upon which have safely rested all the plans of National Banks that have from time to time been adopted by Congress, and our present excellent system of National Banks, so stable and uniform in its operation in all parts of the Union. Here, too, he rendered a still more broad and signal service, in first setting forth in clear and convincing terms the theory of implied powers and resulting powers vested in the National Government under the Constitution—the theory that every power clearly given involves necessarily the right in Congress to use every necessary and proper means to carry that power into execution. In other words, he was the author of the doctrine of liberal construction, which has enabled the Supreme Court from time to time to adopt and apply the general provisions of the Constitution, as its framers intended, to successive national exigencies as they arose, whereby that venerated instrument has grown with the growth of the nation, instead of being left behind and discarded as an outworn garment rent asunder at every seam.

His report on Manufactures, the third of these great State papers, is still more remarkable. Taking the ground that Manufactures were as essential to the prosperity of the whole country as Commerce and Agriculture, and should therefore be equally encouraged and developed, he presents the whole subject in a broad, comprehensive and truly National spirit, setting forth both sides of the question as clearly and strongly as possible, and evincing a deep knowledge of the principles of political economy and of the science of taxation. This paper did not, like the others that have been referred to, result in immediate legislation, but it was in pursuance of his great National purpose that the United States should as rapidly as possible make themselves independent of all foreign control or interference, and it is so full and perfect a presentation of the general subject, that it will always be worthy of careful study, from whatever side the question may be approached. It is safe to say that not much has been added to the argument on either side since this Report was published.

These great subjects, important and fundamental as they were, were

not the only ones that engaged the attention of the youthful Secretary at the outset of the new Government. Congress, earnestly devoted to the study of the legislation necessary for calling into effective action the vast and varied powers conferred by the Constitution, was continually calling upon him for advice and reports, which he gave with wonderful ease and versatility, on a great variety of subjects, within and without his own department. He was also during the first five years of the Administration of Washington, the chief political adviser of the President, who relied upon him in every emergency, and whose arms he upheld, on every great question of public policy.

The aim of Hamilton's efforts from first to last was to create a strong and independent Government, in full possession of all the powers that by reasonable construction it could derive from the Constitution; to establish the credit of the Nation upon the impregnable basis of absolute good faith, to develop all its resources as rapidly as possible, and to hold fast to its support, through a strong spirit of Nationality, all the strongest men and most powerful interests in the land. By his untiring labors, and by the commanding influence which he acquired and exercised to these noble ends, he stamped the impress of his character and personality upon the National history, and is entitled to a full share of that glory which mankind awards to the founders of great States. As the Republic which he helped so efficiently to bring into being and to place upon its feet, expands and grows, his fame grows with it, and will last as long as the Nation endures. His name will be always identified with the strength, the splendor, and the purity of Washington's Administration.

Senator Lodge, his biographer, has truly said of him: "As time has gone on, Hamilton's fame has grown, and he stands to-day as the most brilliant statesman we have produced. His constructive mind and far reaching intellect are visible in every part of our system of government which is the best and noblest monument of his genius."

It is quite impossible to form a just estimate of the value and efficiency of Hamilton's ideas and labors in promoting the adoption of the Constitution, and in the legislation of Washington's Administration, without taking a general view of the condition of affairs at the close of that period, and contrasting it with that which existed, as we have seen, at its commencement.

Instead of a powerless league of States, held together by Articles of Confederation which have been aptly described as "a rope of sand," a young, vigorous and ambitious Nation had been created, with a Government fully organized, armed and equipped for all national purposes,

with the most illustrious man in the world at its head, whose character commanded universal respect, confidence and admiration, at home and abroad. In its hands had been placed full and adequate powers of taxation, by which every form of property, occupation, and industry could be reached, and compelled to contribute to all those purposes which involved the general welfare of the people of all the States; to internal administration and the support of a judicial establishment; to foreign relations; to the building of a Navy; to the organizing and equipment of Armies; to the regulation of Commerce; and to carrying out the provisions of Treaties. The Nation could now, if need be, without aid from the States, draw into its military service every able-bodied man within the bounds of the Republic.

It left untouched all those powers of the States, which were essential to the proper conduct of domestic affairs, and at the same time effectually restrained them from the exercise of those which would interfere with the independence and efficiency of the general government. They could no longer levy imposts upon imports from abroad or from any of the other States. The citizens of each State were secured the enjoyment of all the privileges and immunities of citizens in every other State. Absolute freedom of trade within the Republic was established, which, in connection with the unlimited power to regulate Commerce with foreign nations and the absolute control of all external relations, has vastly contributed to the general prosperity of the Nation. The States were also prohibited from passing any laws impairing the obligation of contracts, a provision which gave great security and stability both to property and business. It put an end for ever to interference between creditor and debtor, of which some of the States had been guilty, and has done much to maintain the sanctity of contracts and of property.

With such a Government the new born Nation could meet and confront other Nations on equal terms. It could make Treaties, with the assurance to itself and to the other party that the terms of the Treaty would be faithfully executed. It was no longer looked upon with contempt, or even with indifference, by other Powers as it had been before, but took its place as an equal in the family of Nations.

The people gradually learned to outgrow the feeling of pupilage and dependence upon a foreign nation and on foreign opinion, which had characterized them as Colonists. In its place they acquired a new spirit of Nationality, proud of their new liberties and rejoicing in the strength of a Union, which, as they believed, was destined to be perpetual. Confidence and Commerce revived, and the busy hum of In-

dustry was everywhere heard. An ample revenue flowed into the public coffers, and the public funds and the national currency were placed upon a firm basis. The great national domain extending from the Alleghanies to the Mississippi was thrown open to immigration, and a resistless and incessant tide of life began to flow through every mountain pass and along every river bed, eager to possess and subdue the forest and the wilderness, and convert them into one great garden of plenty.

I doubt whether in such narrow limits of time, a change in the form of Government and the adoption of a new system of Administration ever wrought such magical effects. A wholly new people entered upon the great and untried experiment of Self Government, with the most buoyant hopes and sanguine expectations.

An opportunity soon came for testing the power of the new Government against domestic turbulence and disorder, and of trying the working order of the new machinery in critical emergencies. The breaking out of the French Revolution created, as might have been expected, a tremendous sensation and universal enthusiasm throughout the United States, in which doubtless Washington and Hamilton at first sympathized, welcoming the hope of constitutional liberty arising upon the ruins of despotism. But when the true nature and inevitable tendency of that awful conflict revealed itself; "when," as Mr. Lodge finely says, "reform became revolution, revolution anarchy, and redress revenge—when hot-blooded killings in the streets changed to cold-blooded massacre and cowardly murder in the palace and the prison, culminating at last in the execution of the King and the daily slaughter of the guillotine—then public opinion in America shifted," and the conservative elements of society, headed by Washington and Hamilton, raised formidable and successful barriers against the tide of Jacobin sentiment, which even the Atlantic was not wide enough to keep out of the land.

When the news arrived of the outbreak of war between England and France, the President, on a careful study of the situation, declared for absolute and strict neutrality between the contending Powers, and determined that our previous relations of alliance and friendship with France should not entangle us in any way in the seething turmoil of French madness. He issued his famous proclamation of neutrality, treating both parties to the war on terms of strict and impartial equality, which established for the future our uniform relation to all foreign wars.

This proclamation of neutrality was, under the circumstances, a magnificent exhibition by Washington of those great qualities of wisdom, firmness and integrity of mind for which he was so remarkable. The drift of popular feeling in America was strongly on the side of France. We were bound to her by ties of gratitude for the timely, efficient, and generous aid she had then so recently given us in the very crisis of our fate, and which had enabled us so soon to secure our independence. We were also bound by the terms of the defensive Treaty of Alliance, which Franklin had won so much fame by negotiating. On the other hand there still lingered in the hearts of the people much of that bitterness of feeling against England, which the recent contest had necessarily excited, and which new causes of difference arising since the war had not permitted to subside. After patiently hearing all sides, Washington concluded that our National interests and National honor alike required us to abstain from all part in the war, and the Proclamation went forth in the most emphatic terms.

When a representative of the Convention arrived as Minister from the French Republic, and endeavored by all sorts of intrigue and plot to embroil us—when Jacobin clubs were established, and a great party was formed in support of so-called French principles, Washington enforced to the utmost of his ability the doctrine of the proclamation, counteracting and defeating all the dangerous efforts of this turbulent emissary and his American supporters, and finally insisted peremptorily upon his recall. The performances of this emissary of the French Revolutionary Government, from the day he landed on our shores until his recall, were most remarkable. Landing at Charleston on the very day of the issue of the proclamation, he persistently defied its provisions. He issued commissions and fitted out privateers to prey upon British commerce, appointed consuls and instructed them to act as prize courts on our neutral territory, and made triumphal processions through the States. He made our soil the base of warlike operations, and did his best to drag us into the war, and, as a last act of temerity, he had the assurance to appeal from the President to the People, whom he had done his best to convert into French Propagandists. During this stirring period Hamilton, in the Cabinet and the press, rallied mightily to the support of his chief, and impressed himself and his ideas most indelibly, not only upon the great Federalist party, of which he was the acknowledged chief, but upon the future policy of the country for generations.

Another occasion arose to test the firmness and efficiency of the new Government. When the growing necessities of the organized service

called for enlarged taxation, and an increased excise was imposed by Congress upon distilled spirits, what was known as the "Whisky Rebellion" broke out in the mountains of Pennsylvania, in armed resistance to the process and officers of the United States—and a widespread indulgence in disorder and outrage. Great forces of armed men in open defiance of the law occupied broad tracts of country, and the practical question arose, whether we had a Government capable of dealing with such a crisis or not. This was the first time that the new Government had had to resort to force against popular violence, and it was now to be determined whether it had the power and the nerve to enforce obedience to its own laws.

Washington, firmly supported by his stalwart Secretary, who liked nothing better than a fight, soon called an army of fifteen thousand men into the field which marched under the general direction of Hamilton, into the disturbed districts, put a speedy end to what threatened to be an obstinate revolution, and set an example of how the Federal Government could and should deal with insurrection. All this was in striking contrast to what had happened in Massachusetts just before the Federal Convention met, when a debtors' rebellion had taken possession of the State and closed all the Courts of Justice, and the Government of the Confederation had not been able to lift a finger to aid the State in its suppression.

I shall not ask you to follow Hamilton through the ten years that remained to him after his retirement from public life, which was compelled by the necessity of providing for a large and growing family. His ardent interest and inspiring influence in public affairs never slackened. Although no longer in the Cabinet, he was frequently called upon by Washington for advice and assistance, and freely gave his opinion and counsel on important public questions. He was the acknowledged head of the historic Federal Party, to whose continual conflicts, alike in victory and defeat, his fiery zeal and passionate nature lent always a glowing heat. Apart from these excursions into politics, his later years were spent in the enjoyment of a most felicitous domestic life, and in the honorable pursuit in a large way of the profession which he loved and ennobled, and in which he was easily foremost.

It is in that honorable calling which he always magnified and adorned, that I love to contemplate him, devoting the marvellous force of his character, intellect, and will to the service of the community, in those great forensic contests to which he was naturally called. Chancellor Kent, whose authority on that subject is conclusive, says of him:

"Among his brethren Hamilton was indisputably pre-eminent. This was universally conceded. He rose at once to the loftiest heights of professional eminence by his profound penetration, his power of analysis, the comprehensive grasp and strength of his understanding, and the firmness, frankness and integrity of his character." The same qualities it will be noted made him so nearly supreme in political and public life.

I would not have you believe that I am presenting Hamilton as a hero without spot or blemish. He had many and glaring faults, but they were mostly the result of that passionate and impetuous nature which was a striking feature of his personality. An intrigue in private life, which his enemies seized upon as a means of defaming his public character, by the pretence that he had spent upon its object public moneys, compelled him to an elaborate vindication of his official conduct. He not only silenced but convinced his slanderers, although at the expense of a humiliating confession on his own part which marred the sanctity of his private life. His political conflicts, even within the party of which he was the acknowledged head, were often marked by fierce outbreaks of temper and vindictive passion. These involved him in personal quarrels which sadly interfered with the plans and the policy of the Federalists, and one of which directly led to their overthrow. But his commanding talents and weight of character were so transcendent, his genius for public service so unfailing, his political vision so clear, and his devotion to public duty so constant, that even these great faults have hardly diminished the lustre of his fame, or the gratitude of his countrymen for his matchless services in laying the foundations of the Republic. He scorned all mercenary ideas and motives, all low ambitions, and his integrity was so absolute, and his patriotism so unselfish and exalted, that his name and career are a cherished national treasure.

The tragical death of Hamilton has done much to embalm his name in the memory of his countrymen. Great as we have seen him to be, he was not great enough to rise above the barbarous and brutal theory and practice of that age, which sanctioned and compelled a resort to the duel as the honorable mode of settling personal disputes, but to which the cruel sacrifice of his precious life put an end, at least in the Northern States. Two years before, he had followed to the grave his eldest son, a victim to the same senseless code of honor, and now, still in the very prime of his own life, at the age of forty-seven, in the midst of a great career of usefulness, crowned with all the laurels which his grateful country could bestow, he was called to meet his own untimely

fate. He accepted the challenge, forced upon him by his most dangerous and unscrupulous political adversary, with whom he had had many bitter contests, and who was at last determined to be rid of him. One glorious July morning, on the heights of Weehawken, overlooking the Hudson and in sight of his own happy home in New York—whose idol he had been—they met for the last and mortal combat. Hamilton fell fatally wounded at the first shot of his adversary, having fired his own pistol in the air, and so unhappily and unworthily ended the life of one of the noblest, manliest and most useful men of whom we have any record—the trusted friend and companion of Washington—and one of the best gifts of God to the Nation which they labored together to found.

THE ENGLISH BIBLE

ADDRESS AT THE CENTENARY OF THE BRITISH AND FOREIGN BIBLE
SOCIETY, LONDON, MAY, 1904.

My Lord Northampton, Ladies and Gentlemen: I consider it a very great honor to be privileged to appear before this great audience assembled from all the Christian nations to-night, to represent first, my country, and secondly, the American Bible Society, as one of its delegates.

I shall take as my text for the brief discourse that I am privileged to address to you, a direct message which I have received by cable from the President of the United States.

The President, no matter what heavy responsibility, no matter what serious labors may rest upon him, is always ready with a good word and a helping hand for every great and worthy cause. The President cables: "Convey to the British and Foreign Bible Society my hearty congratulations on their Centenary and my earnest wish for the continued success of their good work. Theodore Roosevelt."

My Lord Northampton, for the American Bible Society and in its name, I have the honor, in common with my fellow-delegate, the Reverend Dr. Ingersoll, to submit this address to the President, Vice-Presidents and officers of your Society:

"Gentlemen and Brethren, we, the President, Vice-Presidents, Officers and Managers of the American Bible Society, in accepting the honor of an invitation to the celebration of the One Hundredth Anniversary of your Society, and in joining the great number of those who congratulate you on the honorable and auspicious accomplishment of your first centenary, do hereby pay our hearty tribute of gratitude, admiration and reverence to our elder sister.

"The organizers of our Society acknowledge, with deep gratitude, the generous gift of money and of sympathy with which the British and Foreign Bible Society brightened our first years. In all our career, we have been stimulated by your faithful example.

"In recognition of the wonderful achievements made possible by your steady fortitude and noble devotion in all lands, it has pleased us to designate as our official representatives to your celebration the Reverend Edward Payson Ingersoll, D. D., Corresponding Secretary, and the Honorable Joseph H. Choate, the Ambassador at the

Court of St. James, to bear personal testimony at your Centenary of our fraternal regard and steadfast confidence. We who send these greetings and salutations, recognizing your high aims and noble endeavors in every domain of your activity, commend you to Him whose we are and whom we serve, praying that He may continue to be your light and guide until the Word shall be fulfilled. 'They shall teach no more every man his neighbor and every man his brother, saying "Know the Lord," for they shall know Me from the least of them and unto the greatest of them.'

"Adopted by the Board of Managers of the American Bible Society
February 4, 1904. Daniel Coit Gilman, President.

"William Ingraham Haven, Secretary."

And now let me say that the President, in his hearty message of good cheer, and the American Bible Society in their more formal address, have but spoken the sentiments of the entire people of the United States, who have justified from the beginning the cordial and hearty support which you have given to the American Bible Society for the last eighty-six years.

I was going to say that the American Bible Society is your own offspring, but, inasmuch as you yourselves were only twelve years old when it became into being, I must regard you as our elder sister, and our elder sister it was who showed us the way, who encouraged us in our small beginning, who sent us a grant of five hundred pounds from her treasury to start with, which was a tremendous help in those days, and who has ever since been leading the way which we have been glad to follow.

Let me say one word more about the American Bible Society. Like yourselves, it has had its struggles and its triumphs. Like yourselves, it has an immense work on hand. Like yourselves, it finds the demand far greater than the supply that it is able to furnish. It is no small undertaking to keep eighty millions of people supplied with a Bible in every house, and that has been their ambition. And then they have to meet about eight hundred thousand immigrants from foreign lands every year as they land in New York and other parts of the country, and I am sorry to say that they are not always provided with Bibles, and the Society has to take care of them. But with all that, I think its records will show, as in the past, that now and in the future, it can be relied on to do almost as much for foreign lands as it does for its own people at home.

Now this great harvest which this centenary demonstrates, is only, after all, what has grown up from the little seed which, nearly three

hundred years ago, your fathers and our fathers united in planting in the distant wilderness. When the Pilgrim Fathers embarked in the Mayflower in 1620, and when, eight years afterwards, the great Puritan immigration from old England to New England set in, they carried with them, our fathers and the brothers of your fathers, carried with them, as their best possession—in fact, the only one which was to have a lasting value—King James's Bible, upon which their infant State was built. It was their only book—their only readable book. I have read catalogues of the books which some who were best off among them had, and the Bible was the only readable book, and that was readable by every man, woman and child. It was the ark of their covenant, and, really, they did find, within those sacred covers, their shelter from the stormy blast and their eternal home. Their faith was founded upon it, and having no other book, you can realize how there they stood to find, not their religion only, but their literature, their biographies, their voyages and travels, their poetry, such as no poets have ever since produced, and that magnificent march of history from the beginning, and they searched and found in it the golden rules of life.

I do not know that I can more forcibly bring before you how completely the Bible was their one treasure, than by describing one of the few family Bibles that have come down from those days to ours—the only legacy that has reached the remote posterity of the family to which it belonged. It was read twice a day in every family by the head of the household, with all the members gathered about him, going in at Genesis and coming out at Revelation, the whole journey being accomplished twice every year between January and December. Dog's-eared?—that is a mild term to express its condition, for its leaves were absolutely worn away by the pious thumbs that had turned them. It was really the fact that New England, in its first generation, was the most biblical community on the face of the earth. Their laws, their customs, their language, their habits, were founded upon it, and in it they found their sole guide of life.

Let me read a word from one of the greatest of their descendants, Phillips Brooks, that most noble product of New England culture, himself a true descendant of their blood. He said worthily of them (I could not begin to find language equal to his in point of expression): "It never frightened a Puritan when you bade him stand still and listen to the voice of God. His closet and his church were full of the reverberations of the awful, gracious, beautiful voice for which he listened. He made little, too little, of sacraments and priests, because

God was so intensely real to him. What should he do with lenses who stood thus full in the torrent of the sunshine?"

Our New England fathers, with the Bible as the basis of their lives, realized that prayer of Erasmus, uttered one hundred years before they found foothold upon Plymouth Rock,—a prayer which it was often dangerous to breathe in those early days: "I wish the Gospels were translated into the languages of all people, that they might be read and known not only by the Scotch and the Irish and the English, of course, but even by the Turks and the Saracens. I wish that the husbandman may sing parts of them at his plow; that the weaver may warble them at his shuttle; that the traveler may, with their narration, beguile the weariness of the way."

Well, our Pilgrim Fathers were exactly the kind of men that you might expect them to have been. I wish you would just imagine, for one moment, what our lives would be if, like them, the Bible were our only book. No newspapers, no weeklies, no magazines, no novels, no libraries, no school reading of any kind. I only hope that we, like them, would find our refuge where they so safely found theirs.

In the days of their greatest poverty and distress, they founded Harvard College, in order, as they said, that the supply of learned and godly ministers might never fail, and they gave it a motto which holds to this day: "To Christ and the Church," and, what means the same thing, "*Veritas*" (truth), and then they founded the great State of Massachusetts, which I shall not ask you for one moment to hear about. I can only say what Mr. Webster says of her: "Massachusetts, she needs no eulogy. There she stands; behold her and judge for yourselves."

If you ask me what more has come of it, what other good things founded upon the Bible, besides Plymouth Rock and Boston, I should say that a very large share of the good which has been wrought out in America from the beginning is traceable to their pious efforts, that if the common schools have found their way from the Atlantic to the Pacific; if slavery has been abolished; if the whole land has been changed from a wilderness into a garden of plenty, from ocean to ocean; if education has been fostered according to the best light of each generation since then; if industry, frugality and sobriety are the watchwords of the nation, as I believe them to be, I say it is largely due to those first emigrants, who landing with the English Bible in their hands and in their hearts, and assisted by men like themselves here in London, established themselves on the shores of America.

Without detracting at all from the great part which has been con-

tributed from other countries, we say that that little leaven has leavened the whole lump, and if you ask me what the signs of the leavening of the lump are, I point again to the work of the American Bible Society and its relation to that community. It is liberally supported and encouraged by many ardent friends in every state and in every territory of the Union. I point to the fame and influence which it has acquired throughout the land. I point to the millions of dollars which it is gathering in for this pious use, and to the scores of millions of Bibles which it has distributed, on the principle always of the whole Bible for the whole world, to all but the poor at cost, to every one of the poor without money and without price.

And now, before I sit down, I should like to make a claim for my country which may be a little surprising to this audience, and that is that one of the first translations from the English text of the whole Bible into a heathen language, was made in the earliest days of Massachusetts with the great aid that was sent over to us from London. There came over to us in 1639 a poor clergyman from Jesus College, Cambridge. There he had been distinguished for his studies in theology and for the study of languages, and when he came to America he made himself busy in connection with that peaceful, harmless tribe of Indians who made their home in Massachusetts, and tried to teach them the word of God. After he had learned their language, and it took him about twelve years to learn, he sent over a cry for help, and he got a response. The same cry and the same response has been going on to this day: "Can we to souls benighted the lamp of life deny?" What was the response? Why, Parliament, consisting then only of the Commons, I am sorry to say, organized a society entitled "The Corporation for the Propagation of the Gospel of Jesus Christ in New England." And the preamble of the act passed in connection with this society is a very remarkable one and shows how interesting was the relationship which our ancestors bore to the Indians to whom they held out the hand of fellowship. Here it is:

"Whereas, the Commons of England have received certain intelligence by the testimonial of divers faithful and godly ministers in New England, that divers heathen natives of that country, through the blessing of God, upon the pious character and pains of some godly English of this nation, who preached the gospel to them in their own Indian language, who not only of barbarous have become civil, but many of them, forsaking their accustomed charms and sorceries and other Satanical delusions, do now call upon the name of the Lord—with tears lamenting their misspent lives, teaching their children what they are

instructed in themselves, being careful to place their said children in godly English families and to put them to English schools, betaking to themselves but one wife and putting away the rest, and by their constant prayer to Almighty God morning and evening in their families, expressed to all appearances with much devotion and zeal of heart, Therefore," etc., etc.

Therefore the Commons established this corporation to raise a fund in England for this purpose, and by their apostle John Elliot, completed, as early as 1663, or one hundred and forty years before the foundation of the British and Foreign Bible Society, a complete version of the Bible in the Algonquin tongue. Probably there is not a man now living who can read a word of it. Certainly there is not a vestige of the tribe for whom it was written, but it is a grand monument for its author, and it pointed the way for this Society and for the American Bible Society.

I cannot take up any more of your time. I only wish to ask, What is it that we are working for as societies? Each for its own interest primarily, but, next to that, we have a greater and a further mission, and that is to promote and advance the cause of civilization, of order, of religion, of peace and of duty. I believe that such occasions as this go far in the accomplishment of that mission. How far, then, is it possible to make these two great nations policemen to keep the peace of the world? Some rely upon armies and on navies, upon armaments and gunpowder and lyddite and dynamite as the best guarantees of the preservation of peace, but sometimes these things explode when least expected. Others rely upon the slow and tortuous processes of diplomacy, but diplomacy sometimes fails, as we have had illustrations lately.

I believe, and I think that the British and Foreign Bible Society and the American Bible Society unite in that belief, that the only sure guarantee of peace is the moral influence of public opinion. Let each nation and the people of each nation give their governments to understand that they are for peace and there will be no war. I believe that if these two nations which you and I represent were to set the example, the other Christian nations would follow. Nothing could withstand such a weight of public opinion based upon this book, which speaks always to the world for peace and good will, "Peace on earth, good will to men." I believe in co-operation in good work, in every good work possible, between the people of our two countries. Why should we not co-operate in all good work, we who have one God, one Bible, one language and one destiny?

JOHN HARVARD

ADDRESS AT THE UNVEILING OF THE HARVARD MEMORIAL WINDOW
PRESENTED BY MR. CHOATE TO THE DEAN AND CHAPTER OF ST.
SAVIOUR'S CHURCH, SOUTHWARK CATHEDRAL, MAY 23, 1905

My Lord Bishop, I may be permitted to state in a few words my object and purpose in presenting the window to the Cathedral. I desired to signalize my long residence in London by an appropriate gift which should be in itself emblematical of the deepseated and abiding relations of friendship which happily unite our two countries. As a loyal son of Harvard, I thought that nothing could be more fitting than a permanent memorial here of the principal founder of Harvard University. John Harvard was born in this ancient borough, close by the end of London Bridge, and baptized in this venerable church in 1607, almost three centuries ago. Educated at Emmanuel College in Cambridge, where he spent eight years, during at least four of which Milton was at Christ's, he and Milton received substantially the same nurture and discipline, and must often have been thrown together. At any rate, he imbibed something of the same spirit as Milton, for his contemporaries speak of him as a scholar and pious in his life. Seeking larger freedom of thought than could be found in the London of that day, he made his way to Massachusetts, and there, within two years of his arrival, he died, prematurely, as it then seemed, but in the fullness and perfection of time, as is now manifest; for, finding the infant colony struggling without means to establish a college in the wilderness, in the first decade of its settlement, he bequeathed to its foundation his library and half of his considerable fortune, and, what was better still, his name, which has now become so illustrious. The colonial record is quaint and touching:—"After God had carried us safe to New England and we had builded our homes, provided necessaries for our livelihood, reared convenient places for God's worship, and settled the civic government, one of the next things we longed for and looked after was to advance learning and perpetuate it to posterity, dreading to leave an illiterate ministry to our churches when our present ministers shall lie in the dust. And as we were thinking and consulting how to effect this great work, it pleased God to stir up the heart of one Mr. Harvard (a godly gentleman and lover of learning then living among us) to give the one-half of his estate (it being in all about £1,700) towards the erecting of a college, and all his library. After

him another gave £300, others after them cast in more, and the public hand of the State added the rest. The college was by public consent appointed to be at Cambridge, a place very pleasant and accommodate, and is called according to the name of its first founder, Harvard College." It assumed in its arms, as you will see in the window, a double motto—*veritas*, truth, a word broad enough to embrace all knowledge, human and divine; and, what meant the same thing, *Christo et Ecclesiæ*, to Christ and his Church, that the supply of godly ministers might never fail.

And now, after the lapse of three centuries, the little college in the pathless wilderness has become a great and splendid University, strong in prestige and renown, rich in endowments, and richer still in the pious loyalty of its sons, who supply all its wants upon demand with liberal hand. It is not unworthy to be compared with Oxford and Cambridge, those ancient nurseries of learning from which it drew its first life. And the name of John Harvard shares the fame which mankind accords to the founders of States. From the beginning until now it has occupied the foremost place in America as a radiating source of light and reading. In all the great movements of progress by which the United States have advanced from that little handful of storm-swept immigrants on the Atlantic coast to the Imperial Republic of to-day, Harvard University and its sons have had their full share; and without disparagement to her younger sisters, who are many and great, it may truly be said that, as she was first in time, she has always been first in position and influence; and especially in the matter of education, which is and always has been the chief industry of America, she has always led and still leads the way. So considerable have been the contributions of her sons to the public and social and intellectual life of the nation that, if all other books and papers were destroyed, its history could be fairly reproduced from the Harvard University Catalogue, and from what is known of the lives of the *alumni* there registered. And if you ask if she is still true to her ancient watchwords *veritas* and *Christo et Ecclesiæ*, I can answer that, in our own time, in a single quarter of a century, she has sent forth Phillips Brooks to be a pillar of Christ and the Church, and Theodore Roosevelt to be a champion of the truth, and thousands more who in humble spheres follow in their footsteps and share their faith and their hope.

Thus the name of John Harvard, unknown and of little account when he left England, has been a benediction to the new world, and his timely and generous act has borne fruit a millionfold. Coming back to the very beginning of things, we are here to-day to lay a wreath upon

his shrine. I hope that this memorial, which the Dean and Chapter have kindly consented to accept from my hands, will long remain for Americans to come and see the very spot where one of their proudest institutions had its origin, and to remind all Englishmen who visit it how inseparable we are in history and destiny. I hope, also, that it may tend to keep alive the kindred spirit between the Universities of the two countries; for Harvard is just as surely the offspring of Cambridge and Oxford, and the own daughter of Emmanuel, as old England is the mother of New England. In the earlier period of the colony we had one hundred teachers from Oxford and Cambridge, and of these seventy were from Cambridge, and of these again twenty were from Emmanuel. So long as ideas rule the world let all the Universities of both countries stand together for truth, and with one voice let them say to the youth of both lands, "Take fast hold of instruction. Let her not go, for she is thy life." I am under deep obligations to the Dean and Chapter for consenting to receive and cherish this gift, and to Mr. LaFarge, the distinguished artist, for the noble manner in which he has designed and executed it.

THE ENGLISH BAR

ADDRESS DELIVERED AT THE THIRTIETH ANNUAL MEETING OF THE
NEW YORK STATE BAR ASSOCIATION, ALBANY, N. Y.,
JANUARY 16, 1907

I am advised by our strenuous and indefatigable Secretary that usage requires your President to receive the members of the Association at their annual meeting with an address of welcome in which some subject of interest to the profession may be presented. It is certainly delightful to welcome so large a gathering of the active and prominent members of the Bar of the State as are assembled here to-day. I am sure that our meetings and discussions and our published reports are of great value to the profession.

I seize upon the first opportunity to thank you for the great honor done me in electing me as your President after a long absence from the country, during which I was wholly withdrawn from your ranks.

In selecting a subject for my address, it has occurred to me that some account of the English Bar, as it was my great privilege to meet its members under the pleasantest circumstances, might possibly be of interest and advantage on an occasion like the present.

You will, of course, understand that I make no reference to the other branch of the profession, which is so distinct—the Attorneys and Solicitors—upon whose learning, efficiency and skill, the whole of the social and business life of England very largely depends; but I speak only of the Bar proper, and of it especially as represented by its leading members, with whom I had much personal intercourse. These are really a group by themselves, generally University men of generous culture, not deficient in means to sustain them during the long and dreary waiting for briefs after their call to the Bar, and then working their way to the front by force of character, courage and ability, and universally recognized as the worthy representatives of the whole body of our great profession.

Let me say in the first place as to the English Bench and Bar both, that I always found them full of interest in, and sympathy with, their brethren in America. Their fraternity with us was always cordially acknowledged, as that of two great branches of the same stock. In view of our common history and language and our identical system of jurisprudence, which relies upon the same authorities, English and American—freely interchanged—for the establishment of the same

principles of justice, I found no perceptible difference in what I may call the cardinal features of the profession between them and us. Their hospitality on all occasions was most cordial, alike in their private houses, in the Inns of Court, and in that great banquet which they gave to the Bench and Bar of the United States in 1900, which was promoted by that great advocate and jurist, Lord Russell of Killowen, the Lord Chief Justice, and which took place on the very eve of his untimely death.

While I was made to feel entirely at home among them, by the general resemblance and identity of our pursuits and surroundings, it was in the changes that time and circumstances have wrought in us rather than in them that I was most interested—and in the observation of which I think we have something to learn.

When Jeremiah Evarts, the father of my great master in the law, and himself a truly great and righteous man, had graduated from Yale, and was considering the law as a profession for life, he was greatly disturbed by the question whether as the one side or the other of every lawsuit was necessarily wrong, he could honestly and conscientiously engage in a pursuit in which about half the time he would necessarily be struggling to maintain injustice, and he consulted Judge Ellsworth, afterwards Chief Justice of the United States, who solved his doubts by advising him that any cause that was fit for any Court to hear was fit for any lawyer to present on either side, and that neither the judge nor counsel had the right to prejudge the case until both sides had been heard, and he told him of Sir Matthew Hale, one of the most righteous lawyers and judges in English history, who began with the same misgivings, but modified his views when several causes that he had condemned and rejected proved finally to be good.

That, I think, was true of all the functions of the American lawyer in those old days. His relation to the business of his clients was strictly professional, just as much so as that of the physician or the surgeon.

And so it is to-day of the English barrister. Whether he tries or argues a cause, or revises a pleading or a contract, or gives an opinion on the facts submitted, he acts without any interest in the matter, or any relation to it other than the purely professional one. The rigid rules of the profession by which he is bound absolutely forbid him to take a contingent interest or share in any controversy in which he acts professionally, and the slightest violation of this rule would compel his disbarment. And so the whole community knows that in proportion to his skill and capacity and judgment they may absolutely confide in his professional conduct, and that no private or personal interest in the

subject of the controversy can bias him to mislead or confuse the counsels of the Court. In the same way his compensation is not dependent upon the amount involved or upon the result of the controversy, but upon his own eminence and reputation. So that when I told some leading barristers that our Court of Appeals had decided that the amount involved and the result as to winning or losing, were material factors in the measurement of the lawyer's compensation, they fairly scouted the idea.

There is no doubt that two important changes in our system have seriously detracted from this strictly professional attitude of the American Advocate, and laid him open to question. I mean the fact that we have not maintained the distinction between the two branches of the profession, but every one of us is a barrister, a solicitor and an attorney, and where three or four of us combine to form a firm, each is properly held responsible for all that is done by any of the firm. But the chief cause of detraction from our absolute independence and disinterestedness as advocates is that fatal and pernicious change made several generations ago by statute, by which lawyers and clients are permitted to make any agreements they please as to compensation—so that contingent fees, contracts for shares, even contracts for half the result of a litigation are permissible, and I fear not unknown. How can we wonder then, if the community implicates the lawyer who conducts a cause with the morale of the cause and of the client? If he has bargained for a share of the result, what answer can we make to such a criticism? And how can we blame the community when it suspects that such practices are frequent or common, and even sanctioned by eminent members of the profession, if they confound us all in one indistinguishable crowd, and refuse to accord to any of us that strictly professional relation to the cause which the English barrister enjoys? And how can the Courts put full faith in the sincerity of our labors as aids to them in the administration of justice, if they have reason to suspect us of having bargained for a share of the result?

If you ask me whether there is no way out of this confusion of condemnation or suspicion for the individual lawyer, I say emphatically there is.

True, we cannot go back on the habits of generations, or repeal statutes which have imbedded such practices in the social habits of the people. But the individual advocate can persistently refuse to follow such practices, or to take a contingent fee or a share in the controversy, and I am old-fashioned enough to wish that every member of the profession who aspires to leadership would take such a stand, and to

believe that if he did so, it would promote his reputation and success in true professional distinction.

For a whole generation, yes, for two generations, we had before us a noble example of this moral distinction—alas, he is no longer with us—I refer to the late James C. Carter, who so long and so gloriously led us, and who I believe never touched a contingent fee or a share in a controversy of which he had the conduct, and was for all the world exactly like the best examples of the leaders of the English Bar.

In another respect the English barristers have a great advantage over us, and one that tends to promote and increase the reasonable enjoyment of life, and that is in more frequent recreation and relaxation and more stated and prolonged holidays—holidays established by custom which has the force of law. In all the time of my busy practice in New York, we were steadily engaged in Court from the first Monday of October to the last Friday of June, with hardly an appreciable break—a few days at Thanksgiving, the week from Christmas to New Year's, and the legal holidays, very few in number. With these scanty exceptions, it was one perpetual grind of work for nine successive months, and the few lucky ones were those who had the temperament and the physique to stand the strain.

But in England the Courts come in with appropriate and appointed ceremonies on the twenty-fourth of October, and work for eight weeks, which brings them to Christmas and a two weeks' holiday—when every barrister drops his briefs absolutely and quits London for the country or for the Continent, which can be reached in a few hours. Then they return and work for eight or ten weeks more, which brings them to the Easter recess, another real holiday of ten or twelve days, with the same advantages—another eight or ten weeks of work and Whitsuntide arrives, a third intermediate holiday, of which we know nothing and which we ought to borrow at once, and then a fourth term of eight or ten weeks of work brings them up to the twelfth of August, when the law is off on grouse, and Courts and barristers, King, Lords and Commons disappear for the long vacation of ten or eleven weeks, which brings them back new men for the beginning of the working year again.

Thus, with the same or only a little more vacation in the aggregate these frequently recurring holidays of substantial amount, which are thoroughly availed of, relieve both judges and barristers of that protracted and unrelenting strain and pressure which I used to find it so hard to bear.

The amount of litigation in proportion to the population must, I think, be much less in England than in New York. Otherwise it would

be quite impossible for the thirty-five judges of the High Court and the Lords Justices of Appeal, and the Judicial Committee of the House of Lords to dispose of the whole of the principal business of England without any serious accumulation of arrears, while in the State of New York, with its eight millions of people, we have ninety-seven Justices of the Supreme Court, seven Judges of the Court of Appeals and ten Federal Judges. Doubtless the County Courts in England dispose of more business and give greater relief to the High Court than is afforded by similar subordinate tribunals to our Supreme Court, but, for all that, the volume of business must be vastly greater here than there.

It is an essential part of our system to bring justice home to every man's door, and it is made very cheap here, especially for the losing party, while in England litigation, for the party who unsuccessfully and without merits prosecutes or defends a lawsuit, it is a seriously expensive business, for in the exercise of the discretion vested in them, the judges in the adjustment of costs are inclined to charge the beaten party with the whole expense of the litigation, including the counsel fees paid by the other side.

Here again comes in another unfortunate result of our system of contingent fees which has resulted in blocking our calendars with thousands of experimental and speculative lawsuits, in arrears, in at least one of our departments for two or three years, which it is quite impossible for our judges to cope with.

Everything in the system of English judicature seems to be arranged with a view to the despatch rather than the accumulation of business. They have nothing like our dismal Code of Civil Procedure with its many thousand sections, which itself in the whole history of its growth and development has been, and is to-day, a prolific cause of litigation and delay, and affords, I should think, an opportunity for a distinct and separate motion every week from the commencement of the cause till its trial. Instead of that they have a few simple rules of practice made by the High Court and always under its control, and these are very simply administered, usually before a Master, after the cause is at issue—and the barrister is generally relieved of any attention to that part of the practice which acts so thoroughly upon the nerves of any lawyer who is engaged in great affairs.

Our pernicious and dilatory habit of waiting for counsel, who are engaged elsewhere when the cause is reached or called on the day assigned, is practically unknown, and the consequence is that in an important cause several counsel must be retained, so that if one is not ready, another shall be, and the cause proceed.

Of course the solicitors and attorneys prepare briefs, and relieve the barrister of a vast amount of that kind of work out of Court, for which counsel with us are largely responsible. I am sure, however, that every conscientious barrister, from the moment of receiving his retainer, is ready to hold consultations and advise on every important step, but as a rule they are not troubled with interviews with parties and witnesses in preparation for the trial. In fact, direct communication between the barrister who is to try the case and the witnesses is theoretically disallowed, and seldom happens.

But it is in the actual conduct of the case in Court that the barristers derive great assistance and support from the prompt and efficient system that prevails. The judges being appointed by the Government, practically selected by the Lord Chancellor from barristers who have been long in active practice in the Courts, are already fully qualified for the performance of judicial duties from the moment they enter on their exalted office, and are not only presumed to know the law, but generally do actually know it. Such a thing as a judge having to be educated upon the Bench, so expensive and so detrimental when it does happen, is utterly unknown there, and as a result the judge takes charge and holds control of the case from beginning to end. Questions of evidence and motions for nonsuit which with us are often occasions of prolific argument are promptly decided. The judge is presumed to know the law of evidence, and it rarely happens that such a question has to be more than stated in order to have it disposed of. Perhaps I was myself as great an offender as anybody in the consumption of time in the discussion of questions of evidence, having often argued them by the hour; and I well remember one case with Mr. Roscoe Conkling where we spent an entire day in the argument of a motion to nonsuit, and even then the Court adjourned till the next morning to decide it.

In cases tried without a jury, including equity, probate and admiralty causes, when the judge has heard the evidence and the arguments, he is generally ready to decide it, and the pernicious habit which once prevailed, and I fear still prevails with us, of taking two weeks, often extended to four, to hand up briefs, when the judge will have largely forgotten the case, and will have to study them at his subsequent leisure, is practically unknown, and the proceedings upon appeal in cases reserved are greatly facilitated by the appeal being heard on the judges' minutes, and report of the points reserved.

If you ask me how the leaders find their way to the front, I should say exactly as they do with us. They are eliminated by a process of natural selection, for merit and fitness, from the whole body of the

Bar. I have known the leaders of the Bar on both sides of the Atlantic, and in this respect the same rule prevails. There is every variety among them of physical, mental and moral qualities. No two are ever alike in personal characteristics, except in one vital and essential quality, which is common to them all, I mean the power and the will to hold on and hold out, under all circumstances and against all counterinducements until the goal is reached. This indomitable tenacity of purpose with brains, health and character insures success and leadership there as here.

A very striking story told me by one of the gentlemen named illustrates what I mean. Some forty years ago on the Northern Circuit three able and ambitious young men had tried hard for a few years, by assiduous attendance, for business in the Courts, and almost hopeless of success, they met and seriously discussed the question whether they should not give it up, and seek some other service in the Colonies, or in some of the many avenues of employment which are open there as here to barristers who despair of the future in the direct line of the profession—but they held on, for life or for death, and in thirty years or thereabouts from the time of their discussion, one had become Lord Chief Justice of England, as Lord Russell of Killowen, the second Lord High Chancellor, as Lord Herschel, and the third Speaker of the House of Commons, who, after an arduous and honorable term of service in that high office, now lives in retirement as Viscount Selby.

The question of emoluments is always an interesting one to lawyers, and if things remain as they were when I went to England eight years ago I should say that for professional leaders in the same relative position the earnings here and there were about the same. There is a well-worn story of Sir Roundell Palmer, who as Attorney General contested against Mr. Evarts the Alabama claims before the Geneva Tribunal of Arbitration, that in one year he realized fifty thousand pounds, but that was adding his compensation as Attorney General to his large and lucrative private practice, which is not permitted any longer to the Attorney General or the Solicitor General. But such earnings there or here represent a prodigious and killing amount of work; and the story is that an old friend desiring an interview with Sir Roundell, called at his chambers one Thursday morning, and asked if he could see him. The clerk replied that if he must he could do so, but he would advise him not to, for he hadn't been in bed since Sunday night. So I have heard of a great Chancery barrister many years later realizing in one year twenty-eight thousand pounds, and during my stay in London thirty thousand pounds a year was the highest sum I

heard ascribed to the most successful leaders of the day. Such earnings anywhere represent the absolute devotion of the highest professional qualities and the sacrifice of everything else to the largest interests of the commercial world. These figures compare very favorably with the best I ever knew or heard of, while I was actually engaged in steady practice. Since my return, I have heard of fabulous sums received by lawyers, either as shares agreed upon, or from great corporations or estates, as rewards for very moderate services. For the credit of the profession I decline to believe such stories, for in the long run nothing is so damaging to us as a profession as the spirit of commercialism—the Wall street notion, that money is the only thing worth striving for, an idea which when it once gets hold of a man unfits him for true leadership, and when it once gets hold of the profession is sure to demoralize it.

I have no time to discuss here to-day the much vexed question of the comparative merits of legal education here and in England—but from what I have seen of the leading English barristers, what splendid men they are physically, mentally and morally, how learned and broadly educated, accomplished and thoroughly equipped, I should say that the system which has produced such men, the combined results of education at the universities and the great Inns of Court, ought not hastily to be exchanged for another as a training for the English Bar.

Perhaps some day the Inns of Court will combine their splendid resources to create and maintain a great University of Law, to which men of all nations, races and languages will resort for legal training, but although this was strongly urged upon them, I believe by Lord Russell and other prominent benchers, the time for such a serious change has not yet come.

Those splendid Inns of Court to which I have so often referred—for it is impossible to speak of English law or English lawyers without constant reference to them—afford to our brethren who belong to them and to whom they belong, a home around which their affections centre, and places and occasions of social and fraternal intercourse utterly unknown to us.

As the sole authority through which admission to the Bar can be obtained, as seats of study and learning in preparation for professional life, as the custodians and guardians of all the history and traditions of the law; they command the loyal affection and devotion of all their members. As the great nurseries of the common law and of equity, and identified in their annals with the whole progress of justice and of

civilization in England, established already for centuries, while we were yet a component part of the English nation, I regard them as the common property and the common pride of all lawyers the world over who speak the English tongue. There our predecessors in the Bar of England have been working out by patient industry, and with ever advancing knowledge those principles which underlie the liberties of England and America alike, and the debt of gratitude we owe them for that long service cannot be overstated. What are those absolute principles which thus lie at the foundation of our common civilization? "That there is no such thing as absolute power, that King, Lords and Commons, Presidents, Congress, Courts and people are alike subject to the law, that before its supreme majesty all men are equal; that no man can be punished or deprived of any of his rights except by the edict of the law pronounced by independent tribunals which are themselves subject to the law; that every man's house is his castle, and though the winds and the storms may enter it, the King or the President cannot; that our government on both sides of the water is in the sublime words of the great Sidney 'a government of laws and not of men.'"

You will not wonder then that in common with all other lawyers I felt an immediate and personal interest in those cradles of the law in which, before America was discovered, those ultimate principles of right and justice which our fathers brought over with Magna Charta and the Petition of Right were brought into being, and already in the way of final establishment.

Those graceful and magnificent halls, rich in beauty and teeming with great traditions, about which the memories of all that has been great and noble in our profession for five centuries still linger, cannot but have an ennobling and inspiring influence upon all who frequent them. The footsteps of American lawyers on arriving in England naturally turn first to them, and often as I haunted them I always met and heard of my countrymen there before me. Their unbounded hospitality often gladdened my long stay among them. On Grand Night in each term of Court when the Benchers of each Inn assemble within those noble walls to entertain their friends and their members and students, with the portraits of the great judges and lawyers of the past whom they claim as their own looking down upon them, and the shields and arms of their treasurers for centuries surrounding them, they seemed to me to represent and embody the living spirit of our law, holding now for the time being, and for transmission to future generations, all the rich heritage of the past. And when as a tribute to the American Bar and in demonstration of their fraternal sympathy and

affection they made me too a Benchet of the Middle Temple, to represent you all, and in the same spirit bade me farewell at Lincoln's and Gray's Inns, I felt that my professional life had not been wholly in vain.

My conclusion, from a fair knowledge of both countries, is that in the law, as in every other element of our common civilization, each nation has yet much to learn from the other, and that to that end we ought studiously on both sides to cultivate more frequent and constant intercourse and a better knowledge of each other, and no profession can do so much as ours to bring about this happy consummation.

I also became thoroughly convinced that for each country its own system of legal administration and of professional life as it stands to-day, is better than any abrupt or violent effort at reform would be. That system for each nation has been slowly evolved out of social usage, and common law and statute in the course of centuries, and any sudden changes would be more likely to mar than to mend it. But we may hope on both sides, by the friendly interchange of ideas from time to time, to gain much in the way of progress and improvement.

HENRY CODMAN POTTER

REMARKS IN MEMORY OF BISHOP POTTER AT A SPECIAL MEETING OF
THE CENTURY ASSOCIATION, NEW YORK, DECEMBER 12, 1908

Mr. President: On such a dignified occasion as this I did not like to trust to extemporaneous speech, and I therefore ask to read a brief appreciation of our departed friend.

I certainly could not, for want of knowledge, have talked about him as a Bishop. I cannot remember having ever seen him in church, and certainly never heard him preach. In truth, I love the outside of the churches quite as well as the inside, and am very like James Thomson—not the poet of “The Seasons,” although he spelled his name in the same way. Few of you, probably, remember him, but he was a great habitu  here twenty, thirty, forty years ago. He subscribed liberally to the church, which his wife attended, duly escorted by him, and the pastor called him a buttress of the Church; but Evarts, a great pal of his, said he must have been a flying buttress. Now that is the way, I am afraid, in which I present myself; and flying buttresses, as everybody knows, certainly cannot see what is going on inside, in the chancel or in the pulpit.

But if you will let me speak of him as a man of the world, as a man among men, which was the phase in which I knew him best, and was in frequent contact with him for thirty years, I shall be glad to do so. In fact we were so much together on the same platforms, in the same causes, that we must have grown to look alike. At any rate, I was often taken for him in the cars, in the street, in the elevator, much to his amusement. One day a good lady sitting opposite to me in an omnibus began to talk to me about her spiritual condition. When I drew back, a little startled, she started, too, and exclaimed, “Why, are you not Bishop Potter?” Again, in an Elevated car, I sat next to a man who was reading an evening paper, which had a picture of the Bishop. Seeing me looking at it he said, “Do you know, sir, how very much alike you and the Bishop look?” I replied, “I have sometimes been mistaken for him, but I don’t see it.” “Why,” said he, “the resemblance is perfect, only the Bishop never looks half as clerical as you always do.”

I got this off on the Bishop once at a public meeting, and he gave me a Roland for my Oliver, saying, “Well, that is the best thing I have ever heard about Choate.”

By a man of the world I do not mean a worldly-minded man at all, but a man that was in close touch and sympathy with men and women all about him, interested in their affairs, conduct and conversation; ready to do for them, act with them, think for them; and that without regard to their class, quality or condition; and this Bishop Potter was, in an eminent degree.

It is such men who make the best bishops, lawyers, diplomatists, presidents—the best anything, in fact, because they are so human, and Bishop Potter was very human. He chose for his motto, “*Homo sum, et nihil humani a me alienum puto,*” and he always lived up to that motto. Whether as president of this club, where, of course, he mingled with the best men in the city, or of the Thursday Evening Club, where he met the best women, or in the deadly heat of summer at the settlement house in Stanton Street, surrounded by the men, women and children of the slums, studying their wants and doing all he could for them; visiting the sick in the hospitals or the wicked in prison; in crowded assemblies speaking for every kind of good cause; at the dinner table with men of his own craft or of any craft, he was always *the man*, full of human interest and sympathy; and the goodness of his heart, quite as much as the strength of his head, made him the leader that he was for so many years in the social life of New York.

Of course he was a prodigious worker, never allowing himself an idle moment. Another of his mottoes must have been, “Never be idle,” and this was one other secret of his marvelous influence and success. If you could have followed him about the city you would have found him, I think, in some such labor as the Rector of St. Martin’s in the Fields found Gladstone. He was visiting one of his parishioners, a street crossing sweeper, and asked him if anybody had been to see him. “Why, yes,” said he, “Mr. Gladstone.” “What Mr. Gladstone?” “Why, the great Mr. Gladstone himself. He often speaks to me at my crossing, and, missing me, he asked my mate if I was ill and where I lived, and so came to see me, and read the Bible to me.”

His friends often wondered how he found time to accomplish all the countless things he did. Sermons every Sunday, addresses every night, parochial work, parish work, committees and meetings of all sorts, and, with it all, time for invalids and sufferers and anxious folks of all kinds who came to him or whom he visited for comfort and consolation. But he did find the time. He must have thought out his addresses and sermons in his waking hours in bed, and finished them on the wing, as he walked or rode, for he had the grand habit of riding every day, and he certainly never threw away an hour. Time he valued

far more than money, and as Franklin said, "Take care of the pennies and the pounds will take care of themselves," so he said, "Take care of the minutes and the hours, days, weeks and years will give a good account of themselves."

Before I quit the point of his interest in the East Side, in our people of the lowest condition, I should like to pay to him the same tribute that he paid to another old Centurion, Theodore Roosevelt, a co-laborer with him in all that sort of philanthropic work. I do not mean the President, but his father, who led a strenuous life and was in his day a great power for good in New York; not so famous, but quite as worthy as the son. "Theodore Roosevelt," he says, "in the Newsboys' Lodging House, in the Cripples' Hospital, in the heart of the little Italian flower girl who brought her offering of grateful love to his door the day he died, has left behind him a monument the like of which mere wealth could never rear, and the proudest achievements of human genius never hope to win." So in city and country alike Bishop Potter made himself beloved for his kindness and sympathy. When he lay dying at Cooperstown on the Fourth of July, the Selectmen requested men and boys alike to abstain from all noise,—so inseparable from the day, as John Adams, who must have been a great lover of noise, advised,—and it passed with all the stillness of a Sabbath Day; not a gunshot, not a cracker, not even a torpedo; and so this friend of humanity, for the love the people bore him, was allowed to die in peace.

Before I refer to the long catalogue of good causes to which he was always devoting himself, I should like to insist for a moment upon the immense self-denial, the constant sacrifice of comfort and personal convenience, the fatigue and exhaustion which such work involves. The laborers are few and the pressure upon them is pitiless. I have heard that the number of subscribers to the organized charities in New York is very small, not more than a few thousands, in our vast host of well-to-do citizens; not nearly so many as the owners of automobiles. The same names are constantly found on all the subscription papers. So I know that the list of men who actively participate, by their personal presence, thought and speech, in all the movements to promote the social advancement of our people, is a very meagre one. Most men prefer to give what they are pleased to call their sympathy, and devote themselves to their business and after that is over, to their slippered ease at home, to cards, to books, to the theatre, to the opera or to sleep. They haven't the least idea what it costs, what it takes out of a man, after the full day's work is done, to brace up and give evening after evening, week in and week out, year in and year out,

to philanthropic, charitable, educational, social and public work, as Bishop Potter, who, from his high character and position, was always called on, was perpetually doing.

I venture to say, in his more than thirty years of active work, that never a week passed, hardly a day, in which he was not actually engaged in some such good work, and such pressure was brought to bear upon him that he found it impossible to say "No." It was not a part of his professional work, but was in addition to it all, and the proper work of a Bishop is enough to test the endurance of the strongest, as you all know. Was it some movement to advance or extend education in the thousand and one forms in which it is constantly coming up, or for the correction and cure of some social evil, or for the organization of charities, to improve the condition of the poor, or to induce the rich to come forward and give the aid that was needed, for the relief of prisoners, or of sufferers from some of those great catastrophes which are constantly occurring, or some purely social occasion, or for the rescue of the negro race,—no matter what the cause was,—so only that it involved the public welfare or the relief of suffering humanity,—Bishop Potter was always called upon and always ready. And besides this his study was daily besieged for advice by men and women, who thought, that because he was a Bishop, he certainly could do something for them.

If one of our clerical brethren would lend me his pulpit and let me preach from the text, "Whosoever would be chief among you, let him be your servant," I certainly would illustrate it by the whole life of Bishop Potter.

Sometimes his engagements were more than he could possibly keep. I remember once, in the infancy of Barnard College, when we were straining every nerve to start it,—after Columbia had banged its doors upon women,—and he was to be the chief speaker, but he didn't come, and I was put up to talk against time until Bishop Potter came; and for more than an hour I talked about everything and about nothing, until at last I had to adjourn the meeting; and afterwards it turned out that the Bishop had been caught equally unawares somewhere else and kept at work the whole evening.

He managed to get a vast deal of interest and amusement out of his work as he went along, and kept his eyes constantly open for what I may call human incidents. Once we were speaking together at the opening of Captain Webb's School for Sailor Boys, and when I sat down the Bishop, who was presiding, said to me, "Did you see that pretty girl who was enjoying our speeches so much?" and called my

attention to a very young lady, whose hand was held by a much older lady who sat by her side and constantly played upon it as on a piano. It was Helen Keller, deaf and blind and dumb, but she was enjoying the meeting as much as anybody, and the Bishop enjoyed her more than he did the meeting.

I wish that his example might stimulate some of our lazy and self-indulgent ones to brace up and throw off their slippers and smoking jackets, and help fill the great gap that he has left.

His buoyant temperament was worth millions. His love of fun was a great help to him in his overwhelming labors, and any joke at his own expense or that of his profession was always most welcome to him. He loved to tell of the old lady on whom he was making a parochial visit and whom he asked the question whether she believed in apostolic succession, and, after long pondering, she replied, "Well, I have nothing agin it." "Nothing agin it," which represents in our day quite a high degree of faith.

He loved Mr. Carter's story of the young man who was trying for a license to enter the ministry, in the good old days, and the examiners put him through all the standard questions, which he answered well, until they came to the final test, "Would you be willing to be damned for the glory of God?" to which he said, "Of course not," and was turned down and went away sorrowful. But he was determined to succeed and to try again, if he had failed at first. So he came the next year, and when they came to the crucial question, he was ready for them. "Would you be willing to be damned for the glory of God?" "Why, certainly," he said, "I should much prefer it." It is needless to say that he got his license without delay.

Thus, besides being a distinguished Bishop and an eminent publicist as the preceding speakers have described him, he was a most public spirited and useful citizen, a genuine philanthropist, altogether worthy to be classed with the great Centurions of the past whose company he has joined; such men as Bellows and Olmsted and Roosevelt and Hewitt, and Dodge and Jesup. And let us hope that our ranks will never fail to supply them with worthy successors.

CHARLES FOLLEN McKIM

ADDRESS AT THE McKIM MEMORIAL MEETING, HELD IN THE NEW
THEATRE, NEW YORK, NOVEMBER 23, 1909

We have assembled in this wonderful hall to-day, at the combined invitation of all the organizations for the promotion of art in New York, to pay a tribute of respect and affection to a great artist, a noble gentleman, a self-sacrificing and public-spirited citizen, and the recognized leader for many years of a powerful and brilliant profession. I deem it a signal privilege and honor, as a lifelong friend of Mr. McKim, to have been asked by this great body of his professional colleagues and disciples to address this interested and sympathetic company of his admirers. Interested and sympathetic I know you must all be, for it was impossible to come into contact with Mr. McKim without loving and honoring him, or to be even the most casual observer of his work without some appreciation and admiration of that.

We have all known him in the zenith of his fame—long recognized at home and abroad as the foremost of American architects—creating in rapid succession building after building, public and private, of singular dignity, simplicity, and beauty; surrounded by all the signs of affluence and luxury, consulted as the leading authority on all matters of taste and art, with all sorts of honors and distinctions heaped upon him, and yet always as simple as a child, as modest and gentle as a woman—shunning publicity and shocked at all ostentation.

It would be interesting to know from what beginnings all this greatness, this gentleness, this instinct for beauty, came. Some day I hope his life will be written by some competent hand.

Recently there were placed in my hands some letters of his to his father, written in his twentieth year—probably before any person present here to-day had any knowledge of him—which seemed to me to shed much light on the formation of his manly and beautiful character.

We know something of the father and the mother, too—a sturdy abolitionist and a famous Quaker beauty. It was from her, no doubt, that he got his striking grace and delicacy of feature. They were both as brave and fearless as they were plain and simple in life and manner. To show their faith by their works, they accompanied the widow of John Brown to Virginia to bring home his mangled body, which was to lie moldering in the ground while his soul went marching on.

The letters are from Cambridge in the summer and fall of 1866,

where the boy was searching in vain in the vacation for a teacher to coach him in chemistry and mathematics to enable him to enter the Lawrence Scientific School in the Mining Department. Mining engineering was what he was bent upon, with no more idea of becoming an architect than of studying divinity.

The Quaker discipline and spirit is stamped upon every line of his letters. They are addressed to "Dear Home," and they reveal on every page the simplicity, the earnestness, the narrow means and self-denial of that home and of the writer. Simplicity, quietness, self-restraint—were not these his guiding motives all through life? Are they not the very things that the name of McKim, Mead & White stands for still? Truly the boy was father of the man. He uses the Quaker style and vernacular: "Father, does thee think I had better come home to Thanksgiving, or will it be spending too much? I can wait till January if thee thinks it best," but "Do send mother to see me" is his constant refrain. "Dear mother, thee must come!" His prevailing thought seems to have been how best to ease the burden of his education on the lightly furnished family purse. What he seems to have intended was one year in the Scientific-School and then two years in Paris—not at all at the Beaux Arts, but in the School of Mines, where the education for his life's calling would be cheaper and better. The spur of necessity was the goad to his ambition, as it always has been to most Americans who succeed. Evidently he had no love for mathematics or mining, but he could toil terribly even at that. What it was that in one short year at Cambridge roused in his soul the dormant love of art and passion for beauty we cannot tell. But kindled they were, and at the end of the year he went straight to Paris and to the Beaux Arts to study architecture and then to travel as long as he could and feast his soul on all the wonderful and beautiful buildings which abound in France and Italy. And at last he comes home, fully equipped for the arduous and fascinating labors that were to fill and crown the thirty years of his successful and brilliant career. In architecture, as in every other profession, opportunity counts for much, and he found a golden opportunity awaiting him.

When Lincoln at Gettysburg, in the middle of the war, said, "This nation under God shall have a new birth of freedom," even he perhaps little dreamt of the marvelous growth and development which that new birth should usher in. Not only was slavery to be abolished and the Union to be rebuilt upon imperishable foundations, but upon these was to arise a wholly new America, of a power and grandeur unknown before, and pregnant with a progress and prosperity never approached

by any nation in the same period of time. The national energy and enterprise were to expand and spring forward by leaps and bounds. A really new people, fired by the stimulus of success in a great war on which the salvation of the nation was at stake, were to grapple with the overwhelming problem of national expansion. New cities and States were to be founded and the old ones rebuilt, and art and architecture especially were to contribute to this development as they had never done before.

Some of you are old enough to remember how New York looked at the close of the Civil War. From the Battery to Forty-second Street it was covered with buildings in the construction of which stability and utility had been consulted, but very rarely beauty at all. Architecture was at a very low ebb, and architects were at a decided discount. Scattered through the city there were many good churches and some good public buildings, and there were two actual gems which still exist to challenge admiration—St. Paul's Chapel and our delightful old City Hall, which has, I believe, but one blemish, that while all the rest of the building is of beautiful marble, the rear wall was of brown stone, it being thought in 1795 that nobody would get so far up-town as to see it. But these two noble examples had been so far forgotten and overlooked that our new Court-House, hideous in its composition as in its history, and the new Post-Office, another horror, were built right over against them to hide them from view; and at the other end of the city the grim Croton reservoir frowned upon us, on the very spot where the New Library now lights up the whole surrounding region.

But for the great fire of London, which laid waste a whole city for him to rebuild, Sir Christopher Wren would probably never have been heard of except as the worthy but obscure professor of astronomy at Oxford. No other architect in modern history had such an opportunity as that. But McKim and his contemporaries, disciples, and followers had their opportunity, too, when it fell to their hands to reconstruct our somewhat ugly and obstinately commonplace city with its long rows of plain and uniform brownstone fronts, and adorn it with so many dignified and beautiful structures which we now take pleasure in showing to strangers.

The architects of the last thirty years have not only built for us a noble city, but have raised their own profession into a brotherhood which almost outranks all the others in efficiency and utility.

When McKim came home in 1872 to offer his services to his countrymen as an architect of recognized qualifications, only a very few of the many societies which have been united in inviting you here to-day

to do honor to his memory had come into existence. The Metropolitan Museum of Art, which heads the list, had but just been founded, and was leading a precarious existence, with no idea of the possibility of its ever attaining its present splendid position.

I shall not in this presence undertake to draw any comparison between him and any other of his brethren, or to measure or analyze his merits. I shall leave all that to his professional brethren. I only know that, by common consent of them all, he was for years recognized, admired, and honored as their leader and master; that many of the chief ornaments of this and other cities are his personal work, or that of the firm of which he was the head and moving spirit; and that not only in his own country, but in England and in Italy, the highest authorities in art have selected him to receive their special honors. And how modestly and meekly he bore all those accumulating honors! I remember when he came to London in 1903, when at the very top of his profession, to receive the Royal Gold Medal for services to architecture the world over, how modestly and timidly he bore himself. He was really all of a tremble, and nothing would do but that Mr. Henry White and I, who had been his friends for many years, must stand by him through what he regarded as a terrible ordeal, and so we held up his arms. And when it was all over, and he began to receive the congratulations of his friends from home, he cabled back: "Thanks! many thanks! but I still wear the same hat!" And that was the beauty of it and of him. No matter what happened, no matter what he achieved in the way of success and fame, he always wore the same hat—his head never swelled; he carried it all off with absolute Quaker simplicity. It required all his early training to bear meekly the flood of applause and adulation which, with many men, would have called for a hat of colossal proportions.

When he took into his hands the British Gold Medal, he said that he accepted it as an honor due not to himself, but to his profession in America, whose representative he was proud to be, and I am sure that he would not be content to-day if we failed to recognize the encouragement which he received from those who went before him, and the constant aid and support of those who shared his labors and his triumphs. It is impossible to-day to forget his indebtedness to Richardson and Hunt, those two brilliant masters and examples to whom he was proud to declare his allegiance and loyalty. It was in Richardson's office that he began his professional life, and although few traces of the influence of that distinguished forerunner are visible in his work, he never ceased to be grateful to him for smoothing his first steps. And working

side by side in the same city with Hunt, that ardent and intrepid spirit whom he cheerfully recognized so long as leader and chief, it was impossible but that each should give much to each other—much aid, much encouragement, and much inspiration. Let us not forget that Richardson and Hunt led and blazed the way in which McKim so modestly and triumphantly followed.

Another important factor in McKim's life-work was the founding and maintenance of the professional firm in which the names and labors of Mr. White and Mr. Mead were indissolubly linked with his own. For more than twenty-five years they were like brothers, brain to brain and heart to heart, sharing each other's labors and designs and triumphs. It was impossible often to tell where McKim's work ended and the others' began, or how much of any given piece of work was done by the one or the other, or which contributed the more important part. At a great banquet, when Burnham, who was presiding, attributed to McKim the great merit of Madison Square Garden, McKim is said to have interjected, "*White*," and that was the only word he uttered on that occasion. McKim always imputed to his partners a full and equal share of the credit and merit of what was done in their joint names, and during the whole existence of the firm no single piece of work was undertaken except in their joint names, but upon almost every piece of their joint work the impress of McKim's peculiar personality and fine genius is indelibly stamped. The truth is that the three stood together at the head of the profession, and the city and the nation owe to their joint labors an everlasting debt of gratitude. Each relied upon the other, and their mutual devotion and admiration knew no limits.

And there was another personal association and ever-abiding influence which McKim enjoyed in all his later years—in the friendship of Saint-Gaudens. I do not suppose there ever was a closer union, or a more active sympathy, between three great artists of kindred tastes and the same exalted aims, than that which bound together McKim, Saint-Gaudens, and White—working together, helping each other, criticizing each other, and all intent together upon the same end—to elevate the artistic standard which it was the great object of their lives to promote and advance. All three have passed away together in three short years. As they were united in life, they were not far divided in death, a triple calamity and loss to the city and the country.

The secret of McKim's professional eminence was not far to seek. There was nothing strange or providential about it.

Emerson attributes to the greatest of architects a sort of special divine inspiration :

"The hand that rounded Peter's dome
And groined the aisles of Christian Rome
Wrought in a sad sincerity.
Himself from God he could not free.
He molded wiser than he knew;
The conscious stone to beauty grew."

And another poet, two hundred years before Emerson, had explained the first miracle in a similar figure of speech :

"The conscious water saw its God and blushed."

But, in the sober prose of modern life, conscious stone is as rare as conscious water, and architects must work out their own salvation. McKim did this by the hardest of hard work, by concentrating his whole mind and heart and feeling upon his work as an architect, never turning to the right or left, or trying his hand at any other art.

Evelyn, writing from Rome, says : "Bernini, the Florentine sculptor, architect, painter, and poet, a little before my coming to Rome, gave a public opera wherein he painted the scenes, cut the statues, invented the engines, composed the music, writ the comedy, and built the theatre." And it has been happily said of Michelangelo that he wore the four crowns of architecture, sculpture, painting, and poetry.

McKim was satisfied with the crown of architecture only, and to win and wear it he gave his life's blood.

I asked Mr. Mead what he thought was McKim's chief motive and object in life, and he said : "Perfection in whatever he undertook to do."

To this single lofty aim he devoted all his powers—his fertile imagination, a memory richly stored with treasures, a patient study of all the best examples of ancient and foreign art, a self-control which enabled him to persuade and control others, an insatiable love of beauty, and that sweet reasonableness which was an essential part of his nature. And with all this, in spite of occasional moods and apparent lapses, he had that unyielding tenacity of purpose which kept the end in view always from the beginning, and which is the invariable trait of leadership in all professions.

But, besides being a great artist, McKim was a great educator. The influence which his work and the work of his firm exercised upon the public taste and judgment was of incalculable value. Scattered through many cities, each building they designed was an object-lesson to the public in dignity, harmony, and beauty. How can even the casual ob-

server stop to gaze at such buildings as the Boston Library, the Rhode Island State House, or the Columbia or Morgan library without being deeply impressed? I am sure these are creating an enthusiasm for beautiful buildings, which is sure to grow and never to die out among us. And yet I fear that not one in five of this company of his admirers has gone out of his or her way as far as Seventh Avenue to study the last and perhaps most marvelous of all their works, the new Pennsylvania Station.

I must leave it to others to tell you how much he has done to elevate the standard and the dignity and the value of his own profession—how large a proportion of the younger architects of to-day have graduated from his office, and have carried with them into actual work throughout the country the impress and the influence of his large imagination and his abiding inspiration. You will hear from them, I doubt not, of his ever-living sense of public duty and responsibility; how freely he gave of his time, his thought, and his influence to the great work of the improvement of the Capitol and the laying out of the city of Washington; and, more than all the rest, how, remembering the difficulties that beset his own career at the outset, he labored in season and out of season in the founding of the American Academy at Rome, which in life and in death was the darling object of his hopes. Who knows but that those hopes may be speedily and finally realized and completed by some timely helping hand?

The name of an architect is generally lost in his works. Of all the great buildings and structures that survive from a remote past, only a very few have brought with them the names of the great geniuses who must have designed them. "Here lies one," wrote Keats in his own epitaph, "whose name is writ in water." But those whose names are writ in stone are hardly as lasting. I doubt whether one in fifty of this audience can give the name of the truly eminent architect who designed our City Hall at about the time that Keats, whose fame has ever since been growing, was born. Now and then there is a signal exception. The name of Agrippa, on the portico of the Pantheon, has kept his fame alive as a great builder for centuries after his military achievements are forgotten. The ashes of Wren, happy in death as in life, enshrined in the great cathedral that he restored, surrounded by what remains of the beautiful churches that he rebuilt, are marked with that matchless inscription: "*Si monumentum quæris, circumspice.*" "If you seek for his monument, look around you." Hunt's statue upon the roof of Mr. Vanderbilt's house—his masterpiece—so unique and characteristic, will keep his features in view as long as that beautiful house shall stand;

but his monogram "R. M. H." must be stamped upon it to tell future generations who he was. Indeed, there is no sign manual for architects as there is always for painters. But McKim's spirit and memory will survive not only in the masterly and beautiful works of his hands, but in the new life that he inspired in his great profession, in the valued services that he rendered to his country, in the ever-growing idealism which he fostered and encouraged in the American people.

Perhaps this is hardly the occasion to dwell upon those innate traits and qualities that made him so dear and precious to his friends, and his loss so deeply and widely lamented. But in truth he was one of the most charming personalities that America has ever known. Wherever he came, he always brought light and warmth and sympathy, which seemed to flow from him whether he spoke or kept silent. It was impossible to know him and not to love him, and, to borrow the language of St. Paul, it may truly be said of him:

"Whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report; if there be any virtue and if there be any praise, we think of these things" as all embodied and transfigured in the life and character of Charles Follen McKim.

AMERICAN MUSEUM OF NATURAL HISTORY

ADDRESS AT THE UNVEILING OF A STATUE OF MORRIS K. JESUP, AT A
MEETING IN COMMEMORATION OF THE FOUNDING OF THE MU-
SEUM (1869), NEW YORK, FEBRUARY 9, 1910

Mr. President and Ladies and Gentlemen: Time, like an ever-rolling stream, bears all its sons away, and a lapse of forty years sweeps off a whole generation and more. After their forty years' wandering in the wilderness, when the children of Israel came again to be numbered on the plains of Moab, Caleb and Joshua alone survived of all who had escaped out of the house of bondage in Egypt; and so Mr. Morgan and I alone survive of those who founded this great Museum in 1869. We have accompanied its progress through mazes of doubts and difficulties until it has come at last within sight at least of a land flowing with milk and honey. I am sure that he will heartily join with me in this tribute to our departed associates, that this marvellous growth and development are to be attributed to their fidelity and courage, their public spirit and their unbounded generosity; and when I read their names you will realize how near they come to our hearts and homes, and how much richer and better New York is for their having lived in it:

John David Wolfe

Robert Colgate

Benjamin H. Field

Robert L. Stuart

Adrian Iselin

Benjamin B. Sherman

William A. Haines

Theodore Roosevelt

Howard Potter

William T. Blodgett

Morris K. Jesup

D. Jackson Steward

A. G. Phelps Dodge

Charles A. Dana.

It was to their initiative and far-seeing sagacity that the City and the country owe the beginning of this great educational and scientific institution, and, as you all know, there is nothing so hard as a beginning.

New York was sadly behind her sister cities in this interesting development of knowledge and science. Although she had many learned naturalists, and had made spasmodic efforts for the establishment of a museum in which their valuable collections might be gathered, she had allowed Philadelphia and Boston to be far in advance.

The advent of the great naturalist, Professor Louis Agassiz, at Cambridge, a signal event in the history of Harvard, his boundless enthusiasm for science, and the wonderful manner in which he imparted it to

his pupils and hearers, gave an impetus to the study of natural history not only at Harvard, but throughout the country, which had never been felt before. The truth is that the acquisition of one truly great man by a university does more for the advancement of learning than whole decades of mediocrity; and Harvard and the country awoke from long slumber to a new life of study and inquiry under the light and leading of this famous scholar and naturalist, and almost all the men who afterwards became famous in natural history flocked about him as pupils and gathered inspiration from his lips. The arrival of Professor Arnold Guyot at Princeton soon afterwards was another great incentive, and the formation and rapid increase of museums at the two universities and in Philadelphia were examples of the practical advance in science as a means of education which New York could not fail to imitate.

There were many strong men here interested in the subject; there were ample resources and many interesting and valuable collections within reach, but there was a total lack of organization, an apparent inability to get together, which paralyzed the growing and general desire for the establishment of a museum of natural history which should be worthy of New York as a great intellectual center. In fact, I am not sure that New York was then a great intellectual center. Its intense energies, stimulated by the triumphant close of our great Civil War, were concentrated in commercial channels, and while they were ready to give generous help to any honorable enterprise, our great merchants and men of rapidly growing wealth had hardly time to think of these higher and better things of the mind. They had to be solicited urgently and intelligently, before they could realize the importance to the city of such things.

Fortunately there came among us at an opportune time a young and intrepid enthusiast who realized keenly the possibilities of the situation and the vast importance to the city of the creation of such a museum. A pupil of Agassiz, and a man of boundless energy and indomitable persistence, Prof. A. S. Bickmore, was a capital engine driver to propel the train of the growing sentiment, and to him, I think, more than to any other one man is due the credit of initiating the movement which resulted in our foundation. It is pleasant to think that Professor Bickmore is with us to-day to enjoy the ripe fruits of his early labors, as is also Dr. Daniel G. Elliot, an important and influential friend and scientific adviser in the early days, and now a veteran and most distinguished zoölogist, again connected with our institution as an investigator and writer.

The first thing to be done was to obtain from the State a charter of incorporation for the founders, under which the scattered elements which might make a beginning of such an enterprise could be brought to work together. I well remember our visit to Albany to wait upon the magnates of the Legislature, and ask for such a charter. William M. Tweed was then in absolute command of that body, and I will say to his credit, as one white mark against the terrible array of black ones under which his memory has long since been buried, that he received us most courteously, and seemed to recognize the importance of the project which we had in hand, and the charter was quickly obtained and signed by the Governor.

We asked for no other legislative aid, and dared not expect or hope that the money of the people of a great democratic city could be asked or required to be spent to gratify the taste or promote the scientific pursuits of a few men of wealth and culture; nor did the most ardent lover of natural history dare to dream that within a single lifetime this magnificent group of spacious buildings would be erected at the public expense for the housing of our collections, and maintained by a liberal allowance from the city treasury,—so rapid has been the growth of a wholesome popular sentiment in support of what has proved to be one of our most valuable educational establishments, and a scientific institution which holds a leading place among those of the country and of the world.

The museum was organized under the presidency of John David Wolfe, whose administration of three years, from 1869 to 1872, was the formative period of the infant body which was destined by and by to reach such colossal dimensions as we see to-day. Quarters for the storage and display of its first collections were granted by the city in the second and third stories of the old Arsenal Building near the south end of Central Park, and there they continued to be kept, until in 1877 the first new building in the center of Manhattan Square was completed.

Those earliest days were full of struggle and full of hope, sometimes even against hope itself; and despair sometimes stalked among us as threatening and terrible as if the carnivorous dinosaur had come to life again and showed his terrible teeth; but the fidelity of the president and the never-failing generosity of the more wealthy among the trustees kept the tottering infant alive. Year after year they put their hands in their pockets to make up the inevitable annual deficit, that ever recurring terror and inspiration of all philanthropic institutions. And the boundless enthusiasm of such true lovers of nature and of nature's handiwork as William A. Haines and D. Jackson Steward, constantly

breathed new life and spirit into our ambitious purpose to make it a true museum of natural history worthy of the name and of New York.

From the outset we met with the usual fate of all, whether individuals or corporations, who become known as collectors. Miscellaneous collections of every description crowded in upon us much faster than our narrow quarters and limited means could possibly provide for them. Nobody can testify from personal experience more truly than Mr. Morgan of the unhappy predicament of a recognized collector. He does not have to seek collections, but collections seek him from all quarters of the world with voracious appetites and open maw, and would bury even him out of sight, if he had not learned to say No. So it was with our young museum, which would have been bankrupt from the start, if it had not denied itself many tempting offers and learned to say No.

Our first object was to attract public attention and gain public confidence by a well-ordered exhibition of our most attractive collections, while the rest were stored away to await future developments. The trustees and their friends raised forty-four thousand dollars the first year, less than one-tenth of what some of the individual trustees have since given, and five thousand visitors rewarded their efforts as against the million who now throng these spacious halls.

The brief administration of our first president did lay the foundations of the superstructure that was soon to rise. The prestige given to the new enterprise by his high character and his unbounded generosity, followed by that of his daughter, Miss Catherine L. Wolfe, must ever be held in grateful remembrance.

Then came the awful panic of 1873, which threatened to swallow us up as if the earth had opened beneath us. Our hearts melted and our spirits gave way;—but even that calamity was tided over by renewed efforts and redoubled gifts of the richer trustees, by means of which the institution not only held its own, but made steady progress.

All the while the trustees and their friends had been besieging the Legislature to come to their aid, as every day made it more and more obvious that it was quite impossible to build up by private means alone a great museum which should be worthy to compete with the great museums of Europe, which were supported almost wholly by public moneys. To show how modest our aspirations then were, a great petition signed by forty thousand citizens was presented to the Legislature, asking that a single building should be erected at the expense of the city for the joint occupation of the museum of natural history and the museum of art, which at the same time was struggling into being and leading a

sickly and precarious existence in private quarters, and sustained largely by the same generous donors.

It was at this period of promising progress and of great struggles under heavy burdens that the ten years' administration of our second president, that generous and public spirited merchant prince, Robert L. Stuart, began, during which the Museum, fostered by public aid and private munificence, grew into a valued and well-recognized educational establishment.

This epoch of steady progress was ushered in by the allotment by the Legislature of the Deer Park on the east side of Central Park for the use of the Museum of Art, and of Manhattan Square, then a remote and almost inaccessible waste land, for the Museum of Natural History, and the appropriation of adequate sums for the erection of a suitable building for each on those respective localities, a most auspicious inauguration of a public policy which provided for the possible growth of each institution in the indefinite future (Manhattan Square alone consisting of eighteen acres) a policy which has already resulted in the expenditure of nearly five millions of dollars by the city under legislative authority in the erection of these magnificent buildings for the housing of our collections, upon which private beneficence has expended an equal amount. And the same may be said of the Museum of Art.

On the second of June, 1874, the corner stone of our first building, designed by Calvert Vaux, as one section of a stupendous plan to cover a large portion—nearly the whole—of the entire square, was laid with imposing ceremonies in the presence of the President of the United States, accompanied by members of his cabinet, the Governor of the State and the Mayor of the City. On the twenty-second of December, 1877, the building was opened with similar ceremonies in the presence of the same august personages. Professor Marsh and President Eliot made admirable addresses, the latter concluding his impressive exhortation to courage and progress by quoting the last words of Moses before he went up on the top of Pisgah to see the promised land which he was not to enter, "The Eternal God is thy refuge, and underneath are the everlasting arms."

Meanwhile a contract was entered into between the city and the trustees which has subsisted without change for more than thirty-two years, and upon which the contracts of the city with other great institutions like the Museum of Art and the Zoölogical Society have been closely modeled. This contract embodies a mutually generous policy which secures equal advantage to the Museum and the public. It prac-

tically provides for a permanent occupation by the Museum of all the buildings erected or to be erected in Manhattan Square, and for a free exhibition to the public of all our collections, under regulations to be mutually agreed upon. The Museum is to continue at all times the absolute and exclusive owner of the collections, and the city the absolute and exclusive owner of the buildings. Under this arrangement the delightful and mutually beneficial relations between the Museum and the people which it inaugurated have steadily grown more close and cordial, to the immense advantage of both.

The administration of Mr. Stuart was one of enormous interest and progress. The Museum was constantly acquiring new and great collections of recognized scientific as well as popular value. A scheme of lectures to public school teachers was instituted under Professor Bickmore, and the Museum began to attract the attention of scientific bodies by the number and variety of its valuable collections. Mr. Stuart's name will be perpetuated as one of our most important benefactors.

I have thus traced the beginnings, but yet only the beginnings, of that truly beneficent institution whose fortieth anniversary we have met to-day to celebrate by the unveiling of this most lifelike statue of the one man who, more than any other—I might almost say, more than all others, for he truly inspired and led all the rest to work in coöperation with him,—has transformed the curiosity shop of miscellaneous and unrelated exhibits which was transferred hither from the old Arsenal in 1877, into this great educational and scientific establishment, this national, this truly American museum of natural history, which is the boast of New York and the admiration of the nation, and may I not say, of the world to-day? If you seek for the monument of Morris K. Jesup, you have not far to go. You have only to wander, with eyes and mind wide open, through these splendid halls, so nobly constructed and fitly equipped, and filled with these collections of wonder and of beauty, among which day unto day uttereth speech, and night unto night showeth knowledge of the works of nature, which are truly the works of God.

I shall attempt no idle words of eulogy of Mr. Jesup, but speak of him only in connection with his work as here accomplished, the crowning glory of a long and honorable life.

To the average observer, the casual layman, untrained by scientific study, the first impression upon entering the Museum is of its immense utility as a place of popular entertainment, recreation and instruction,—recreation of the most innocent and ennobling kind, for who ever heard of an immoral naturalist, and how could the most casual study of any

single thing on exhibition here fail to exalt and elevate the mind and heart? That splendid lecture room, filled to overflowing day after day and night after night with eager teachers and students listening keenly with delight and laying fast hold of instruction, not to let her go;—as the layman enters this vestibule, those wonderful visitors from other worlds, so mysterious and so impressive, excite his imagination and amazement;—as he rises from hall to hall and from floor to floor, does he desire to know the history of his own race, from the days when Adam delved and Eve span up to that considerable civilization which had developed here before Columbus came, every step in the advance from the crudest flint instrument is spread out before him;—would he see something of primitive animal life as recorded in the fossils of many succeeding ages, they are here;—does he incline to study the rocks and minerals and know how and where the most precious stones are found, there is the marvelous Morgan collection of gems, so rich in variety and beauty that the cases containing them are surrounded by hundreds day by day;—is he curious to know how trees grow, there is the splendid Jesup collection of woods from all parts of America;—do the beauties and mysteries of insect life attract him, he is lost in the mazes of entomology;—is he a lover of birds, there they are in their native habitats, all true to life;—would he know what mighty animals roamed the earth before Adam, let him gaze, awe-struck, on the brontosaurus, the mastodon and the dinosaurs in both kinds, and observe how Professor Osborn has learned to put hooks in the jaws of leviathans;—and would he see how woman in all ages has suffered for man, let him visit the copper woman, resting from her labors, immortalized on earth; but his wonder grows as he gazes at her. Will she, who was once all flesh and blood, but long since transmuted into pure copper,—will she wake with the rest of us when the last trump sounds, or has she joined the mineral kingdom forever?

The amusement of the people, however, was only an incident in Mr. Jesup's lofty conception of the true mission of the Museum. He aimed at something far higher and nobler. His lofty purpose was to enlarge and extend the work which had been so well begun, to keep pace with the marvelous growth of the city, and develop the Museum not only into a great educational institution, imparting life and light to the people, but also, which in his mind was the chief object, to make it the home of true science, which should be the center of the scientific activities of the nation, so far as natural history was concerned,—and in all three of these objects his success was most remarkable.

Coming to the presidency in the very prime of manhood, with ample

fortune achieved, and the rich experience of a great business life behind him, he bestowed upon the Museum not only generous gifts, constantly repeated, but what was far better, he gave it the best twenty-five years of his life, and all the rich powers of his generous and large-hearted nature. Stimulated by his enthusiasm and his example, the trustees and friends of the institution rallied to its support, and so rapidly did its collections grow, that the Legislature and the City, recognizing its rapidly growing needs, added every four years a new section, a new and noble building to the original edifice, so as to complete already about two-fifths of Vaux's original plan, which in 1869 the trustees had had the far-sighted audacity to adopt and approve. I do not hesitate to say that the money spent by the city in the development of this Museum and the Museum of Art is the best investment of public moneys ever made by it, whether we consider the direct benefit to the people, or the prestige and character attained by the city as the great metropolitan center of knowledge and culture.

The appetite of the people for what they could learn here grew by what it fed on. The establishment of the Department of Public Instruction, and the erection of a new and complete lecture hall, afforded facilities for education which were largely availed of and widely appreciated. The daily attendance rapidly multiplied, and the people showed their growing love of what they justly regarded as their own free pleasure ground.

Mr. Jesup's generous nature broadened rapidly and constantly with the growth of the work which had come to his hands, not only as to the scope of its objects, but as to the spirit in which it should be administered. This was never better illustrated than in the matter of Sunday opening. At first, and for many years, with the large majority of the trustees, he was utterly opposed to it from early training and prejudice, but as the demand grew, the subject was more carefully considered, and he and those who thought with him yielded, having become satisfied that to look through nature up to nature's God was the best way of spending a portion of the Sabbath, and both he and William E. Dodge, who sympathized with him, and who was one of our most valuable and generous trustees, assured me afterwards that this was the best step forward that the Museum had ever taken.

Mr. Jesup's extraordinary enthusiasm for science and his sympathetic admiration for scientific men, though having little knowledge of science himself, was the most striking feature of his career as President, and wholly unexpected, because he had given up his life before to business and affairs. As he said himself in the report of the trus-

tees for 1886: "It is a difficult task to estimate the money value of what belongs to science and scientific institutions. To their value must be added their ameliorating power, their educational force, and the scope they afford the higher faculties of man to apprehend the wonderful phenomena of nature, and to master and utilize her great forces." "The highest results of character and life offer something which cannot be weighed in the balances of the merchant, be he ever so wise in his generation." In this view he directed with exhaustless energy and rare intelligence the resources and progress of the Museum.

The establishment of the Department of Woods and Forestry, and his wonderful collection of the woods of America under the direction of Professor Sargent; the creation of a great Library of Natural History; alliances with Columbia University and the Board of Education; the scientific arrangement of the collections in proper departments with a skilled scientific curator at the head of each; the publications of the Museum, growing more and more valuable to science as the years progress; the sending out of exploring expeditions to all parts of the world in quest of scientific knowledge and specimens, some of the most prominent of which were at his own expense; the interchange of specimens and the establishment of mutual and cordial relations with other scientific societies—all testify to this lofty ambition of his to promote here the highest possible objects which he happily lived to see realized. I must not omit his generous and unfailing support of Peary in his repeated and undaunted efforts to reach the North Pole. We had hoped to have that famous discoverer here to-day, but I have the great privilege to read this letter from him, just received:

"New York, February 9, 1910.

"Dear Sir: It is with the deepest regret that I am obliged to say that an engagement in another city, which cannot be postponed, will make it impossible for me to be present this afternoon on the occasion of the unveiling of the statue of my friend, Morris K. Jesup.

"His breadth of mind and character is perhaps in no way indicated more clearly than by the wide range of his interests, as shown by the two projects in which his heart was most deeply centered—the future of the American Museum of Natural History and the discovery of the North Pole.

"The fact that such a big, broad, practical mind as his should take up with such deep and steadfast interest the question of North Pole efforts, proved to me conclusively that my own conviction of the value of those efforts was correct.

"To Morris K. Jesup more than to any other one man is due the fact that the North Pole is to-day a trophy of this country.

"His faith and support carried me past many a dead center of discouragement amounting almost to despair.

"Friend of unswerving faith, advisor of keen, long-headed ability, backer of princely generosity, he was first in my thoughts when I reached that goal of the centuries, first in my thoughts on my return, and my ever present regret is and has been that he could not have stayed with us a little longer to see the realization of his faith.

"Faithfully, (Signed) R. E. Peary, U. S. N.

"President Henry Fairfield Osborn."

By all these means the Museum did become, in Mr. Jesup's life time, a veritable Mecca for scientific men and societies from all parts of the country, and foreign scientists of distinction were its frequent visitors. He labored in season and out of season with the authorities of the City and State to promote the interests of the Museum, and by the princely bequest of a million dollars doubled our endowment fund, which he had labored strenuously and already contributed generously to create. The debt of gratitude which the Museum and the City owe to him can only be repaid by continuing his work, and carrying it as near to perfection as the ever-growing domain and horizon of science can permit it to go.

We should be false to him and to our own trust if we allowed the work of the Museum to stop where he left it, advanced though that point was. Its relations with the city are fixed and permanent. It has grown with the growth of the city in the past, and it must continue to do so. Judged by its marvelous present development, New York is destined soon to become the greatest of the cities of the world. Shall it be content with riches and luxury and material strength, or shall it lead, as it ought to lead, its sister cities in higher things, in knowledge and culture, in art and science? We and our successors can give it that lead, if we will, by promoting with all our might the higher objects of such institutions as this and the Museum of Art, and the universities, so as to make the higher education and training of men and women the leading feature of our civic life. -

I deem it a great privilege in behalf of the donors to present to the Museum this fine statue of our beloved and honored President, Morris Ketchum Jesup, and am glad that his Honor the Mayor, who by virtue of his office is one of our trustees, will accept it on the part of the Board.

WHAT FLORENCE NIGHTINGALE DID FOR MANKIND

ADDRESS DELIVERED ON THE FIFTIETH ANNIVERSARY OF THE FOUNDING OF THE FIRST TRAINING SCHOOL FOR NURSES, AT THE CONVENTION OF THE ASSOCIATED NURSES OF THE UNITED STATES, NEW YORK, MAY 18, 1910

I consider it a very great privilege to be permitted to stand here for a few minutes to speak about Florence Nightingale. How could this great convention of the nurses of America, gathered from all parts of the country, representing a thousand schools of trained nurses; representing more than fifty thousand graduates of those schools, and more than twenty-five thousand pupils of those schools to-day—how could they better close their conference than by coming here to-night, to celebrate the foundation, by that great woman, of the one first great training school for nurses, which was the model of them all? And how could she, that venerable woman, be more highly honored than by this gathering, in a distant land, of these representatives of the profession which she really founded and created, to do her honor? I hope that before we close our proceedings this evening, we shall authorize our presiding officer to send her a cable of affection and gratitude for all the great work she has done, not only from all the nurses of America, but to testify the admiration of the entire American people for her great record, and her noble life.

One word as to the place and date of her birth. She was born in the beautiful city of Florence, where the steps of Americans always love to linger, in the very first year of the reign of George the Fourth. She lived in honor and triumph through the succeeding reigns of William the Fourth, of Victoria, and of Edward the Seventh, and at last united with the rest of her countrymen to hail the accession of George the Fifth who, I am sure, values her among his subjects quite as highly as he does the most renowned statesmen and greatest soldiers among them.

She was born in the first administration of James Monroe, the fifth president of the United States,—before the Monroe doctrine had ever yet been thought of. She has lived through the entire terms of the twenty succeeding presidents, and is now cherished by the hearts of the American people as one of the great heroines of the race.

As there were great heroes before Agamemnon, so she would be

the last to wish us to deny or ignore the fact that there were splendid nurses engaged in the work, even before she was born. Not trained nurses, nurses according to the modern school of the Nightingale system, but women, ladies, refined, delicate, accomplished, giving themselves to the service of the sick and suffering. And I believe we ought always to acknowledge the debt of gratitude that the world owes to the great Roman Catholic Church for the Sisters of Mercy, whom for centuries it was sending out for the relief and succor of the sick and suffering in all parts of the world. It has been truly said that for centuries the Roman Catholic community was training and setting apart holy women to minister to the sick and poor in their own homes, and had hospitals supplied with the same type of nurses. A large number of these women were ladies of birth and breeding who worked for the good of their souls and the welfare of their church; while all received proper education and training, and abjured the world for the religious life. Now all you have to add to that character is the discipline and special training and organization which Florence Nightingale contributed to this great profession, to bring before your view the trained nurse as she is to-day.

This woman of great brains, of large heart, of wonderfully comprehensive faculties, appears to have been born a nurse. If the stories we hear of her in the nursery are true, that was literally so; because they tell us that dolls were always in very delicate health, and had to be daily put to bed and nursed and petted, with all possible care; and that the next morning they were restored to health only to become ill again for service the next night. And her sister's dolls—she was less careful of them—suffered all kinds of broken limbs, and were subjected to amputation and splinting and decapitation; and Florence was on hand always to restore those broken fragments to their original integrity.

She had every possible advantage to make her what she afterwards came to be. She was born in that most interesting phase of English society—in English country life—where for centuries it has been the rule that the lord of the manor, the squire in his mansion, the leading person of the region, and his family have the responsibility always upon them to take care of the sick and suffering among all their neighbors. She was trained in that school; and one of her first experiences was to visit with her mother the poor and sick of all the neighboring region.

And she had a magnificent education. She was not averse to the pleasures of society; but she fortunately had a father who believed in

discipline, and he brought her up to the finest education known to that day. Not only was she thoroughly trained in Greek and Latin and mathematics, but in French and German and Italian, and I do not suppose there was any young woman of her time who was better or more brilliantly educated than this woman, who was to become the leading nurse of the world.

She was brought up to believe in work and training. And would you know the secret of her success; would you realize the rule of her life? Let me give it to you in her own words. "I would say," she says, "I would say to all young ladies who are called to any particular vocation, qualify yourself for it, as a man does for his work. Don't think you can undertake it otherwise. Submit yourself to the rules of business, as men do, by which alone you can make God's business succeed." And again she says: "Three-fourths of the whole mischief in women's lives arises from their excepting themselves from the rules of training considered needful for men."

Besides this, she had every possible advantage in the way of association. Early in life, as a very young girl, or young woman, she made the intimate acquaintance of Elizabeth Frye, who had already for many years been visiting the sick in the prisons and had established, under her old-fashioned Quaker garb, such an immense reputation as a reformer of prison life. And through Elizabeth Frye, she fell in, fortunately, with the Fliedners, Theodore and Fredericka Fliedner, who had established in Germany a real training school for nurses; and it was the delight of her life, that she, an accomplished lady, went to that training school of the Fliedners, on the banks of the Rhine, and went in, adopting the garb, following the habits, and associating on terms of absolute equality with the nurses that were there being trained, all of whom, but herself, I believe, were of the peasant class; and came out of it, after a few months, knowing as much about nursing as it was possible for any woman then to know.

Then she visited the hospitals of all the great countries of Europe, and among others, she spent some weeks, or months, with the Sisters of St. Vincent De Paul, that splendid Catholic institution where some of those nurses, such as I have described to you, were already gathered, and there she added to her wealth of knowledge and richness of experience.

She recognized no religious differences. Catholic and Protestant were both alike to her. The real object of her life; the real object that she had in view in influencing other women was how best they might come to benefit mankind.

The English hospitals of that day could not, by any chance, be compared with those upon the continent she had visited. The character of the nurses was absolutely beneath contempt. Let me read you from a very authoritative statement what the fact was about them: "The nursing in our hospitals was largely in the hands of the coarsest type of women: not only in training, but coarse in feeling, and even coarser morally. There was little to counteract their baneful influence, and the atmosphere of the institutions, which as the abode of the sick and dying had special need of spiritual and elevating influences, was of a degrading character. The habitual drunkenness of these women was then proverbial, while the dirt and disorder rampant in the ward were calculated to breed disease. The profession—if the nursing of that day can claim a title so dignified—had such a stigma attached to it, no decent woman cared to enter it; and if she did, it was more than likely she would lose her character."

Now, she had to compare with this the splendid discipline and training that was maintained at Kaiserswerth, and the very fine character of the nurses whom she had seen in these Catholic institutions abroad. She had acquired a thorough training and she was ready to become a true pioneer in the profession to which she was to give her life. She wrote a book about her experiences at Kaiserswerth. It shows she was a woman in every sense of the word, full of sensibility. She never married; but although she never married herself, she approved of it. Let me read you a few words from her own book. In her description and reminiscences of Kaiserswerth she says: "It has become the fashion of late to cry up old maids, and inveigh against marriage as the vocation of all women; to declare that a single life is as happy as a married one, if people would but think so; so is the air as good a medium for fish as water, if they did but know how to live in it. So she could be single and well content, but hitherto we have not found that young English women have been convinced, and we must confess that in the present state of things their horror of being old maids seems justified."

So you see, it was not without a full appreciation of all that goes to make home life tender and happy that she turned her back upon matrimony, and gave it up for nursing and caring for the sick.

She was fortunate at every step of her career. She was the immediate neighbor, down there on the borders of Wiltshire, of the great Sydney Herbert, who afterwards became the war minister of the day, at the time of the Crimean war, and at his splendid ancestral home, Wilton House, she was a frequent visitor; she was well liked by that

household and by all who knew her. Her training told; her education told; her character told. Let me read you a wonderful prophecy that was made about her, long before the Crimean war broke out, long before she had shown what was in her, and what she could do. This verse is by Ada, Countess of Lovelace, the daughter of Byron; and I say it is a wonderful prophecy:

"In future years, in distant climes,
Should war's dread strife its victims claim;
Should pestilence unchecked, betimes,
Strike more than swords, than cannon maim;
Then readers of these truthful rhymes
Will trace her progress through undying fame."

I think it is not often that you will find in history such a prophecy as that, so absolutely realized within a few short years.

Well, then came the breaking out of the Crimean war. As Col. Hoff told you, 25,000 English soldiers landed at Scutari. And such a state of things, I won't say never has been heard of, because it is often heard of in the outbreak of many a war, which often finds a nation utterly unprepared to wage it. There were no ambulances, no nurses, no means providing for caring for the wounded and suffering soldiers as they were brought in from the fields of battle.

Fortunately we had a great war correspondent at the Crimea in those days—we afterwards knew him here, when he wrote the dispatches about our battle of Bull Run—Mr. William Howard Russell, as he was then called, who spoke in clarion notes to the men, and especially to the women of England, making an appeal which reached the ears of this wonderful woman, and made her the heroine of her age. Let me read you one sentence of Russell's appeal. After describing the horrible state of things that existed at the Crimea, and the shameful want of preparation for the care of the soldiers, he says: "Are there no devoted women amongst our people, willing to go forth to minister to the sick and suffering soldiers of the east, in the hospitals of Scutari? Are there none of the daughters of England, at this stormy hour of night, ready for such a work? France has sent forth her Sisters of Mercy unsparingly, and they are even now by the bedsides of the wounded and dying, giving what woman's hand alone can give of comfort and relief. Must we fall far below the French in self-sacrifice and devotedness in a work which Christ so signally blessed, as done to Himself, 'I was sick and ye visited me'?"

And a lady, the wife of an officer, wrote from the seat of war: "Could you see the scenes that we are daily witnessing you would indeed be distressed. Every corner is filled with the sick and wounded.

If I am able to do some little good I hope I shall not be obliged to leave. Just now my time is occupied in cooking for the wounded. Three doors from me is an officer's wife who devotes herself to cooking for the sick. There are no female nurses here, which decidedly there should be. The French have sent fifty Sisters of Mercy who, I need hardly say, are devoted to the work. We are glad to hear that some efforts are being made at home."

Well, Miss Nightingale was one of the first to respond to that appeal. And yet there was hostile objection from many quarters: from official quarters, where it was thought that the present regimen, the present organization, was good enough, and could do all the work; from social sources, for whom Mrs. Grundy spoke, "Why certainly it cannot be proper for young women and young ladies to go as nurses in a soldiers' hospital, of all things in the world! Too horrible to think of!"

There was a great deal of that sort of opposition; and there was religious opposition, too. When she made up the band of thirty-seven nurses, which Colonel Hoff has spoken of as her first contingent with whom she went to the Crimea, there were ten Catholic Sisters of Mercy, twelve Church of England Sisters, I believe, and then there were some who belonged to neither organization; and the religious people took it up, and they said, "She is evidently going to the Crimea to convert the soldiers to the Roman Catholic Church;" and others said, "No, that isn't so; don't you see she is taking some that are neither Catholic nor Episcopalian? We really believe that she belongs to that horrible sect, the Unitarians!"

Even *Punch*, who always represents the current feeling of the day, made a little light of her, and mingled admiration and raillery. Let me read you two of his verses, in honor of "The Lady Birds," as they were called in London before they started.

"THE NIGHTINGALE'S SONG TO A SICK SOLDIER.

"Listen soldier, to the tale, of the tender nightingale;
 It is a charm that soon will ease your wounds so cruel,
 Singing my song for your pain, in a sympathetic strain,
 With a jug of lemonade and gruel,
 Singing succor to the brave, and a rescue from the grave;
 Hear the Nightingale sing that goes to Crimea.
 'Tis a Nightingale as tender in her heart as in her song,
 To carry out her golden idea."

When this terrible state of things was disclosed by the letters of Russell and other news that came from the seat of war, the govern-

ment was as horror-stricken as the people, and so were Mr. Sydney Herbert, the life-long friend of Florence Nightingale, and Mrs. Herbert, who was also one of her friends. Mr. Herbert, who was responsible for the administration of military affairs, said to his wife, "We must send for Florence." And then a most singular coincidence happened. He wrote her a most serious and dignified letter, pointing out the necessity of sending a band of nurses, composed of capable and courageous women; and he said to her, "It all depends upon you; if our plan is to succeed, you must lead it." And without pressing her unduly, he put 'it before her as a matter of conscience and duty. I believe that letter was written on the fifteenth of October, 1854, when the first horrible news came from the front. What I call the remarkable coincidence was that on the same day, without knowing anything about the writing of that letter, Florence Nightingale was writing unsolicited, to Sydney Herbert, the Secretary of War, offering her services to lead a band of nurses to the front.

Time would fail me if I undertook to tell you the frightful condition of things she found when she got there. Doubtless you have all read of it. The great Barracks Hospital of Scutari was filled with thousands and thousands of sick and wounded men who had been brought from the seat of war, without nurses, without suitable food, without a laundry, without the possibility of a change of clothes, without a kitchen for the preparation of proper food, with no possible conveniences or appliances for the care of the sick and the wounded. The descriptions are too horrible to realize or to repeat. She found these three or four thousand men in this great hospital, which had been a barracks and had been converted, off-hand, into a hospital—a place for the deposit of these poor bodies of the sick and wounded; and that was about all that had been done for them before Miss Nightingale arrived. They had had no medical attendance from the time they left the front many days before; they had had no change of clothing, not the possibility of a washing or of a clean shirt.

And this woman, with her thirty-eight nurses, came among them. It was chaos! confusion, worse confounded! She put to use her wonderful powers of organization, and in two months she had that hospital in absolute control. A kitchen was established and a laundry, and she provided ten thousand clean shirts for these sufferers, and had taken absolute command of the whole establishment, as the government had given her authority to do. In six months, great resources being sent to her from home, great numbers of recruits to her nurses arriving,

every soldier, to the number of six thousand in the Barracks Hospital and in the General Hospital at Scutari, was being well and comfortably taken care of and provided for.

Then came all the other horrors that attend war. Fever broke out, and the frost-bitten men who had lain in the trenches before Sebastopol were brought in, after spending five days out of seven in those horrible trenches, exposed to the Crimean frost, with nothing but the linen clothes that they had worn in Malta. All these ghastly things she had to take care of and provide for, but her genius was equal to the emergency. Her powers of organization, her powers of endurance seem to me to outstrip those of any other woman on record. They tell us that for twenty hours at a time she would stand when the ships arrived,—twenty hours at a time,—receiving those broken fragments of men that came from the front, seeing that they were properly handled and cared for. And when all the work of the day was done and others rested she made her rounds, visiting the worst cases, the most frightful cases. They weren't safe, she thought, unless she personally visited them. She, the Lady in Chief, as she was ordinarily called, and "The Lady of the Lamp," as she became known in poetry and history, visited the bedsides of the suffering, soothed the suffering and dying; she wrote letters to their friends at home, and did everything that one woman could do to restore life and light to the suffering. Let me read you Longfellow's tribute to her:

"On England's annals, through the long
Hereafter of her speech and song,
That light its rays shall cast
From the portals of the past.

"A lady with a lamp shall stand
In the great history of the land,
A noble type of good,
Heroic Womanhood."

Then she went on from Scutari to the Crimea. She went so far as to visit Sebastopol itself, going to the very front, and looked not only into the trenches, but entered the great crater of that vast volcano of war; and on her way back she was stricken with the Crimean fever and very nearly lost her life, as Colonel Hoff said. They carried her to the hospital—one of those improvised hospitals on the heights of Balaklava, five hundred feet above the sea. She was nursed for weeks and weeks and weeks, and finally brought back to life. They tell us of the Six Hundred at Balaklava: that "into the jaws of death rode the six hundred!" Why this woman was in the jaws of death from

the time she landed at Scutari until she was stricken down, eight months afterwards.

Then they said, "You must go home to England; that is the only way for you to get well." "I will not go home," she said, "I will not leave these soldiers;" and she continued her heroic duties of nursing and supervising. She was a great genius in every sense of the word. She would not go home, and did not go, until not only the war had closed, but until long after; until every soldier had been shipped home to England, and every hospital was cleared.

And then, how do you think she went home? she the foremost woman in the world now! to whom all mankind and womankind looked with reverence and honor. How do you think she went home? Did she go with a flare of trumpets? Did she expect or wait for a grand demonstration on her return? Did she notify everybody or anybody that she was coming? Not at all. She had such a horror of publicity, she was so modest, so meek,—one of those that are going to inherit the earth,—that she went home incognito. She arrived in England without anybody knowing it. She managed somehow or other to get into the back door of her father's house in Derbyshire, and the first that was known of her having returned to England was when the neighbors heard that Miss Florence was really sleeping in her father's house. *Punch*, always quick to respond to public feeling, reflected the sentiment of the hour with respect to her return. *Punch* says this:

"Then leave her to the guide she has chosen;

She demands no greeting from our brazen throats and vulgar clapping hands.

Leave her to the sole comfort the saints know that have striven;

What are our earthly honors: her honors are in heaven!"

Earthly honors awaited her. In truth the whole nation was up in arms to do her honor, to pay homage to her, and to make some reward for her wonderful sacrifice and services. Subscriptions were opened, not only in all parts of England, but in all the English dominions, extending all around the English world. Subscriptions were actually opened among the English residents at Hong Kong, and fifty thousand pounds was poured out by the English people into her lap. England is full of generosity to her heroes and heroines. She rewards her great generals with munificent sums; and so her people in this case wanted in like manner to honor this heroine of their own creation.

What did she say? She said, "Not for me; not one penny for me. I will not take a penny. But it has been the ambition of my life to establish a training school for nurses—the first of its kind to be conducted on high and broad and pure methods and principles. Let it all

be devoted to that, and I accept the gift. Otherwise, not." And so it came about that the first great nurse's training school was established at St. Thomas's Hospital, which bears her name. It is still supported by "The Nightingale Fund," and is a model and example for all the training schools of the world.

Colonel Hoff has told you of her subsequent life. Practically her health was ruined. She has been fifty-five years an invalid, often confined to her bed, and yet always working for the good of humanity, always working for the relief of the sick and the wounded, the sanitation of camps and the relief and succor of the soldiers.

But she has had her reward; through all ranks of mankind, wherever there is a heart to beat in response to such noble deeds as hers there has been a glorious answer.

I will only speak for a few minutes of those things in which we are especially interested and first of the Red Cross. The convention that met in Geneva, in 1863, founded it and it has from time to time since been the subject of subsequent amendment. Our Hague Conference, in 1907, had representatives from forty-four nations, and there for the first time all the nations of the world became parties to the Red Cross movement, which meant the saving of the sick and the wounded, and hospital and ambulance corps to rescue them from all the perils of war and of battle; which meant preparation for war while yet there is peace, so that these horrible sufferings that have been witnessed at the outbreak of almost every war may not be repeated. At the meeting of the Congress of Red Cross Societies, held in London two years later, in June, 1909, unanimous resolutions were passed, honoring Miss Nightingale and declaring that her work was the beginning of the Red Cross activities.

Then look at her influence in America! When our terrible Civil War broke out we were almost as unprepared in this matter of sanitation and nursing as the British had been at Scutari. Fortunately there were some women who lent their aid at once, and these were inspired by the example of Miss Nightingale. They were women of the same type. Let me read you the names of some of them. One, at least, is present here to-night, and I do not know but there are more. Dr. Elizabeth Blackwell, the intimate friend of Miss Nightingale, is, I believe, still living in England, one year younger than Miss Nightingale herself. Miss Louisa Lee Schuyler, Miss Dorothea L. Dix, Miss Collins, and Mrs. Griffin. What did they do? Why they were responsible, really, for our great sanitary commission, and they formed the woman's branch of that great humanitarian enterprise, which did

so much to save our sick and wounded in that protracted and terrible war. They acknowledged their allegiance to Miss Nightingale, and were in constant correspondence with her. Dr. Blackwell had known absolutely all her methods, her principles, and her whole plan of nursing, and it was on those principles and those lines that our noble women worked.

Then, ten years afterwards, there came the foundation of this work in America—I might almost say the foundation of the training school for nurses—at Bellevue Hospital.* And there you find several of the same women again: Miss Schuyler, Miss Collins, Mrs. Wm. Preston Griffin, and leading them was Mrs. Joseph Hobson, afterwards president of one of the committees; and there was the mother of our present chairman, the woman of sainted memory, Mrs. William H. Osborn, who led their activities in the creation of that great school. It is a splendid thing that he should be here to-night to represent one who gave so much of her heart, her soul, her life, and her treasure to the building up of that school. Miss Nightingale was immediately approached by the founders of that school, and gave them full written instructions as to how they ought to proceed.

Her letter ought to be read by everybody; it is full, explicit, and detailed, and she is as much entitled to the credit of the creation of this first school in America as even those ladies of whom I have spoken.

Now, I close as I began. Do not let us separate to-night without authorizing our chairman to send, on behalf of all the nurses and all the people of America, a word of greeting and of gratitude to this noble woman.

*The exact dates of the founding of the first training schools in America, as given in the History of Nursing, are: The Women's Hospital, Philadelphia, 1863; New England Hospital for Women, Roxbury, Mass., 1872; Bellevue, May 1, 1873; New Haven, October 1, 1873; Massachusetts General, November 1, 1873.

PANAMA CANAL TOLLS

ADDRESS DELIVERED BEFORE THE CHAMBER OF COMMERCE OF THE
STATE OF NEW YORK, FEBRUARY 13, 1913, IN OPPOSITION TO A
CLAUSE OF THE PENDING PANAMA CANAL BILL EXEMPTING
AMERICAN COASTWISE SHIPPING FROM THE PAYMENT OF TOLLS

Mr. President and Gentlemen: I come here to-day as a member of the Chamber of Commerce, hoping to help it to decide right in the matter that is now before it, because I consider a wrong decision would be not only a serious blow to the good name and honor of the Chamber of Commerce but of the country itself.

It is true that I had something to do with the negotiation of this treaty. In the summer of 1901—you will remember that this treaty was ratified by the Senate in November, 1901—I was in England until October, and was in almost daily contact with Lord Pauncefoot, who on his side represented Lord Lansdowne, the Foreign Secretary, and was also in very frequent correspondence with Mr. Hay, our Secretary of State, under whom I was acting. As the lips of both of those diplomatists and great patriots, who were each true to his own country and each regardful of the rights of the other, are sealed in death, I think it is quite proper that I should say what I believe both of them, if they were here, would say to-day; that the clause in the Panama Canal Bill exempting coastwise American shipping from the payment of tolls is in direct violation of the treaty.

It is true, as Mr. Douglas has said, that we cannot decide this question, but we can decide whether, as men of conscience and honor, constituting this Chamber of Commerce, we shall support Senator Root's motion to strike out a single provision of that Panama Canal Bill, which is believed by him, and by us, and by the almost unanimous voice of the American Press, I think, to be in conflict with the treaty. Why, the merest school boy can pass upon the question.

I am going to read you the two clauses and I would like to challenge any member to show how they can possibly be reconciled:

"The canal shall be free and open to the vessels of commerce and war of all nations on terms of entire equality, so that there shall be no discrimination against any such nation or its citizens or subjects in respect of the conditions or charges of traffic or otherwise."

That is what the treaty says. In the Canal Bill the clause covered by Senator Root's motion to amend by striking out is this:

"No tolls shall be levied upon vessels engaged in the coastwise trade of the United States."

Can you put those two things together and reconcile them in any possible way? Of course it is an utter impossibility; and even Mr. Douglas has not ventured to show how the two could by any possible construction mean the same thing.

No newspaper, no President, no public authority whatever that I have heard of, has ventured to take the plain words of the treaty, and the plain words of that clause of the Canal Bill, and say that the two mean the same thing.

I hope you will give Mr. Douglas a chance to expatiate further beyond his half hour to show how those two things mean the same thing. If he can convince you of that he will carry his motion to lay upon the table; otherwise not.

I venture to say now that in the whole course of the negotiation of this particular treaty, no claim, no suggestion was made, that there should be any exemption of anybody. How could there be in face of the words they agreed upon? Lord Pauncefote and John Hay were singularly honest and truthful men. They knew the meaning of the English language, and when they agreed upon the language of the treaty, they carried out the fundamental principle of their whole diplomacy, so far as I know anything about it, and in the six years I was engaged with them, their cardinal rule was to mean what they said and to say what they meant. [Applause.]

They had something to guide them. You will remember that in the previous year there was a canal treaty arranged between Mr. Hay and Lord Pauncefote which was so amended in the Senate that another treaty was negotiated and substituted for it and took final form in the treaty that is now under consideration. Mr. Cushman K. Davis, who was Chairman of the Committee on Foreign Relations in the Senate, made a report which was very direct on this particular subject, and I read now from Senator Root's argument in the Senate delivered very recently.

"In view of that report"—the report of Cushman Davis—"the Senate rejected the amendment which was offered by Senator Bard of California, providing for preference to the coastwise trade of the United States."

That is pretty direct authority, is it not? That motion was made in the Senate, on the discussion of the previous Hay-Pauncefote Treaty which never was finally approved by the Senate. This is the amendment which was proposed: "The United States reserves the right in

the regulation and management of the canal to discriminate in respect of the charges of trade in favor of the vessels of its own citizens engaged in the coastwise trade." That was pretty direct, was it not? Mr. Root adds:

"I see the Senate rejected that amendment upon this report which declared the rule of universal equality without any preference or discrimination in favor of the United States as being the meaning of the treaty, and the necessary meaning of the treaty." That was something they had to act upon; and there was a great deal else besides.

From the time that this question of a canal through the Isthmus, or a canal from the Atlantic to the Pacific, whether through the Isthmus or by way of Nicaragua or Tehuantepec or anywhere else, was agitated, the universal declarations of public men, of Presidents and Secretaries of State, and other public men, on both sides of the Atlantic, were to the effect that the canal, if it ever should be built, should be built for the benefit of mankind on principles of universal equality of the vessels of all nations, and without any discrimination in favor of any.

Another thing: they had a direct ruling of our own Government under the treaty of 1871. That was the treaty, you remember, under which the Alabama Claims were finally disposed of. They inserted in that treaty, as one of its later clauses, a provision almost exactly like this, bearing on the same subject in respect to the canals, that constituted a part of our great waterways through the Lakes, the Welland Canal on the British side and the Saint Claire Canal, I think it was, on this side; and it was stipulated in that treaty, as I recall it—you gentlemen will correct me if I am wrong—that the vessels of both nations should have equal rights without discrimination, and have the right to use the canals on both sides for their traffic on terms of complete equality and without discrimination in favor of either. After a while, our government found that Canada, although charging twenty cents per ton, I think it was, the rate fixed by the treaty or by the agreement between the two governments, was remitting on its own traffic in Canadian vessels to Canadian ports, eighteen cents, and remitting nothing on American traffic to American ports passing through the same canals; the result of which was that while our traffic paid twenty cents the Canadian traffic paid only two cents. This being brought to the attention of the government of the Dominion, that exemption was abandoned; they took the American view of the subject and from that day to this the vessels of both nations have passed through these canals on terms of perfect equality. [Applause.]

That is sound American doctrine. It was asserted by us to be the only honest interpretation of that treaty, and that interpretation was accepted by the other side.

It has been said that in this connection we have nothing to do with the question of arbitration. I say we have everything to do in this connection and on this occasion with the subject of arbitration. What country has been the champion and leader in the cause of arbitration since the very foundation of our government? Why, the United States of course. We have insisted first, last and always, not only by the voice of the people as represented by the press, but by joint resolutions of the Senate and House of Representatives, by declaration of every President, from John Quincy Adams down, that arbitration is the only mode in which there can be a settlement of international disputes without resort to war. I do not believe that England has any disposition to resort to war. I do not believe that under any circumstances you could provoke either England or America to go to war with each other. All possibility of that has been left behind us for a hundred years.

We made a treaty in 1908 which is still existing. It was made by Mr. Root as Secretary of State. The treaty provided that when a difference arises between the two countries, which is incapable of settlement by diplomatic means, that it shall be referred by arbitration to the court at the Hague, always provided, that the independence or the honor or the vital interests of either nation be not involved.

Nobody can pretend that the vital interests or the independence or the honor of the United States is involved in this question. What is involved? Why, a few paltry hundred thousands of dollars a year. That is all. If the trade goes on increasing as the last speaker has said, it may amount to a few millions a year, but what is that to a nation that is spending over a billion dollars every year, and is likely, so far as I can see, to spend two or three billions unless somebody calls a halt. [Applause.] We are bound to submit this question under the treaty which was made by Mr. Root and the British Government in 1908. President Taft has said that the possibility of the question being decided against us is no reason at all why we should not arbitrate it. That is all the more reason why we should take the first opportunity to arbitrate it. [Applause.]

To my mind there is no reason that will hold water against the passage of the resolution offered by this committee. There is no reason why we should not be honest and fair and courageous in our dealings with other nations. [Applause.]

We are now about to celebrate the one hundredth anniversary of

Peace, continued and unbroken peace, between the United States and England. How have we maintained that peace? Why, I believe by treating each other fairly on both sides; and there have been questions ten times as difficult, ten times as important, as this, and we have never failed to settle any of them by arbitration. [Applause.] That is the way we have got to settle this, whether we like it or not. We have agreed that it shall be arbitrated. Somebody says the treaty expires in June of this year. I do not think the people of the United States will tolerate any attempt to sneak out of it in that way. [Loud applause.] Nor do I believe that the people of the United States will tolerate, upon serious consideration of this matter, any attempt to break faith with Great Britain or with any other country. [Applause.]

I was asking you how we have kept faith with them so long. It is by dealing fairly with them. Here is a question of the interpretation of language used in a treaty upon which important men differ. I will agree to that. Mr. Douglas and I differ, and Mr. Taft and Mr. O'Gorman differ, from Mr. Root, but we have positively agreed by the treaty of 1908 that if such a question comes up and it cannot be settled by diplomatic means, it shall be settled by arbitration. Everybody seems to think that if it is referred to arbitration, no matter whether the arbitration is to the Hague Court or to any local Court in the City of New York, or to the Supreme Court of the United States or to the Hague Tribunal, all we have to do is to get up and read these two clauses, the clause from the treaty and this clause from the bill which we consider so obnoxious. The Tribunal would then decide against us. Which is better for us, to have an arbitration which will almost inevitably decide against us, or, like men, settle the matter ourselves. [Applause.]

Let us admit that we have made a mistake and go forward and reverse it, and support our noble Senator, to whom we cannot by any possibility give too much praise for his effort to have it stricken out.

NATIONAL SECURITY

ADDRESS DELIVERED AT A MASS MEETING OF THE NATIONAL SECURITY
LEAGUE, CARNEGIE HALL, NEW YORK,
FEBRUARY 29, 1916

Ladies and Gentlemen: We were consulting whether we should wait a few minutes more for the Mayor, who has promised to be one of the speakers tonight, but have concluded to put me up here to talk until he comes. (Applause.)

I have had luck in that way some times. I remember at an educational meeting in Bishop Potter's time I was put up to talk until he came, and after every sentence or two I turned to the door and looked for the Bishop, but he didn't come; and when they had kept me talking until after ten o'clock, I adjourned the meeting and the Bishop did not appear at all. (Laughter and applause.)

But I consider it a very great honor to have been asked to preside,—at least, to call this meeting to order, and yet this everlasting round of meetings and speaking in which I am involved, has got to end, some time or other. (Laughter.)

I am of the same age that Mr. Gladstone was when he retired to Hawarden and never appeared again in public; of the very same age that Franklin was when he made that splendid appeal for the abolition of slavery, and then gathered up his feet into the bed and fell into his last sleep. And I believe I am exactly of the same age that Voltaire was when he made that wonderful last appearance in Paris and aroused such an outburst of enthusiasm for Liberty that the echoes of it are heard there still and still inspire the gallant French soldiers in those horrible trenches.

Well, I am now in a way helped by this age, for it has enabled me to persuade my friend, Mr. Robert Bacon, who has lately become the Chairman of our Board of Directors, and who is the greatest acquisition that we have made since the formation of our Society, to relieve me from the further duties of Chairman after I have introduced him. (Laughter.)

I am delighted to say that there is to be no 10 o'clock for me. (Laughter.) When His Honor has arrived, I shall introduce him—by and by when I get through—as the first speaker, because he is enlisted in this great cause of ours and is to take a train before midnight for St. Louis, where he is to be a part of a gathering of the Mayors

of sixty great cities, all assembled to see what they can do to promote this sacred cause of National Defense. (Applause.)

I emulate the example of my dear old friend, Lord Roberts, who was engaged, as you know, for the last ten years of his life, in begging the English people to get ready. And they laughed him to scorn. How bitterly they regret now you all know, and what they are suffering from because they did not do as he advised them to prepare while there was yet time.

There are certain things that are too clear to discuss, and one is that the United States is now absolutely unprepared to defend itself from any enemy from any quarter. The Army is not sufficient; the Navy is not sufficient. We have only a reserve force, a national reserve force, of 165 men. (Laughter.) Our 21,000 miles of seacoast are open to attack from any quarter. Our great seaboard cities are absolutely undefended. The events of the last week show that perfectly well. The events of this terrible war show that no fortifications erected before the beginning of this war, either here or in Europe, are any defense to any city, so that point, I think, does not need to be discussed. Nobody now needs to be told that we are unprepared.

There has been a great change of mind since the beginning of the war eighteen months ago. Eighteen months ago the President and many distinguished men of our country said: "There is no need of any particular preparation; there is nothing to be afraid of. Where have we any enemies?" But now they have changed their minds, and the President himself has made a recent tour across the Continent, which I believe made a very great impression upon the people, declaring that there was instant and immediate need of being ready. You will remember that he traveled from Boston to Topeka and Kansas City, urging to the full extent the plan that had been arranged and advocated by Secretary Garrison. (Applause.) And so long as the President and Secretary Garrison held together, we believed exactly what they believed and what they advocated, but it appears now again that the President has changed his mind. Well, Presidents have a right to change their minds and the people have a right to change their Presidents. (Applause.)

Some people think there is not any danger of war, but the President,—who knows more than all the rest of us put together, of the hidden secrets of intercourse between the various countries of the world and between this country and all the other countries,—said the other day: "Why, we may be involved in war at any minute," and I am afraid that is true.

From what quarter it may come, he perhaps does know—I don't. War comes like a thief in the night, like death, without notice and without warning. Certainly we have as much reason to apprehend invasion as Belgium did on the 4th of August, 1914. They thought they were absolutely safe and in ten days they were absolutely destroyed. No, the only thing for our people to do is to get ready. (Great applause.)

It was because of this belief that the National Security League was formed, for the purpose of stirring up the people, for the purpose of arousing attention in all parts of the Union to the possibility that we might be open to attack, and I think we have had wonderful success. I think that from Maine to Oregon and from New York to San Francisco, the people are fully aroused to the dangers of the situation.

But the question is, how far have we,—how far have they,—been able to impress that conviction upon the minds of Congress so as to compel them to do something. I believe myself there is a little nest of Bryanites in Congress who are determined that no preparation shall be made if they can possibly help it by any means in their power. But the people of the United States are not going to be ruled by any such little set as that. They are alive to their own interests; they know what immense interests they have at stake and the sacrifices they may be called upon to make; and I believe that from now on they will press harder and harder upon the Congress and upon the President until they get what they want.

We certainly have done what we could, and now it remains to see what more can be done. The National Security League did not organize itself for a day, but for all time as long as it may be necessary to accomplish the great purpose which they have in view. (Great applause.) They have not enlisted for the war; they have not enlisted for one Congress; they have not enlisted for one President,—but for as many Congresses and as many Presidents as it shall require to accomplish the purpose that they have in view, and to afford them the defense to which they are entitled. The President has advocated exactly what we want. We want him to keep advocating it. He has appeared before Congress and stated it. He has gone across the Continent and stated it in many cities—in Topeka, in Kansas City, in St. Louis—everywhere between here and there.

But, as I have said, he does sometimes change his mind. I think if I were President I should claim the right to change my mind every day, if I wanted to. But he has changed his mind on this subject of the mode of preparation. He and Secretary Garrison appealed to the

people and endeavored to satisfy them, and did convince them, that what we needed besides an efficient army and an adequate army, and proper coast guard defenses, was an army of reserves, gathered, paid, trained and commanded by the national authority (applause), and he said more than once that a collection of States' home guards, national guards, as I believe we call them in New York, an army of reserves made up of the representatives of forty-eight states and two territories, each commanding its own battalions, each gathering them together and each paying them until they were turned over to the actual service of the United States on the outbreak of war, was insufficient. And now, if I understand rightly, he has expressed the opinion that there isn't any very serious difference between that and the Continental army of reserves which he and Secretary Garrison have been advocating. That is the great point of dispute between them which compelled the resignation of that splendid cabinet officer, who knew so what the needs of the country were and who was not afraid to defend them. (Applause.)

Well, as I say, we cannot question the motives of the President. We cannot ask him to explain the reasons for his change of mind. We can do, however, what he has told us that he hoped we all would do—exercise patience. Well, we will exercise patience, and I will tell you how long—until the 7th day of November next. (Applause.) And then, if we have not accomplished our purpose—in the first place, if Congress has not done anything or has not done anything proportionate to the demands of the situation, we will have a new Congress that will. (Applause.) And it may possibly be—I have the greatest respect for the President—but it may possibly be that if he does not satisfy the demands of the people in this particular on the 7th of November next, we will have a new President.

I have no doubt that our Chief Magistrate feels that he has done all that the English language could do to defend—(applause and laughter)—he has done all that the English language could do to defend our citizens upon the high seas and our national defense for the protection of our citizens at home. The English language is not the most effective weapon in the world for self-defense. (Laughter.) Words are not equal to deeds. If words were things, as Mirabeau declares, what monstrous loads march up the White House stairs. (Great laughter.)

No, we must have a new shuffle on the 7th of November, unless the demands of the people are satisfied in the meantime, and you may take my word for it, we will have it.

Now, I have accomplished all that I was told to do. (Laughter.) I have talked until the Mayor came, and I hope that you are all in good

humor to welcome him. He is a splendid asset of this City of New York, and is a splendid representative for us to send west for the purpose of advancing the cause that we are advocating here tonight, for the purpose of insisting with the people of the West, the people of those 60 cities, as we insist with the people of this city, that we must get ready immediately and must spare no pains until our defense is actually complete.

I have now the honor of presenting to you his Honor, the Mayor.
(Great applause.)

NATIONAL PREPAREDNESS FOR DEFENSE

ADDRESS DELIVERED AT A SPECIAL MEETING OF THE CHAMBER OF
COMMERCE OF THE STATE OF NEW YORK, NEW YORK CITY,
MARCH 22, 1916

Mr. President, and Fellow Members of the Chamber of Commerce:
I must plead guilty at the outset to having been implicated in the formation and progress of the National Security League which has done so much to agitate the people of the country on this question of preparation for National Defense. I see that we were denounced in Congress yesterday as being inspired only by motives of personal gain. [Laughter.] I need not speak of myself, but I think I can safely say that nobody that has worked at all for the National Security League has had any but the highest and most patriotic motives. The truth is that there is no longer any question about the fact that our great country, which has taken its place as one of the great world powers is absolutely unprepared for its own defense from whatever quarter an attack may come. I see that yesterday in the House of Representatives at Washington we have been making tremendous progress. We have made conquests in all parts of the land. We converted the President some time ago, and yesterday the Chairman of the House Committee on Military Affairs, who has been fighting us all the time, announced that he was an advocate of preparedness. So that that question has not to be discussed at all. Everybody agrees that we are absolutely unprepared.

Your resolution starts with that premise, and everything that is now proposed starts with that fundamental idea. But the folly of it and the pity of it is, that all foreign nations understand it just as well as we do, and just as well as our representatives in Washington understand it. You don't suppose, do you, that the ambassadors and ministers of any of the foreign countries represented at Washington have failed to keep their eyes and ears open, and to report to their respective governments? That would be absolutely out of the question. Whether they represent nations engaged in this war that is going on, or nations that are still at peace and like ourselves are neutral, they know all about us. They know in the first place that we have not an adequate army, and they are reading in the papers this very day, and cables are going to-day to all lands, that it is taking pretty much all of our avail-

able and movable army to capture and suppress a single Mexican bandit. [Laughter.]

There is no doubt about that. And more than that, they know the whole situation. They know how utterly unprepared we are to take our place on the theatre of the world among the great world powers. They know that we have a coast line of 21,000 miles, utterly undefended at every point. They know that our great seaboard cities, at this moment that I am speaking to you, are not prepared to resist any attack from whatever quarter it may come, if it represents a nation or a government armed with these terrific great guns, that have been so absolutely destructive during the whole period of this war.

They know also that all our professions and pretenses of power are unsupported by naval and military strength adequate for that task. They know that our much boasted Monroe Doctrine, to which I believe all the people of the United States are still devotedly attached, as Mr. Roosevelt kept saying to the people, is not worth the paper on which it is written, unless it is supported by an adequate naval power. [Applause.]

They know also that since we ceased to be a strictly continental power, since we acquired the Philippines and the Sandwich Islands and other outlying possessions, we are exposed at those points to attack from every quarter, and no preparation has yet been made for their defense in case of attack.

They know also that they themselves, the twelve great and small nations that are at war, are armed to the teeth. Attacks may come at any moment. As the President said not long ago on his way from New York to Topeka, nobody knows how soon we may be involved in war, and yet so far nothing has been done to prevent this horrible condition of weakness and unpreparedness. Congress has been in session now four months, and as yet has done absolutely nothing except to pass one or two small bills affecting the army, about which there was no possible room for dispute. So that it seems to me it is just the nick of time now for this great body that represents the power and the wealth and the best citizenship of the country to let its voice be heard.

What did we read only to-day? That there is hesitation now in Congress about standing by what they voted the day before yesterday, because they are so deeply impressed with the views of the people coming to them from every quarter, and they don't know now whether it is not better to have an army raised to the strength of 220,000 men

instead of 140,000, although they voted that down by emphatic majority only day before yesterday.

I think that if the Chamber of Commerce makes its voice heard at this critical moment, after taking the advice of the ablest experts in the country, after hearing what General Wood has to say to you to-day, —if it makes its voice heard, it will make a very decided impression upon what is going on in Congress, and it may be that a better bill and a stronger bill will after all be passed than that which thus far the will of the House of Representatives seems to have indicated.

The truth is that the members of Congress are watching very carefully for what the people think, and when this body makes itself heard it will make a very great impression upon Congress.

But I know that you have not come here to-day to hear me. You want the advice of "One Who Knows" what the country requires in this present emergency and are eager to hear from General Wood.

I would like to say a word or two about the value of American citizenship before I sit down and give place to General Wood. It used to be thought the proudest boast, the richest asset and the surest protection of every citizen of the United States,—that he was an American citizen. And until lately it has been truly so. You do not suppose that there has ever before been such a situation as this in which we now find ourselves, when all the rest of the world was armed and we were practically unarmed? You do not suppose that in the administration of any of our great Presidents of the past any such insult, any such attacks, any such gross violations of the dignity and the value of American citizenship could have occurred as have been witnessed during the last eighteen months? Certainly it could not have been done during the administration of George Washington, he who left us an abiding lesson which is just as true to-day as the day that he uttered it, that "The true way to preserve the peace of a nation is always to be prepared for war."

He had at his call all the veterans of the Revolutionary army whom he had led to victory, and you may be sure that if there had been liners in those days, no such vessel with American citizens on board would have been torpedoed or fired at by a hostile or a friendly power. You do not suppose that in Lincoln's time any such insults would have been given to American citizenship? Let me read you a single word,—I have it here,—of what he said in his second inaugural, and see whether anybody after hearing that, any foreign nation, whatever its feelings towards us, would have ventured for a moment to offer any such insult to our citizenship. That is what I am thinking of all the time. He

said in his second inaugural when the war was nearly at an end and yet did not appear to be so:

"Yet if God wills that this terrible war continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said, 'The judgments of the Lord are true and righteous altogether.'"

You don't suppose that in the administration of General Grant any such affront would have been offered to our citizenship as we have suffered over and over again during the last eighteen months? Grant, who said "Let us have peace," but yet believed like Washington that the only true way to peace was to "Fight it out on the same line even if it took all summer."

You do not believe that in Cleveland's administration any such insult would have been offered us? He who declared that as to American affairs, *our fiat is law. He spoke and it was done.* You don't believe that in Roosevelt's administration [applause]—I am simply calling attention to the advantages which these previous Presidents had and which this President of ours to-day is utterly without—Roosevelt, who could have summoned to his aid the veterans of the Spanish War in which he had taken part. As long as any of those supports to those previous Presidents existed no foreign nation dared for a moment to insult our flag or our citizenship. [Applause.]

What has happened in the last eighteen months? It is a year now,—almost a year,—since the *Lusitania* was sunk and scores of American citizens, absolutely helpless, absolutely innocent, were sunk to the bottom, torpedoed by a submarine of another nation which even calls itself a friendly nation. That is the grossest insult to American citizenship that has ever been offered and I believe that it never will be submitted to by the American people again. [Applause.]

And what has happened in the last year since the *Lusitania* was sunk? Why, we have exchanged notes, very much like the notes exchanged by two irresponsible merchants, neither of which mean anything on either side and which the makers have no idea of redeeming. You probably have heard of such people. They cannot of course belong to the Chamber of Commerce. [Laughter.]

I believe the guilty party has promised to pay damages—was it five thousand dollars a head for all who were destroyed? I think it was something like that, but no matter what it was. That offer in itself implied a gross insult to our people. It implied that they might sink

as many American citizens as they pleased, if only they would agree to pay \$5,000 or \$10,000 apiece for them.

No. The trouble is that the President has not had behind him any force adequate to deal with the situation, and at last he has found it out, and I hope that before another month passes, before this Congress adjourns, power will be placed in his hands by a strengthened army and a strengthened navy and a powerful reserve force, to be created somehow or other, that will enable him and us to resume the old position that we occupied before the war, that an American citizen on the land or the sea must be safe from attack, sheltered by his own government wherever he goes. [Applause.]

There has been devolved upon me the pleasant duty of introducing to you General Wood—not that he needs any introduction. But he is the man you want at this very hour to tell you what to think and what the government ought to do. [Applause.]

DEFENSE AND NATIONAL SERVICE

ADDRESS DELIVERED AT A SPECIAL MEETING OF THE UNION LEAGUE CLUB OF NEW YORK, MARCH 20, 1917.*

Mr. President and Gentlemen: You will certainly expect only a few words from me tonight. I never agree to speak in public that I am not always very sorry that I promised to do so. But I could not resist this appeal, for it seemed to me to be a summons to come to the rescue of our country in the hour of her deadliest peril. (Applause.) If the words that I shall utter to you tonight shall be my last, I shall feel that I have breathed my last in the actual service of my country. (Applause.)

You said, Mr. President, that we are here tonight for the purpose of declaring our unconditional loyalty to the Government of the United States. And if that is the object of the meeting, there certainly is no place for it like this, and no company so well entitled to make the declaration as the members of this Club.

Few of you are old enough to remember the foundation of the Union League Club in which we are now assembled. It was founded in one of the darkest hours of our history for the very purpose of declaring and proving our unconditional loyalty to our country and to Abraham Lincoln, its sorely-tried President. I can recall its earliest days and I know that it was established at a time not unlike this, and that it accomplished a mighty purpose in carrying out the wishes of its founders. Why, at that day New York was not an American city; it was a foreign city. It was a disloyal city. Disloyal sentiments and influence mightily prevailed.

Then a few public-spirited and able citizens gathered together to see what could be done in the way of reforming the city and of coming in their turn to the rescue of their country. It was the gloomiest period of our Civil War, defeat had followed defeat, and it was only hope that maintained the courage of our loyal citizens and of our great President at Washington.

I am often asked today what can we do, what can we mere citizens do when our Government is doing nothing or next to nothing, what can we do for our country? Let me tell you what they did. They did what the last sentence of the excellent report that has been read

* Resolutions were submitted by the Special Committee on Immediate Defense and National Service, and the speakers, in addition to Mr. Choate, were Charles E. Hughes, Elihu Root, and Theodore Roosevelt.

by Mr. Bacon tonight suggests that we should do now: "It is arousing a National spirit in our citizens which shall inspire them to pledge themselves wholeheartedly to the task of getting ready, so that the Union League can render to the country service as useful and effective as it rendered during the Civil War."

By the founding of this Club and by the appeals of its members in public and in private, the whole sentiment of the city was changed, or rather the loyal sentiment overrode and suppressed the disloyal sentiment that had previously prevailed. (Applause.) That was not all they did. They raised and equipped two regiments for the service of their country, which immediately entered into that service. And when I look on these walls and see the portraits of their leaders, Captain Charles Marshall and Jackson S. Schultz and John Jay, I wish they were here tonight to inspire us, this whole city again, as they roused the city in those days. (Applause.)

Now, whatever the Government does, we can at least do that. I understand from the resolutions that we are already engaged in a state of war. I don't care whether you call it war, or, as Lord Salisbury once called it, "a sort of a war," or "a state of war," or "armed neutrality," when it takes the shape of allowing Germany to sink our ships and murder our citizens, it does not matter what you call it, it is time for the people of the United States to spring to arms and assert their rights. (Loud applause; cries of "Good! good!")

This city is not half awake to the perils that encompass it. Go up and down our streets and avenues, and by day and by night you will see its people devoted to pleasure, to their ordinary pursuits, to enjoyment and luxury without limit. They have got to find out what is the matter. They have got to learn that we are in a moment of deadly peril, that we are, as the President said two months ago, "On the brink of war." Well, we can't stay on the brink forever—we have tumbled in—that is what has happened, we have fallen in. The Government may still be on the brink, but the rest of the people have tumbled into the abyss of war. (Applause.)

Now this horrible war—I call it so now in accordance with these resolutions framed by Mr. Root and Mr. Bacon, two of our learned Secretaries of State—I acquiesce when I read those resolutions when I find that we are declared to be actually engaged in this horrible war. And remember what the Union League Club did in its earliest days in raising those two regiments. You ought to have seen them. The disloyal said, "They will never dare send those regiments down to the ferry to embark for Washington," and these men whose portraits

hang on these walls, Captain Marshall, Jackson Schultz and John Jay, with a goodly following of the members of the Club, headed the procession,—and the regiments—they were colored regiments, you will remember—marched to the ferry and started in the train for the defense of the national capital, without let or hindrance from any quarter, much as the disloyal would have liked to attack them.

I was talking the other day with a very distinguished Frenchman. He recognized, and nobody can deny it, the lack of preparation in which we find ourselves—unpreparedness, to use a very long word. "But," said he, "if a single brigade, a single division of American troops would appear on the other side of the water and take their stand by the side of the French Army or the British Army, it would infuse such new life into all the combatants on the side of the Allies, that victory would be assured and greatly hastened." (Cries of Bravo! and applause.) That was the great leader of thought and philosophy for all Europe, and America, too—I refer to Professor Henri Bergson. Now, unprepared as we are, to send any large expeditionary force across the ocean in time to be of actual service in the field, the United States Government can, nevertheless, equip a single brigade or even a single division of fairly experienced soldiers under a competent commander, whose appearance in London or in Paris with the Stars and Stripes waving over them in close company with the Union Jack or with the glorious Tricolor of France, would testify to the world that America is heart and soul with the Allies and determined to help with all its might in the destruction of Prussian militarism, and in bringing the war to a speedy and decisive end.

Now I want to say a few words about this war that are not in the resolutions. If we are going into war, if we are in war now, I do not want its cause to be limited to a few submarines, and here and there a few ships sunk. I want it to be spread over a much broader and wider ground, and to go upon deeper and grander principles than even the defense of our own property. Of course, we insist that our flag shall be an all-sufficient protection to American citizens wherever they go. But that is not enough—nor by any means all that should impel us to take part in this world-wide fight.

This war has been from the beginning a contest for freedom, for justice, for civilization, in which we are as much interested as the Allies themselves. I recognize the fact that from the beginning they have been fighting our battles (applause), while we have lingered on in this state of stupid unpreparedness, they have been actually sacrificing all their resources; sacrificing all the youth of all their countries;

and vast treasures involving infinite losses; all for the principle of equality of right among all nations, great and small, and for the purpose of securing the right of each Government to maintain its own independence and the integrity of its own sovereignty. So I have always thought, from the beginning and more and more as the war has proceeded, that if the time should ever come when by going into the war, with all our might and main, we could put an end to it in the right way in the triumph of the Allies, it was the duty of this country to do it. (Applause.)

And because I believe now that the time has come when by going in, even with the little preparation that we have yet made, we can cast the balance so decisively in favor of the Allies that very speedily a final victory will be assured; it is for this reason that I am in favor of our joining with these other nations who have so long been battling for the right—as the only sure mode of securing that righteous peace that the whole civilized world desires—and which, as I hope, will last for a century to come. We can certainly help them a great deal. They won't expect great armies to come, for, unfortunately, we haven't got them to send. But I hope that brigade, that division will go, and I believe it will. (Applause.) We can, however, help them in what they sorely need. We can help them to finance the conclusion of this war; and I shall be ashamed of America, I shall be ashamed of its bankers and manufacturers and merchants and lawyers and farmers and doctors and ministers, and of all its men and women, if they don't all rally to that proposition. (Applause.) We think we have done a great deal already. We have. We have sold them a great many goods at excellent prices. (Laughter.) We have loaned them a great deal of money at a considerable rate of interest. We have sent a vast amount of relief to their suffering; but I say that every American and all America could well afford to spend the whole income of one entire year to bring this war to the end that it ought to come to, and I hope we shall not shrink from doing that at least. (Applause.)

Now, I have talked a great deal longer than I ought to have done. (Cries of "No, no.") I know there is a great treat in store for you on the platform. There is another on the way upstairs. So, I thank you very much for giving me your attention for these few minutes, and I hope this meeting is only the beginning of wonderful activity on the part of the Union League Club that will renew the spirit of the days of the Civil War.

A WAR FOR FREE GOVERNMENT

ADDRESS DELIVERED AT THE ANNUAL LUNCHEON OF THE ASSOCIATED PRESS, NEW YORK CITY, APRIL 24, 1917

I was afraid for a long time that we should not get into the war at all, for I believed from the day of the entrance of the Germans into Belgium and their trampling upon all human rights, their breaking of treaties and of pledges, that we ought to have gone in then.

But there was something higher and grander, it seems, that we were waiting for, and it has come at last. I believe that the spirit of Abraham Lincoln has led us into this war. [Applause.]

I have tried to find a key and a solution of it, and I find it all in that two-minute address that Lincoln delivered at Gettysburg which is now to be applied and is to have a world-wide application, instead of to our own nation, as he used them. You remember what he said: "The world will little note nor long remember what we say here, but it can never forget what we do here." How unconscious he was of his own immortality!

And then he went on to express the hope that out of the blood of those who had given their lives for their country this nation should have a new birth of freedom. And it got it.

When slavery disappeared and the new birth of freedom came the United States entered upon a career of prosperity and nobility such as it had never dreamed of before. And then he concluded with those words which your President has already quoted and which every speaker everywhere during this war, I believe, will quote. You remember them all—that "government of the people, by the people, and for the people shall not perish from the earth."

Now what do we have? If Lincoln were here to-day, his prayer would be verified and glorified into the prayer that all civilized nations shall now have a new birth of freedom, and that government of the people, by the people, and for the people shall not perish from any portion of the earth.

Now I think it is not difficult to understand what this war is. It is a war for the preservation of free government throughout the civilized world. And I believe that I may include in that not only free governments of the allied nations and the neutral nations, but of Germany itself.

The truth is that this war upon which we have entered is not going to be any child's play. We all know that. The only way to fight is

to fight, and we have not begun that yet. One thing we have already done, and it shows that our entrance into this war has united the whole American people. This great money bill that was passed, very largely for the benefit of our Allies, by unanimous vote, as I understand it, of both houses of Congress, shows that all the people of America are of one mind and are agreed that there is to be no back-sliding, no hiding behind any cover, but that we are prepared and determined to face the music and to make whatever sacrifices may be necessary to secure that lasting victory that alone can make certain and enduring peace.

Then there are all those other bills which the Government has presented, as I think so wisely, and with such forethought, that last one of which is under discussion to-day, and which we are assured will pass by the vote of both houses of Congress, on Friday, for universal enrollment of all men capable of bearing arms. I do not call it a conscription bill. I think that name has been unhappily applied. The Government ought to know where the men are who are capable of bearing arms, what their ages are, and what their addresses are; and the President ought to know when the time comes—and we can trust him for that—what men are fit to go to the front.

We are very much honored by the presence in this country of these two wonderful commissions from these two great countries. The presence of Mr. Balfour here alone is a wonderful demonstration of the good-will of Great Britain toward us. And then there are Viviani and Joffre, two of France's greatest men. I noticed that when the flashlight was cast upon the tricolor there was more enthusiasm and ardent applause among you than at any other demonstration that has been made here this afternoon. But suppose they could appear in New York and receive the greetings of the people of this great city—what a thunder of applause would roll across the ocean, reporting to their countrymen abroad how enthusiastically they were received here by us.

Now, before I sit down let me say a word about our great President, for he is entitled at every step to the applause and support of every American citizen, man, woman, and child, and I believe he has it. [Loud applause.]

Some of us in the past have criticised the President. Some of us long hesitated and doubted; some of us thought that watchful waiting would never cease. But now we see what the President was waiting for and how wisely he waited. He was waiting to see how fast and

how far the American people would keep pace with him and stand up to any action that he proposed.

From the day the President appeared before Congress and made that wonderful address of his—one of the greatest State papers in the affairs of the United States since the formation of the Government—from that moment all doubt, all hesitation, all unwillingness was banished from the minds of all the people, and he is now our chosen leader for this great contest.

By no possibility can we have any other or think of any other. And we must uphold him through thick and thin from now until the end of the war.

IMPETUOUS YOUTH

ADDRESS AT THE OFFICIAL DINNER GIVEN BY THE CITY OF NEW
YORK IN THE WALDORF-ASTORIA, MAY 11, 1917, TO THE
BRITISH AND FRENCH COMMISSIONS

Mr. Mayor and Gentlemen: When I surveyed these galleries, one above the other, and beheld what celestial happiness has prevailed there for the last hour and what earthly happiness has prevailed on the floor below, I made up my mind that there is nothing that women love better than to see the lions feed—until the time comes to hear them roar.

Now that we have fairly embarked in this war, following the lead of those Allies of ours, Great Britain, our beloved mother country, and France, our delightful, bewitching, fascinating, hypnotizing sister, there can be no such word as fail. We are in for victory, which must be won together. Why, we have only been at war for thirty days, and see what a change has come over the young men of America. I feel it myself, being young.

I feel inspired with the soul of our dear old Admiral Farragut. You remember when he was making his toilsome way up the Bay of Mobile, lashed in the rigging of the Hartford, and the Brooklyn, that was before him, stopped for a moment, as if to throw the whole line out of order, and the Admiral shouted through his trumpet, "What's the trouble there?" The answer came back, "Torpedoes." The Admiral immediately replied, "Damn the torpedoes; full speed ahead," and he went full speed ahead. He suffered some from the torpedoes but he reached the bay.

Now we are impetuous youths, full of the spirit of early manhood. We want to do something at once; and yesterday, when I ventured to say that we should call upon our authorities at Washington to hurry up, Mr. Viviani, I noticed, answered me in the negative. So impetuous youth must wait. We have to wait a little while for them. Then I could never see—it was my youthful ardor, because I looked upon it in the boyish spirit—I could not see why a man who had already served his country so nobly and so widely that his fame had reached the uttermost corners of the earth and was identified with the name of America, when he proposed to offer to his country a division of 20,000 soldiers all prepared to cross and take their places by the side of their brethren in France or even Great Britain, why he should

not have been allowed to go. I think that if he was willing to take the risk of it, we might. But there again a wiser body than any of us, an immortal body, not possessed so much of soul as of immortality—there Congress stepped in and held me and Roosevelt back. So we are here to-night to address you; although we have got a great deal to learn, and happily for us England has sent her wisest and her best, and France has sent her noblest and her proudest, to teach us how.

They will show us the way which we want to follow. They will show us what to do and what not to do, and following their lead we shall come to that great and last and final victory which will secure us a peace that will never end.

Why has America entered this war? What had she to gain by it? Far removed from the scenes of carnage, her youth untouched, her manhood and her womanhood undisturbed, a few of her vessels sunk, a few lives lost—ample causes for war; but we waited, we were not ready. We are not very ready now, but by and by America will learn. America, from the Atlantic to the Pacific, from the Lakes to the Gulf, America has learned what this war is about, what it is for—that it is for the establishment of freedom against slavery, for the vindication of free government against tyranny, and oppression and autocracy and all the other horrible names that you can apply to misgovernment. When it came to that there was but one question for America, and our President at Washington has answered it for us. Nobody can tell how far he saw ahead any more than we at this moment can tell how far we can see ahead. Congress has declared war upon the Imperial Government of Germany, and has placed in our hands all the power, all the privileges that President Abraham Lincoln in the midst of our civil war ever possessed. So that is the way out of it. We are to go on to victory, and that victory, I believe, will be hastened, not only twofold, but tenfold, by the fact of our entering into the contest.

That is what I hope we can do for these war-worn Allies of ours. How they have suffered! How they have toiled! What horrible sacrifices they have submitted to! Their own homes have been decimated, their firesides made unhappy, their youths slaughtered, and they are suffering extreme agony, while we have gone on indulging in luxuries, increasing our wealth, thinking that no harm could ever come to us; that no guns could ever be forged big enough to reach our homes. And we began to hang our heads in shame until the President gave the final order that we must go and help them with all the might we have. For the first time, after two years and a half, I was

able to hold up my head as high as the weight of eighty-five years would allow.

And I believe that is true of every man here. I believe it is true of the husbands and brothers and sons of every woman here. Now, we have a great opportunity. No country ever had so great an opportunity as we have. No man was ever prouder than I am, as a citizen of this country, that the opportunity has at last been seized upon and we are here side by side with Balfour and Viviani and Joffre and all those great and distinguished men, to whom we are seeking to do honor.

VI
AFTER-DINNER SPEECHES

THE ENGLISHMAN'S DINNER

SPEECH AT A DINNER OF THE ST. GEORGE'S SOCIETY, NEW YORK,
MAY 6, 1871

Mr. President and Gentlemen of the St. George's Society: Before acknowledging your generous hospitality on the part of the New England Society, which was all I thought I had to do, I must first attend to those equivocal compliments which have been thrust upon me by St. Nicholas and St. Patrick. My best answer to the former is to give you a plain and simple statement of our quarrel and its cause. It is one of long standing, for it began two hundred and fifty years ago last summer, when a little company of my ancestors embarked from a port of Holland, to seek their fortunes, as they hoped, in those pleasant lands that lie about the mouth of the Hudson River, which came within the limits of the Royal Charter which King James had given them. But, as bad luck would have it, the progenitors of St. Nicholas were here before them, and, jealous of the near approach of newcomers of the English tongue they bribed the Dutch pilot of the *Mayflower* to lead her godly company astray, and land them on the other side of Cape Cod, on a more sterile and inhospitable shore. It was some centuries before our people found out the scurvy trick; but, having at last discovered it, they came here in great numbers to rescue from the descendants of the wrong-doers the island which had been their true heritage, but for that ancient fraud—and this it is which makes St. Nicholas always so sore.

And then as to St. Patrick, I haven't a word to say. It is never safe in New York to utter a word against him. At our dinners the laws of hospitality forbid, at his the dread of his sensitive shillelagh restrains us, and even here I feel that the ægis of the British Lion is hardly mighty enough to shield us from his wrath. If he would sometimes conceal the rod with which he smites us, we could bear it better; but he flaunts it ever in our faces. Once, for instance, he came to us with this sentiment, "New York, the Irishman's Paradise"—and it was so true that we had to acknowledge it, and confess him to be the man and the Lord of the Garden. Like Adam he comes in naked, but soon is clothed in more than Royal Fig-leaves, and rules unquestioned over beast and bird and fish—over all the other living inmates of this Eden.

And now, gentlemen, many thanks for this generous welcome. To one who like myself has often partaken of your hospitality, this nu-

merous and brilliant gathering of the devotees of St. George is gratifying indeed. I first had this pleasure in the same representative capacity, ten years ago to-night, in the spring of 1861, at the beginning of "that little unpleasantness" which, according to the prophecies of your President, is about to end in the universal congratulations with which the people of both countries will welcome the result of the labors of the Joint Commission. After that for many years St. George languished, or seemed to languish, among us, for it was only in appearance. It seemed as if it would require all the skill and science of Professor Hawkins, (whom I am glad to see at this table,) the reconstructor of all the giants of the past, to restore him in all his ancient vigor and beauty; but, behold! of his own strength he has arisen more potent than ever. And I believe that I know the secret of St. George's recovery. He owes it to that ever living source and spring of British power, the pride of the true Englishman, and the inspiration of his best triumphs, I mean his dinner. For there is no mistake about it that the dinner is the true pride and boast of the British heart. St. George deserved and won great glory by the slaughter of the Dragon, but his best claim to the gratitude of his countrymen and of mankind is in his having founded the St. George's Dinner. I claim no exclusive knowledge of English history, but I know that the annals of your race will show that all the greatest achievements of Englishmen have been accomplished after dinner. St. George himself could never have won that grand triumph which the genius of the French confectioner has perpetuated in the sugar sculpture before me—which presents him sweeping on his victorious charger, spear in hand, down the dragon's throat—had not his jacket been well lined with the richest sirloin and the stoutest pudding. See how the mighty victor is whetting his tusks over the recollection of the roast beef and plum pudding that he has just devoured, while the shad-bellied and empty unicorn betrays the secret of his defeat, in his meagre fare of thistles and oatmeal. And so in all ages the dinner has been the indispensable preface to British victory.

Now, with my ancestors of New England it has been just the other way. Whether it be owing to the coarse fare of the Mayflower, or the hungry days that followed in the wilderness, we have learned to do our best on an empty stomach. The American before dinner and the Englishman after, the hungry Yankee and the gorged Briton, are the distinctive types of our national constitutions. Why, the only way we ever got through our famous revolutionary war, I believe, was by starving you out. The longer the contest waged, and the hungrier all sides

became, our fathers fared the better and yours the worse, till at last we got the upper hand. But England has paid us roundly for that in these last days, and has learned the art of fighting us with her invincible weapon, the dinner itself. We had a grievance against you, and sent one of our hungry emissaries over to demand redress, but you got his legs under your national mahogany, you held them there with a truly imperial grip, you dined him within an inch of his life, and soon he forgot the errand on which he went, acknowledged that our supposed wrongs were all imaginary, and returned to a discontented and still hungry people. But, not to be baffled by a single failure, you have at last sent over a quartette of your best men, clad in complete dinner panoply, to besiege the American people in its own capitol. They have sat peacefully down before the President and both houses of Congress—have exhausted the matchless arts of the dinner-table, and so have mastered and overcome the very Genius of our Republic, and to-day the despatches from Washington assure us that we have no longer any wrongs at your hands to be redressed.

But now, seriously, gentlemen—for even Englishmen after dinner, I suppose, can be serious—I wish to contribute a word for New England to the many earnest wishes for the peace and unity of the two nations that have been uttered here to-night. One event has occurred since your last St. George's Day, which seems to me most fitly to illustrate the concord of spirit and of feeling which pervades the people of England and America. I allude to the departure of that great Englishman, who had done as much as any other of the Anglo-Saxon race to entertain and edify the people of this country, whose name was dear to every American home, without whose books we thought no household fitly furnished, and no American youth's education complete—I mean, of course, Charles Dickens. He was an embodiment of the best virtues of our common blood. Every page that he wrote was full of truth, of courage, of loyalty to his fellow men, of piety towards our common Maker. I know that the Reverend Messrs. Stiggins and Chadbands, who unhappily survived their biographer, have indulged in gloomy misgivings whether he was in truth one of the elect; but I know of many of his devoted followers on this side of the Atlantic; who would distrust the happiness of any realms of bliss which should not be large enough to admit his grand and catholic spirit, and would rather stake their chances of welfare in any heaven that shall be good enough for his exalted spirit. I give you therefore, in conclusion:

“The name and memory of Charles Dickens; a tie which should bind in perpetual harmony all the scattered branches of the English-speaking race.”

ST. PATRICK AND THE IRISH

SPEECH AT THE ANNIVERSARY DINNER OF THE SOCIETY OF THE
FRIENDLY SONS OF ST. PATRICK, DELMONICO'S, NEW YORK,
MARCH 17, 1873

I am sure, Mr. President, that I should have made a capital Irishman, if my nurse, who was of your country, had not changed me at my birth, as happened to the friend of Horace Walpole; for every year, as St. Patrick's Day comes round, I feel growing within me a renewed verdancy, and your cordial invitation finds me ever ready to come to the table of St. Patrick, to acknowledge his prowess, and to enjoy the overflowing hospitality of his Friendly Sons. Who knows, sir, but that, if I could have kissed the Blarney Stone, I might have become as smooth of speech and as glib of tongue as yourself, or as any of these rollicking companions of yours who surround these tables.

Our staid old mother, Massachusetts, as you know, sir, has among that necklace of precious stones that binds her throat, and which her poet has therefore called her rock-bound coast, one dear old rock on which she has taught her sons to sharpen and polish their tongues, before she sends them forth to contend with the Irishman and the Dutchman, and the men of all nations who swarm beyond her borders, and I suppose it is because you, sir, have often come to that shrine and done your best to lick that *sham-rock*, as you sarcastically call it, that you have assigned to me a part of this toast, to which none but an Irishman born and bred should respond.

My children, at the breakfast table this morning, were determined to know who St. Patrick was, and all about him [laughter]; and as I had to rack my brain to answer their questions, and you no doubt will all be interested to hear the result of the latest researches into the history of that mythical hero [laughter and applause], I perhaps cannot do better than to give you the drift of the dialogue.

Well, who was St. Patrick, anyway? Why, he was a very great man, to be sure, as you may know, from his having a day set apart for him in the calendar to be all his own; for that is a prouder tribute than the grandest monument or the stateliest tomb, to have one of the three hundred and sixty-five days made his, and his only, for all time to come; for, though the world has been going on for thousands and thousands of years, you can still count upon your fingers the great heroes to whom this peculiar honor has been assigned. In the first

place, there is Christmas, which is Christ's own day; and then there is New Year's Day, which is appropriated to old Father Time; and the Twenty-Second of February, set apart to Washington, the Father of his Country [loud applause]; and the Twenty-Third of April, which belongs to St. George and Shakespeare, and commemorates the day when

"The Lion and the Unicorn
Were fighting for the Crown;
And the Lion beat the Unicorn
All about the town."

[Laughter and applause.] And then there is the Thirtieth of November, which belongs to St. Andrew, and his horrid bagpipes and his haggis; and there is the Fourth of July, which was the birthday of our dear country herself [applause]; and last, but not least, St. Patrick's Day, which comes always in the middle of March. [Laughter and applause.] And why do you put it in the middle of March? Why, because he was always in the middle of his marches, full of fight, and because he comes into history like a lion roaring for his prey, and goes out of it like a lamb, having pacified and purified all Ireland. [Applause.] Well, when was he born? I cannot name the day or the hour exactly, but, at any rate, it was immediately after the Deluge. And how do you know that? Why, because of his hatred of cold water. [Applause.] He never would touch a drop of it. [Applause.] Father Matthew, you know, tried to make him sign the temperance pledge [laughter], and when he was sick they endeavored to persuade him to try the cold-water treatment; but he resisted them stoutly, and would have none of it. He remembered the Flood, he said, when all the world tried that treatment, and it killed millions to every one it cured. [Tremendous applause.] Well, where was he born? Why, in France, to be sure. And how do you know that? Why, because when he landed in Ireland his soul was still so full of *gall*, that he had but to spit [applause] upon the head of a serpent, and however monstrous it might be, it straightway rolled in the dust, and shuffled off its mortal coil. Well, who were his relations? Why, he was first cousin to St. George, who slew the dragon, and they set sail from France together to conquer and possess the British Isles. But, when they reached the Channel, a storm came up that made them part company; and while St. George put in to England, St. Patrick sailed on and landed in Cork, and only with his shillelagh; and straightway he began his victories, for he found that beautiful island overwhelmed with serpents and bulls and bears and Druids, and every other kind

of monster; but he laid about him so stoutly that he drove them all into the sea, and in a few days he had Ireland all his own. And yet not quite all to himself; for there he found a lovely virgin, overflowing with youth and beaming with beauty, no other than Erin herself, and he paid court to her and married her, and settled down to domestic life [laughter], and he went to work to people that beautiful island, and very soon he began to have children in plenty [applause], and instead of being born with gold spoons in their mouths (for I believe there are no gold mines in Ireland), every mother's son of them came into the world with a shillelagh under his right arm, and a whiskey bottle under his left. [Applause.] And it was well they did; for the good old mother, for lack of better nurses, brought them up upon that bottle, and soon they became strong and lusty, and put about them each with his club, and plied it so vigorously, that very soon he became a very King of Clubs, and so it has come about that every Irishman in the last reduction of his pedigree comes of royal blood [applause]; and at last the good old hero died and was buried, but every true-hearted Irishman believes with implicit faith in the second coming of St. Patrick, and that when he does come, Ireland will have her own again; and that there he will set up his shrine, and will recall all of his Friendly Sons from wheresoever they have wandered; that in that great day you will see them coming, bearing their sheaves with them, from New York and from California, from the banks of the Mississippi and the Hudson; from the Persian Gulf, from the sources of the Nile, from the Mountains of the Moon and the Isles of the Sea, all bringing their spoils with them to enrich their dear Motherland; and that then at last Ireland will belong once more to Irishmen, and will be as free as the winds that fan her harvests, and as the waves that wash her shores. [Applause.]

And now, Mr. President, if there is any one here that knows anything more about Ireland or St. Patrick than I do, I hope he will speak at once, or else forever after hold his peace. It has been said, sir, and certain people are never tired of saying, that Ireland is in all history a bone of contention. Well, who wonders at that, when in every genuine Irishman every bone in his body is a bone of contention. [Great laughter and applause.] Why, you know, sir, that they begin to wrestle at least as soon as they are born; and as soon as the gristle hardens into bone, each man puts about him, hitting wherever he sees a head, and they are forever foremost in every fray. [Applause.] Why, I remember an old story, hundreds of years old, that illustrates this. When the Duke of Berwick went over and joined the French

alliance, and carried with him an Irish brigade, the great King Louis the Fourteenth, in a moment of ill humor at hearing of some of their freaks in camp, exclaimed, "Why, these Irish fellows give me more trouble than all the rest of my army!" "Sire!" was the quick reply of their witty commander, "that is exactly the fault which Your Majesty's enemies to a man find with them." And General Sherman will tell us that the same thing might be said of more than one Irish brigade that, under his gallant lead, followed the Stars and Stripes in our late civil war, and perilled all in the defence of their adopted country. [Applause.]

Mr. Chairman, there is a great deal more that might be said in praise of Ireland, but I shall leave you to imagine it. [Applause.] When I survey that mighty tide of emigration that for the last twenty-five years has been pouring through the narrow gate at Castle Garden and spreading in many different streams over the whole length and breadth of the continent, carrying richness and verdure wherever it flows, converting many a wilderness into a blooming garden, enriching and building up this great country, I cannot but reflect that if these same Irishmen, two millions strong now, of Irish birth in this country, had, by the providence of God, been permitted to spend their energies and genius at home in their dear native land, why, the sea-girt shores of their beloved island would have been all too narrow to hold the rich and splendid monuments of their labor. [Cheers and cries of "Bravo!"] The truth is, that the Irishmen have had their fair share in all the victories both of war and of peace, that have illustrated the English name and race. Why, to this very day the British Lion roars with something of an Irish brogue [great laughter and applause], and it is Irish pluck that lends a stiffness to the bristle of his mane, and a snapper to the lash of his furious tail. [Laughter and applause.]

Judge Daly and Mr. Savage have told you of how much Ireland has contributed to English literature and English orators; but I think that the world over, all who speak the English tongue for all coming time will have to thank the genius of Ireland, if for nothing else, for the fact that, with her matchless gift of language, she has taught Englishmen to speak. If the little island that, after keeping Grattan and Flood and O'Connell, for herself, could lend to her sister across the Channel such masters of speech as Burke and Sheridan, and then could have enough of the raw material to send to her niece across the Atlantic a Henry, an Emmet, and a Brady, why, she must be the very nursing mother of eloquence itself.

Mr. President, I don't know how to account for it, unless it is this: they say that Mercury was the god of eloquence, and I suppose that it is the mercurial blood that flows in the veins of every Irishman that has accomplished this. [Applause.] But, I am afraid, Mr. Chairman, that if I go on, you will think, as I have suggested—[cries of "Go on!"]—you will think, as I have suggested in the beginning, that I have mistaken my nativity, so I will make my bow to St. Patrick and take my seat. [Cheers, and cries of "Bravo!"]

THE IRISH IN NEW YORK

SPEECH AT THE ANNIVERSARY DINNER OF THE SOCIETY OF THE
FRIENDLY SONS OF ST. PATRICK, DELMONICO'S, NEW YORK,
MARCH 17, 1874

Gentlemen of the Friendly Sons of St. Patrick: Nothing but my inveterate devotion to the memory of your Friendly Saint, and my ardent love and allegiance to your presiding officer, has brought me here to-night. Such is the love I bear him, that I believe I should go wherever he bade me, and do whatever he commanded, unless at last he got abusive, as he sometimes does, and bade me, as he has so many unfortunates before him, go and be hanged. [Laughter.]

Mr. President, when I look about these tables, and see how this company is made up, I agree with the Mayor, whom you have commissioned me to follow, that there are some signs that St. Patrick is beginning to die out; for while I see many pure and genuine gems of the Emerald Isle about me, I discover some, a disproportionate number of those whom I may call diluted, if not adulterated, Irishmen. [Laughter.] And I should like to know the secret of there being congregated here—for instance, at this single table before me, there is an array of foreign element, foreign to you, men of official position, such as entitles that one table to be recognized as one of the Treasury benches. Why is it that we have here, not only an ex-Assistant Secretary of the Treasury, but Collector after Collector, and the person of a promising future Collector, with many of their marked myrmidons? [Laughter.] There is some mystery in it that is yet to be unraveled. Can it be, sir, that the administration, in view of certain recent defections, sees the means of forming a new alliance, and is proposing to unite itself with the Friendly Sons of St. Patrick for some future political combination? If they do so, sir, I fear they are reckoning without their hosts, and I would advise our Collectors, numerous, powerful and popular as they are, if they go into any such combination as that, to look out for their moieties. [Laughter and applause.] Because, sir, they have no idea of the almighty swallow of St. Patrick. [Renewed laughter.] However, I suppose that upon that subject the Collector, satisfied with his present associations, would say, that

"Where ignorance is bliss,
'Tis folly to be wise."

[Laughter and applause.]

Now, Mr. President, to the special subject assigned to me, to say ditto to our worthy Mayor. I think that it is with a good reason that

the Irishmen of the city, two years ago, joined hands with other good citizens in electing him to occupy, for a second time, after the lapse of twenty-five years, the great municipal office of the city. It is true, that he refused to wear to-day the time-honored suit of his predecessor, which Mr. Murphy has suggested to me has been "hauled" off for repairs. It is true, also, that he refused to don that venerable white hat, appropriate to the occasion, which was anonymously sent him. But then the records of his administration show that he wears the green always in his heart. And he will be content to go down to posterity hand in hand with the steadfast green under any and all circumstances.

I think, too, sir, that he has exhibited some of those great Irish qualities in the course of his administration, which entitle him, not only to the original support, but to the continued advocacy of all true sons of St. Patrick. I might speak with marked emphasis of that extraordinary faculty with which he has always refused to be driven where you want him to go, which I understand to be one of the most remarkable traits of the Irish character. I have often been asked for the secret of my influence with Mayor Havemeyer. [Laughter.] And as we are all friends here together, I do not object to telling you the secret, and that is, that when I want him to appoint a particular man to office, I am very certain not to ask him to do so; and if I have a very particular desire indeed to secure an appointment, I go directly to him and ask him not to make it; and ten to one the name goes in to the Board of Aldermen. [Laughter.] In fact, I serve him exactly as Paddy served his pig, and when I want him to go to Cork, I put my cord about him and pull as if to go to Dublin.

Now, gentlemen, to come down to the city, or to come up to it, what is there that I can make of it? I am at a loss to see, when addressing a body of men who, for so many years, have been making so much of it. [Laughter.] What is it? The Mayor, and several of the gentlemen that have spoken before me, having enlarged upon how much the City and State of New York owe to Irishmen, it seems to me that I might better deliver a discourse upon how much the Irishmen owe to the city of New York; and the great question, gentlemen, that we of other nationalities are interested in is, when are you going to pay it? When are you going to pay and discharge that great debt that you owe to the city? What is it that you have been doing here for the past twenty-five years? Mr. Sewell says, "Making the coming man." That certainly is a very worthy and commendable object. [Laughter.]

But how much else have you made out of the city? Where are the great places of trust that you have not filled? Where are the great

spoils that you have not enjoyed? Where are the great combinations by which you have not controlled all its honors? To be sure, for a year or two, this combination of hostile nationalities, the Dutchman, the Scotchman, and the Yankee, appears to have held you only for a little while in probation. [Applause.] It is only two years of a probationary period that you are going through, and I am afraid that we must all acknowledge that very soon you are to return to that power which you love so well to wield. However, while we have a full-blown Yankee in the office of District Attorney, another in the post of Comptroller, another at the head of the Tax Department, and another at the head of the Commission of Parks, who shall say that it will not be, after all, for some time to come, a drawn game. But, gentlemen, the Mayor has exhausted the subject. I have exhausted the five minutes, which was all I undertook to fill, and I only want to switch off from the subject of the city to say a single word in advocacy of another, which it seems to me is equally important, and of which a word might be fitly spoken to you here and now. I wish I might be allowed fifteen or twenty minutes more to deliver a temperance discourse, and address you a few words in behalf of the great temperance movement that is now spreading over the land. I know I should receive a warm response in support of it from the other end of the Chamber. When the ladies came in, I knew that they were coming for a good object, in which their sisters throughout the country are all warmly engaged; because I am sure, that if the Friendly Sons of St. Patrick, and their brother Irishmen throughout the country, are once converted to the temperance cause, the whole cause itself is won. Why, gentlemen, what can be done to improve the "spirits" in which Irishmen from the beginning of time indulged? I want you to take that question home with you to-night. I want you to form an offensive and defensive alliance in support of the temperance movement, and then I will give way for Brother Bailey, who will pledge the New England societies, and all the other sister associations, to join you in the good work. [Applause.]

HARVARD EXAMINATIONS

SPEECH AT A HARVARD ALUMNI DINNER, CAMBRIDGE, MASS.,
JUNE 30, 1875.

Mr. President and Gentlemen of the Alumni: If our worthy Alma Mater looked forth this morning, as I have no doubt she did, upon our passing column, she must have congratulated herself upon the fact that all the boys were here,—even the old boy himself was here. I refer, sir, to no person; I mean nothing personal, none of those gray-headed men who immediately surround your table, but I speak of that venerable and reverend company of ancient graduates who preceded the class of 1835, and who, therefore, upon their own merits, are allowed to eat and drink freely in honor of Alma Mater. [Laughter and applause.] To us, sir, children of a later growth, who are mindful of the almighty dollar, it lends a new charm to life, a new ambition, and something purer and grander than we have had before, to which we may work up. For, gentlemen, before the only real prize for seniority among Harvard graduates was the position of the oldest-surviving graduate; and as playing for that, sir, was extremely a game of chance, there were very few who had the temerity to aim at it. Now, sir, to recollect that forty-three years of faithful service, paying always for our dinners as we go, will enable us to spend the evening of our days in free and sumptuous feeding at these tables, is indeed, an incentive to the highest happiness. [Laughter and applause.] I take it for granted, sir, that it was for age of service that that compliment was paid them, for, judging from symptoms I have observed to-day, if it was upon the idea that these gentlemen have outlived their appetites, that was a mistake which has told with frightful effect upon the general dinner. [Loud laughter.]

Mr. President, to graduates, distant in time or place, returning upon these festive days, one of the most delightful things that we observe is the universal emulation of youth that marks the whole concern; how each man, each class, is struggling to be a little younger than they really are. How to preserve youth, the art of keeping perpetually young, is, indeed, a secret worth discovering. Lord Bacon, sir, understood it, as he understood almost everything that pertains to human nature; and he concentrated the whole thing in a little story that he told in one of his famous apothegms on Sir Thomas More. As I have

heard it told at a commencement dinner, I will tell it here. "Sir Thomas More," he said, "married, and at the first had daughters only; and his wife did ever pray for a boy. At last she had a boy, which, after it reached man's years, proved simple. Sir Thomas said to his wife, 'Thou prayedst so long for a boy that he will be a boy as long as he lives.'" [Laughter.] I could not help observing here to-day, Mr. President, how this struggle for youth marked the advancing column. How frisky the aged graduate appeared, how boyish the men of middle age, and how perfectly childish the last of the column. [Loud laughter and applause.]

Mr. President, we, who are getting to be among the older graduates, refer with longing to the past; and great and growing as is the college, or the university in which it is now lost, we can't help thinking that our brightest days were when we were under her cool and shady trees. And, for one, I shall always, whatever fate may come upon the college, remain of the honest conviction that the Presidency of Jared Sparks was the best time of the college. [Laughter.] And, sir, in those days the government of the college was administered on very different principles than those which are now maintained. The standard was established upon the orthodox theory that the capability of every class is to be measured by the strength of the weakest links in the chain, and the curriculum was adapted to the understanding of the stupidest. That worthy president, Mr. Chairman, whose precepts and examples have been so much neglected in recent days, made a practical application, in his treatment of the student, of what Mr. Quincy, I believe, had once jocosely pronounced when he said that his maxim was: "Be to their faults a little blind, be to their virtues very blind, but clap the padlock on the mind." [Laughter.] The key, sir, to that padlock was lost in Quincy's time; Sparks never looked for it, and when I hear of the miseries of the undergraduates of the present day, I almost regret that Eliot found it and set out to insert it in the rusty wards of the lock. [Laughter and applause.] I don't mean to say, sir, that we were kept away from the fountain of learning; far from it. We learned few things, and tried to learn them well; but then, too, there were hidden mysteries in those days as in these more recent.

I remember Professor Pierce, whose venerable form I now rejoice to see in freshness among us. [Great applause.] He and his functions were the *ne plus ultra*. [Laughter.] I believe that a modern upstart among philosophers, Herbert Spencer, has claimed to be the first originator and teacher of the unknowable. Professor Pierce was ahead of him by many years. [Great laughter and applause.] He, sir, had

three different forms of a mathematical problem by which he used to test our progress: the first and simplest were those that only the first eight in the class could understand; the second were those which nobody but the professor himself could master, and the third were those which neither he nor anybody else could understand. [Laughter.] Now, sir, I am truly horrified in taking up one of these annual catalogues, to see the tests that are applied to the modern mind. I verily believe that any simple-minded graduate of more than twenty years' standing would find it more difficult to pass any one of the junior examinations that we have laid down, than really it would be for a camel to pass through the eye of a needle. [Laughter.] I wish, sir, that justice might be done to these trembling youths [laughter], and that for once the tables might be turned upon the board of overseers [loud and prolonged applause], under whose authority these excruciating tests are applied to the infant minds. I take up the last annual catalogue [pulling the book from his pocket], with a view to see whether there were probably any of the venerable and honorable overseers, as they used to be called, who could answer the simplest of these questions, and I would like to have it applied here and now. [Great applause and laughter.] Begin, sir, with the venerable head of the university. [Roars of laughter.] That, sir, was the formal mode of speaking of the President when I was in college. I don't know how it suits him to be addressed in that way by one who was a sophomore when he was a freshman. But, really, gentlemen, if wisdom, if the gray head of man and honest living are true old age, why he is already as old as Quincy and as venerable as Walker. [Applause.]

Now let us have a little examination in philosophy. Why, Mr. President, there was something called philosophy taught in our day by Professor Bowen. That was before the true function of the brain as the seat of the mind had been discovered; but we were taught a spurious and effete kind of mental philosophy which consisted in evolving something out of our own consciousness which was not there. [Loud laughter.] Let us see whether the venerable head of the university could answer a single one of these questions, and if he can he will rise to do it. [Roars of laughter.]

"Explain the Paralogism of Rational Psychology, the Antinomies of Rational Cosmology (proving the thesis and antithesis of one of them, as an example); and the ontological, cosmological, and physico-theological proofs of the Ideal of Pure Reason, or Idea of God, together with Kant's objections to each of these three modes of proof."

I am sorry Mr. Charles Francis Adams, the genial President of the

board of overseers, has left in time to escape the examination, and in his absence I would like to ask Judge Hoar to tell me this:

"Explain briefly the theory of atomistic dynamism, and how it reduces matter to mere Will and Presentation. Of what only do the senses and the physical sciences take cognizance as constituting the primitive element of Matter? What must ideally or in thought precede every motion or physical force?"

Judge Hoar: "Not prepared." [Loud laughter and applause.]

Then, sir, I would like to ask Dr. Samuel Green, that youthful and ubiquitous member of the board, to answer a plain question in "harmony" which is now required:

"Resolve the dominant seventh chord of G into other seventh chords and give an example of the progression of three of the secondary chords of the seventh into other chords than those of the regular progression."

Why, sir, I might go on exhausting, not these questions, but the honorable board of overseers [laughter] till I could demonstrate to you that not one of these gentlemen is, as he is found at present sitting at the table, fitted to enter into, much less to escape out of, their difficulties. [Renewed laughter.]

Mr. President, I am very glad you wrote down the toast that I was to speak on. You wrote me that I was to speak for the graduates, *in partibus infidelium*, and if I rightly remember the Latin that used to be taught us by Dr. Peck and Professor Lane, that means "a region where infidelity prevails." I would have you know, sir, that I came from the virtuous and orthodox city of New York. You may well study the example and virtues of the people, even the alumni of Harvard. We are not so benighted as you, in your note, seem to suppose. Why, sir, we have a Harvard club organized after the fashion of this association of the alumni, and so far as I can see it is a perfect miniature. Meeting periodically, we resolve ourselves into a mutual admiration society, and sing the praises of our Alma Mater. We are visited every year by the worthy head of the university himself, who comes to us as certain as the twenty-second of February comes round. He tells us all that is being done and attempted in this our ancient college, and never leaves us without revealing to the sons the needy condition of the college. [Laughter.] And from all that I can learn it is not only his favorite theme, but her normal condition. [Laughter.] We have a chance, sir, to put our names to all the subscriptions that are started, although we have not the right of representation on the board of overseers. But, sir, if the board of overseers is to be subjected to a test, an example of which I have suggested, it may be a happy escape for us. [Loud applause.]

THE DAY WE CELEBRATE

SPEECH AT THE SEVENTIETH ANNUAL DINNER OF THE NEW ENGLAND SOCIETY IN THE CITY OF NEW YORK, DELMONICO'S, DECEMBER 22, 1875 *

I hardly know, Mr. President, to what I owe it that I have been selected to speak to this memorial toast, which was always wont to be assigned to some learned divine or some renowned statesman. Possibly it is to the fact that now for twenty-one successive years I have faithfully partaken of the coarse fare of the Pilgrims as reproduced by Stetson or Delmonico at these annual dinners. (Laughter.) Certainly a majority so fairly earned by such devout diet and digestion might have a worse reward. (Laughter.) Shakespeare tells us of those who "have been at a great feast of languages and stolen the scraps," and I can assure you that crumbs thus pilfered from your own tables are all you will get from me to-night. (Applause.) Seriously, however, these pious banquets afford no mean field for the study of human nature, and no man in the country, however exalted his station, can claim to have completely finished his education until he has attended at least one New England Dinner in New York. (Applause.) It was doubtless this sage reflection that has led hither to-night the august footsteps of the President of the United States. (Laughter and applause.) It was not enough for him to have led grand armies and to have achieved magnificent victories—to have first saved and then governed a nation of forty millions of freemen—unless he could once kneel at the shrine of the Pilgrims, and study his own great trade of war with Captain Miles Standish, and the art of free government with Winthrop and Bradford (applause); and even he, I am inclined to think, can learn something here, and may possibly find, by the contemplation of the occasion and the company, some reason for revising, not to say correcting, his own favorite views as recently expounded. (Loud laughter and cheers.) In pressing upon the country the urgent necessity for a speedy return to the use of hard money, of which he has been the proper and consistent champion (applause), he has been pleased to represent inflation as the source of unmixed evil to the people of the United States, and that there is no health or happiness in it. But he has only to look before him to behold a striking

* The occasion was the 255th anniversary of the landing of the pilgrims. Isaac H. Bailey, President of the Society, presided; at his right sat President Grant, and at his left, General Sherman.

argument to the contrary, and to see two or three hundred representative men of the great commercial metropolis who have been undergoing for three mortal hours a systematic and forced process of inflation, and for all that, and because of all that, are as happy and as healthy as the lot of humanity will admit. (Laughter.) These well-rounded forms, this sea of upturned faces, Mr. President, so beaming and so smiling, all belong to practical inflationists for the time being, who would have scouted and stoutly resisted any attempt at contraction while engaged at these tables. (Laughter.) So, too, he has lost no opportunity to declare that an irredeemable currency is inconsistent with true financial credit and prosperity (applause); but here before him is a great company, mostly of merchants, filled almost to overflowing with the soft currency of Delmonico, which is certainly irredeemable; and who can doubt their credit or their prosperity? (Laughter.)

But I must not lose sight of the grand and sober theme of the hour, which is no less than Plymouth Rock—that historic boulder which the far-reaching scheme of Providence, in shaping the destiny of nations, transported in some remote glacial period from the frozen regions of the North to the harbor of Plymouth, to be the stepping-stone of the Pilgrims to glory. My historical studies, Mr. President, have led me to discover a certain likeness of character in all the rocks about which, for any reason, the sentiments or the feelings of mankind have clustered. They are few in number. You can easily count them on the fingers of one hand. Rome had her Tarpeian Rock; England, the matchless Gibraltar; Ireland, which must always have something, has her *sham-rock* (laughter), and we of New England the imperishable stone about which, in imagination, we gather to-night. (Applause.) And I think the comparison is obvious between our own and each of theirs. All strangers who arrive at Rome are found flocking next morning to the summit of the Capitoline Hill, to gaze upon that rocky ridge, so dear to the dreams of the schoolboy, within whose recesses the fabled Tarpeia still sits, buried beneath the avalanches of gold and jewels with which the Sabines rewarded her treachery, and from whose top the Romans hurled to destruction the victims of their national vengeance. Certainly our stone itself is far more precious than the gold and pearls of Tarpeia, and who can deny that the high-strung morality of New England has used it for a similar purpose? There is this difference, to be sure, that since Plymouth Rock came up by the roots and was transported into the public square of the village, New England hurls it bodily at those whom she condemns, and every

true New Englander has armed himself with a chip of it to fling in the faces of all who savor of ungodliness or otherwise arouse his saintly wrath; but whether dashed in pieces at the foot of the rock or crushed beneath it is all the same to the victim. (Laughter.) And then as for Gibraltar, the darling treasure of the British heart, honey-combed with batteries, and bristling with great guns from sea to sky, against which all the enemies of England in turn have butted their heads in vain, and ended by saluting it in honor, how true a picture of the history of our own more modest rock (!) against which the prejudices, the jealousies, and the hatreds of every hostile interest and sentiment in the whole country used to batter themselves to no purpose; but at last, in the healing of hereditary strifes and sectional discords, they have joined hands in applauding it, and now cherish it with pious solicitude as a national treasure. (Applause.) They once even threatened to shut it out in the cold, but now from all quarters they come flocking in on the 22d of December to warm their hearts and hands in the blaze of its brightening glory. (Applause.) And last of all, the shamrock. Shall we not—now that we are all here alone and no reporters are present—shall we not, whispering in each other's ears, confess that even Plymouth Rock has a faint shadow of a shade of sham about it? (Laughter.) Now that school is out, we don't mind owning that we can give our friends of St. Patrick's a heavy discount at the game of brag, and beat them on their own terms. (Laughter.) But enough of this rocky subject. Let us get off the rocks! Hugh Miller's study of the rocks is said to have made him mad. I hope that this little study of mine in the same direction will have had no such effect upon any of you.

But I must return to the subject of the toast—*The day we celebrate*. I have sometimes wondered, Mr. President, how the sons of the Pilgrims, if brought back in the eighth generation, after the lapse of 250 years, to undergo the perils and hardships of that wintry voyage in the Mayflower, and the deadly sufferings that followed the landing, would have stood it all! The present officers of the Society may serve as examples. Imagine, for instance, gentlemen, our worthy retiring President, Mr. Bailey, carried back over the gulf of time, appearing as one of the armed followers of Captain Standish in his monthly raid against the surrounding savages (laughter); or measuring out with Elder Brewster, with the acquired skill of a Commissioner of Charities (laughter), the scanty rations among the new immigrants, the thermometer at fifteen degrees below zero, and no shelter anywhere but

the *Mayflower* and the rock. You would have to put on him a steeple-crowned hat, of course, to give him any thing of a churchly or religious look (laughter); but so transformed and translated, who shall say that he would not have made a very passable Pilgrim? And then Colonel Borden, our President elect. (Applause.) I owe him one, and am glad, before he mounts the throne, to pay it off in kind. I understand he said, when informed of his election as President of this Society, that if they expected him to make long speeches without saying any thing, they had got the wrong man, and that in his last three predecessors they had had enough of that. (Laughter.) But imagine our new President in that first winter at Plymouth, when the common larder of the Pilgrims was reduced so low as to afford only a handful of Indian corn to each man per day; how long do you think he would have retained his rotund and rosy visage? Perhaps, in the contemplation of such an empty feast, even his tongue would have gladly "dropped manna," as Milton says. (Laughter.) But of all the men of this generation, I am sure that our worthy and venerable Secretary, Mr. Hubbard, would have been most at home at Plymouth in 1620. (Loud laughter.) Can you not see him in your mind's eye taking his daily round among the new settlers, and even extending his visits to the neighboring Indian tribes? (Laughter.) Why, he would have been just the man for the occasion, and would have sustained the arms of the ruling elders as stoutly as he has held up those of our succeeding Presidents, from Grinnell to Bailey. In his presence, I am sure, grim-visaged war would have smoothed his wrinkled front, and a new Indian policy would have prevailed. I can see him now visiting, catalogue in hand, the wigwams of the Pequots, the Narragansetts, and the Naumkeags, satisfying them all of the great usefulness of the New England Society, and of the extreme importance of joining its ranks. (Laughter.) In a few short months he would have had every mother's son of them enrolled, and so, perhaps, have advanced the march of civilization a century at least. The picture gains upon me so that, whenever I see him coming round for the annual assessment, I almost regret that he had not, indeed, been present at the landing. (Continued applause.)

I have thus spoken, Mr. President, lightly, but not irreverently, to this time-honored toast. Had not these more important considerations pressed upon my mind, I should have told in sober earnest of the great results that have grown from the little seed that the Pilgrims planted; how vastly grander these results have been than even their pious hearts conceived; how their grateful descendants have reaped from their toils and sacrifices an overwhelming harvest of plenty and

of bliss; how the system of education and the gospel of hard work (applause), of which they set the example, and which they transmitted to their posterity, triumphing over their own dark superstitions and obsolete theology, have transformed the austere and gloomy life of New England as it was in their day into the fair sunshine of knowledge, prosperity, and happiness which illumines it now. (Applause.) But time forbids, and I will only say, in conclusion, that the Pilgrim Fathers, in laying Plymouth Rock as the corner-stone of that great moral edifice which has grown up around it and upon it, like

"The hand that rounded Peter's dome
And groined the aisles of Christian Rome,
Wrought in a sad sincerity.
Themselves from God they could not free.
They builded better than they knew,
The conscious stone to beauty grew." (Loud applause.)

THE BENCH AND BAR

SPEECH AT THE 111TH ANNUAL BANQUET OF THE CHAMBER OF COM-
MERCE OF THE STATE OF NEW YORK, DELMONICO'S,
MAY 13, 1879

Toast: "*The Bench and Bar—Blessed are the Peacemakers.*"

Mr. President: I rise with unprecedented embarrassment in this presence and at this hour to respond to this sentiment, so flattering to the feelings of all the members of the Bench and Bar [applause], to say nothing of that shrinking modesty inherent in the breast of every lawyer and which the longer he practices seems to grow stronger and stronger. [Laughter.] I have a specific trouble which overwhelms me at this moment, and that is that all the preparation I had made for this occasion is a complete miscarriage. [Laughter.]

I received this sentiment yesterday with an intimation that I was expected to respond to it. I had prepared a serious and sober essay on the relations of commerce to the law—the one great relation of client and counsel [laughter], but I have laid all that aside; I do not intend to have a single sober word to-night. [Laughter.] I do not know that I could. [Renewed laughter.] There is a reason, however, why nothing more of a sober sort should be uttered at this table; there is a danger that it would increase by however small a measure the specific gravity of the Chamber of Commerce of New York. Certainly nothing could be a greater calamity than that. [Laughter.] At an hour like this, sir, merchants like witnesses are to be weighed as well as counted; and when I compare your appearance at this moment with what it was when you entered this room, when I look around upon these swollen girths and these expanded countenances, when I see that each individual of the Chamber has increased his avoirdupois at least ten pounds since he took his seat at this table, why the total weight of the aggregate body must be startling, indeed [laughter], and as I suppose you believe in a resurrection from this long session, as you undoubtedly hope to rise again from these chairs, to which you have been glued so long, I should be the last person to add a feather's weight to what has been so heavily heaped upon you. [Applause.]

I have forgotten, Mr. President, whether it was Josh Billings or Henry F. Spaulding, who gave utterance to the profound sentiment that there is no substitute for wisdom, and that the next best thing to

wisdom is silence. [Laughter and applause.] And so, handing to the reporters the essay which I had prepared for your instruction, it would be my duty to sit down in peace. [Laughter.] But I cannot take my seat without repudiating some of the gloomy views which have fallen from the gentlemen who preceded me. My worthy pastor, the Rev. Dr. Bellows, has said, if I remember rightly his language, that there is a great distrust in the American heart of the permanence of our American institutions. [Laughter.]

Rev. Dr. Bellows: "I did not say anything of the kind." [Laughter and applause.]

Mr. Choate: "Well, I leave it to your recollection, gentlemen of the jury, what he did say." [Laughter.]

I am perfectly willing that the doctor should speak for his own institution, but not for mine. I do not believe that a body of merchants of New York with their stomachs full have any growing skepticism or distrust of the permanence of the institution which I represent. [Laughter.] The poor, gentlemen, you have with you always, and so the lawyer will always be your sure and steadfast companion. [Applause.]

Mr. Blaine, freighted with wisdom from the floor of the Senate house and from long study of American institutions, has deplored the low condition of the carrying trade. Now, for our part, as representing one of the institutions which does its full share of the carrying trade, I repudiate the idea. We undoubtedly are still prepared to carry all that can be heaped upon us. [Laughter.] Lord Bacon, who was thought the greatest lawyer of his age, has said that every man owes a duty to his profession; but I think that can be amended by saying in reference to the law, that every man in the community owes a duty to our profession [laughter]; and somewhere, at some time, somewhere between the cradle and the grave, he must acknowledge the liability and pay the debt. [Applause.] Why, gentlemen, you cannot live without the lawyers, and certainly you cannot die without them. [Laughter.] It was one of the brightest members of the profession, you remember, who had taken his passage for Europe to spend his summer vacation on the other side, and failed to go; and when called upon for an explanation, he said,—why, yes; he had taken his passage, and had intended to go, but one of his rich clients had died, and he was afraid if he had gone across the Atlantic, the heirs would have got all of the property. [Applause and laughter.]

Our celebrated minister to Berlin [Andrew D. White] also has spoken a good many earnest words in behalf of the institutions he rep-

resents. I did not observe any immediate response to the calls he made, but I could not help thinking as he was speaking, how such an appeal might be made, and probably would be made with effect, in behalf of the institution I represent, upon many of you in the course of the immediate future. When I look around me on this solid body of merchants, all this heaped-up and idle capital, all these great representatives of immense railroad, steamship and other interests under the face of the sun, I believe that the fortunes of the Bar are yet at their very beginning. [Applause.] Gentlemen, the future is all before us. We have no sympathy with Communism, but like Communists we have everything to gain and nothing to lose. [Laughter.]

But my attention must be called for a moment, before I sit down, to the rather remarkable phraseology of the toast. I have heard lawyers abused on many occasions. In the midst of strife we certainly are most active participants. But you apply the phrase to us: "Blessed are the peacemakers!" Well, now, I believe that is true. I believe that if you will devote yourself assiduously enough, and long enough, to our profession, it will result in perfect peace. [Laughter.] But you never knew—did you?—a lawsuit, if it was prosecuted vigorously enough and lasted long enough, where at the end there was anything left for the parties to quarrel over. [Continued laughter.]

Mr. President, I shall not weary your patience longer. This long program of toasts is not yet exhausted. The witching hour of midnight is not far off, and yet there are many statesmen, there are many lawyers, there are many merchants who are yet to be heard from, and so it is time I should take my seat, exhorting you to do justice always to the profession of the law. [Loud applause.]

THE PILGRIM MOTHERS

SPEECH AT THE SEVENTY-FIFTH ANNIVERSARY BANQUET OF THE
NEW ENGLAND SOCIETY IN THE CITY OF NEW
YORK, DECEMBER 22, 1880.

Mr. Chairman and Gentlemen:

"As unto the bow the cord is,
So unto the man is woman:
Though she bends him, she obeys him;
Though she draws him, yet she follows;
Useless each without the other."

I have no doubt, Mr. President, that it is in obedience to this most truthful sentiment of our New England poet that, to-night your committee of arrangements have added the cord to the bow, so that, for the first time in the history of the Society, there might be a complete celebration of the landing of the Pilgrims. [Cheers.] I am not surprised, Mr. President, that you deem this subject so delicate a one for your rude hands to touch, or for your inexperienced lips to salute [laughter]; that you have left it to one who claims to be by nature and experience more gifted with knowledge of the subject. [Laughter.] And yet even I tremble at the task which you have assigned me. To speak for so many women at once is a rare and a difficult opportunity. It is given to most of the sons of the Pilgrims once only in a lifetime to speak for one woman. [Laughter.] Sometimes in rare cases of felicity, they are allowed to do so a second time; and if, by the gift of Divine Providence, it reaches to a third and a fourth, it is what very few of us can hope for. [Laughter and cheers.] And yet, sir, they will point out to you in one village of Connecticut a graveyard wherein repose the bones of a true son of the Pilgrims, surrounded by five wives who in succession had shared his lot, and he rests in the center, in serene felicity, with the epitaph upon the marble headstone that entombs him inscribed, "Our Husband." [Laughter.] Now, whose husband, sir, shall he be in the world to come, if it shall then turn out that Joseph Smith was not a true prophet? [Laughter.]

I really don't know, at this late hour, Mr. Chairman, how you expect me to treat this difficult and tender subject. I suppose, to begin with, I may take it up historically. There is no part of the sacred writings that has so impressed me as the history of the first creation of woman. I believe that no invasion of science has shaken the truth of that remarkable record—how Adam slept, and his best rib was

taken from his side and transformed into the first woman. Thus, sir, she became the "side-bone" of man!—the sweetest morsel in his whole organism! [Laughter.] Why, sir, there is nothing within the pages of sacred writ that is dearer to me than that story. I believe in it as firmly, as I do in that of Daniel in the den of lions, or Jonah in the whale's belly, or any other of those remarkable tales. [Laughter.] There is something in our very organism, sir, that confirms its truth; for if any one of you will lay his hand upon his heart, where the space between the ribs is widest, you feel there a vacuum, which nature abhors, and which nothing can ever replace until the dear creature that was taken from that spot is restored to it. [Cheers and laughter.] Now, Mr. Chairman, you, as a bachelor, may doubt the truth of that; but I ask you, just once, here and now, to try it. [Laughter.] Follow my example, sir, and place your hand just there, and see if you do not feel a sense of "gone-ness" which nothing that you have ever yet experienced has been able to satisfy. [Cheers and laughter.]

I might next take up the subject etymologically, and try to explain how woman ever acquired that remarkable name. But that has been done before me by a poet with whose stanzas you are not familiar, but whom you will recognize as deeply versed in this subject, for he says:

"When Eve brought woe to all mankind,
Old Adam called her woe-man,
But when she woo'd with love so kind,
He then pronounced her woman.

"But now, with folly and with pride,
Their husbands' pockets trimming,
The ladies are so full of whims
That people call them w(h)imen."

[Laughter and cheers.]

Mr. Chairman, I believe you said I should say something about the Pilgrim mothers. Well, sir, it is rather late in the evening to venture upon that historic subject. But, for one, I pity them. The occupants of the galleries will bear me witness that even these modern pilgrims—these Pilgrims with all the modern improvements—how hard it is to put up with their weaknesses, their follies, their tyrannies, their oppressions, their desire of dominion and rule. [Laughter.] But when you go back to the stern horrors of the Pilgrim rule, when you contemplate the rugged character of the Pilgrim fathers, why you give credence to what a witty woman of Boston said—she had heard enough of the glories and virtues and sufferings of the Pilgrim fathers; for her part, she had a world of sympathy for the Pilgrim mothers,

because they not only endured all that the Pilgrim fathers had done, but they also had to endure the Pilgrim fathers to boot. [Laughter.] Well, sir, they were afraid of woman. They thought she was almost too refined a luxury for them to indulge in. Miles Standish spoke for them all, and I am sure that General Sherman, who so much resembles Miles Standish, not only in his military renown but in his rugged exterior and in his warm and tender heart, will echo his words when he says:—

“I can march up to a fortress, and summon the place to surrender,
But march up to a woman with such a proposal, I dare not.
I am not afraid of bullets, nor shot from the mouth of a cannon,
But of a thundering ‘No!’ point-blank from the mouth of a woman,
That I confess I’m afraid of, nor am I ashamed to confess it.”

Mr. President, did you ever see a more self-satisfied or contented set of men than these that are gathered at these tables this evening? I never come to the Pilgrim dinner and see these men, who have achieved in the various departments of life such definite and satisfactory success, but that I look back twenty or thirty or forty years, and see the lantern-jawed boy who started out from the banks of the Connecticut, or some more remote river of New England, with five dollars in his pocket and his father’s blessing on his head and his mother’s Bible in his carpet-bag, to seek those fortunes which now they have so gloriously made. And there is one woman whom each of these, through all his progress and to the last expiring hour of his life, bears in tender remembrance. It is the mother who sent him forth with her blessing. A mother is a mother still—the holiest thing alive; and if I could dismiss you with a benediction to-night, it would be by invoking upon the heads of you all the blessing of the mothers that we left behind us. [Prolonged cheers.]

THE HORNS OF A DILEMMA

SPEECH, AS PRESIDING OFFICER, AT THE HARVARD ALUMNI DINNER,
CAMBRIDGE, MASS., JUNE 27, 1883

STATEMENT

Of this speech, Mr. Choate wrote in 1911 as follows:

"In 1883, when General Butler was Governor of Massachusetts, the corporation of the College, following its custom from time immemorial of recognizing the newly elected chief magistrate of the Commonwealth, had voted to confer on him the degree of Doctor of Laws, but this had been vetoed by the Board of Overseers, whose consent was necessary. This led to a great deal of agitation and discussion among the Alumni, and much excitement ensued.

General Butler had announced his intention of attending the Commencement exercises in his official capacity, as all his predecessors since the foundation of the college had done, but so strong was the feeling against him that the elected President of the Alumni, who had long been his severe political critic and adversary, refused to serve, and as vice president I was called on to take his place. An unusual throng of the graduates attended, and much apprehension was expressed lest the Governor might improve the occasion, by way of retaliation, to say something unkind of the college, as he had been known to do before, and so everybody expected a disturbance, or at least something resembling it. But their expectations were doomed to a happy disappointment. In opening the proceedings, I made a conciliatory speech, appealing to that close bond of loyalty and mutual friendship which had always united the College and the Commonwealth. His Excellency then arose and fairly turned the tables upon everybody, by making an equally friendly and a very dignified reply, but he confided to me afterwards that it was quite a different speech from that which he had expected to make when he entered the hall. He was certainly true to the traditions of his office, and his audience treated him with the utmost courtesy."

Brethren of the Alumni: I hardly know how to begin. My head swims when I look down from the giddy and somewhat dangerous elevation to which you have unwittingly raised me. Here have I been seated for the last hour between the two horns of a veritable dilemma. [Laughter.] On the one side the President of the University [cheers], on the other His Excellency the Governor of Massachusetts [applause], whom to-day we welcome to the hospitalities of Harvard. [Prolonged applause.] As to our worthy President—you all know him—you know how he strikes—always from the shoulder—a true Harvard athlete, and how idle it is for any ordinary alumnus to contend with him. [Applause.] And as to his Excellency, a long professional observation and some experience of him have taught me that he, too, like the President, is a safe man to let alone. *Experto credite. Quantum in clypeum assurgat, quo turbine torqueat hastam.* Well, I assure

you I have found it a most safe and comfortable seat. I have got along splendidly with both by agreeing exactly to everything that each of them has said. [Laughter.] For you know the horns of a dilemma, however perilous they may be to their victims, never can come in conflict with each other. [Laughter.] And so, directly between them, if you take care to hold on, as I have done, tight to each, you are sure to find safety and repose. [Laughter.] *Medio tutissimus ibis*. I accept it as a happy omen,—prophetic, let us hope, of that peace and harmony which shall govern this meeting to its close. [Applause.]

And now, brethren, I am at a loss whether to thank you or not for the honor you have done me in calling me to preside on this occasion, for it was only when the alumni of Harvard had lost their head that they invited me to supply its place. [Laughter.] I sincerely regret the absence from this chair to-day of that distinguished gentleman who should have occupied it, in deference to your wishes, expressed by your ballots. [Applause.] His character, his eloquence, and his life-long loyalty to Harvard, would have graced and adorned the occasion, and we all lament his absence. But though the association of the Alumni is for the moment without a head, Harvard College still lives, and to-day is younger and fresher, more vigorous and more powerful, than ever before. [Applause.]

With the pious devotion of elder children, we have come up here to-day to attend upon our venerable Alma Mater in the hour of her annual travail [laughter], and gathered about her couch with patient reverence to witness the birth of the latest addition to the family, those two hundred and five new pledges of her never-failing and ever-renewing creative power. [Laughter.] We wish them Godspeed on that journey of life which they have to-day so auspiciously begun. [Applause.] The degree conferred upon them this morning is an assurance to the world that they start in the race with more or less learning—some of them a good deal more, and some of them a good deal less. [Laughter.] But let us hope that every man of them has got and carries away with him what is better than all their learning, and what it has been our boast to believe, that the training of Harvard has always tended to cultivate, an honest and manly character, a hatred of all shams and humbugs [prolonged applause], an earnest purpose to make the most of themselves, and to serve their times as men, and their country as good citizens and patriots. [Applause.]

I think we may well congratulate each other upon the dignified and proud attitude which Harvard University now presents to the country and to the world [applause], and that she has made more real and

lasting progress in the last fifteen years than in any prior period of her history [applause]—a progress due in large measure to the hopeful wisdom and tireless energy of President Eliot. [Enthusiastic applause and cheers.] He found here a local college whose administration, whose standard, whose system, had undergone no radical change for generations; and to-day he presents her to the world a great and national university, and the national features and relations of Harvard are now its most striking and attractive ones. No State—not even Massachusetts—can any longer appropriate her. [Applause.] No city—not even Boston—can any longer claim her for its own. [Applause.] She belongs henceforth to the whole country, and is justly regarded at home and abroad as the one typical American university. [Applause.] Perhaps we of the alumni who live in other and distant parts of the country can appreciate this change better than those of you whose lives are spent almost within the shadow of her elms. The tide is setting towards Harvard across the whole continent. Her examinations, carried first to New York and then to Cincinnati, and then to Chicago, and at last to the Pacific coast, have raised the standard of education and the quality of the schools throughout the whole country [applause]; and this influence is yearly increasing. And the diplomas of her professional schools now carry into all the States an assurance of new and increased fitness for the commencement of professional life. [Applause.]

The best test of your success, Mr. President, is that other colleges are rapidly beginning to adopt and accept your system and your reforms. Even the meager little that Harvard has yet done for the education of women is beginning to bear fruit elsewhere. [Applause.] To-day, Columbia, forced by the pressure of public opinion, with tardy and reluctant hand is beginning to dole out to women a few stale and paltry crumbs that fall from the bountiful table in distant imitation of the Harvard Annex. [Applause.] Of course, Harvard will by and by do a great deal more for them than she has done yet [applause], and Madam Boylston, who alone of her sex has held her solitary place on these walls for nearly a century, among these shades of learned men, looks down upon me with smiling approval when I say that somehow or other, sooner or later, Harvard will yet give the women a better chance for education, as Cambridge and Oxford have already done. [Applause.]

No enumeration, Mr. President, of the glories of Harvard would be quite complete which omitted to refer to the athletic development of these latter days. Voltaire wrote to Helvetius: "The body of an

athlete and the soul of a sage are what we require to be happy." How prophetic of to-day's curriculum at Harvard! [Laughter.] To-morrow at New London will put our muscle and our mettle to the test. Let us pray for the pluck and the wind and the bottom of the Harvard crew. [Laughter and applause.]

I must not prolong these pleasing bits of eloquence [laughter], or else his Excellency will begin to suspect that we sons of Harvard think a little too much of ourselves. [Laughter.] Nothing could be farther from the truth than that. [Laughter and applause.] Yet I need not assure him, because he knows it already, that it is our true boast that an overweening modesty is the leading Harvard attribute. [Laughter.] But let me before closing refer to one or two special incidents of the day. It is now two hundred and forty-five years since John Harvard died at Charlestown, bequeathing his fair name, his library and the half of his estate to the infant college in the wilderness, then just struggling into existence and matriculating its first freshman class of nine. He surely builded wiser than he knew; he died all unconscious of the immortality of glory that awaited him, for it was not till after his death that the General Court voted, in recognition of his generous gifts, to change the name of the little college at Newton to Harvard College. And now, after eight generations of graduates have been baptized in his name, a pious worshipper at his shrine, turning his face toward Mecca, has presented to the alumni a bronze statue of our prophetic founder, which is to be erected at the head of the delta, and to stand for coming ages as the guardian genius of the college. [Applause.] Let me read the letter which precedes the gift, and I will say that the writer and the giver, a gentleman here present, from whom and of whom I hope we shall hear more by and by, is Mr. Samuel J. Bridge, of Boston. The letter is as follows:

"To the President and Fellows of Harvard College:

"Gentlemen—I have the pleasure of offering you an ideal statue in bronze representing your founder, the Rev. John Harvard, to be designed by Daniel C. French, of Concord, and to be placed in the west end of the enclosure in which Memorial Hall stands. If you do me the honor to accept this offer, I propose to contract at once for the work, including an appropriate pedestal, and I am assured that the statue can be in place by June 1, 1884. I am, with much respect,

"Samuel J. Bridge."

I am sure, gentlemen, that I can assure the generous donor, in your name, of the hearty thanks of all the alumni of the college, those who

are here to-day and those who are scattered throughout the country and the world. [Applause.]

Other generous gifts commemorate this occasion,—a marble bust of General William F. Bartlett [prolonged applause and cheers], of the class of 1862,—a hero, if God ever made one [applause], a martyr who was fourteen years dying for his country of wounds that he bore for her,—is placed in this hall to-day to stay as long as marble shall endure in the fit company of heroes and martyrs to whom its walls are dedicated. [Applause.] Colonel Henry Lee, by and by, will formally present it to you, and also a bust of Ralph Waldo Emerson, sacred forever within these walls. [Applause.] Surely, if Harvard had never produced anything but Emerson, she would have been entitled to a front rank among the great universities. [Applause.]

But, brethren, I know you are all impatient to hear those you have come to hear. [Applause.] You cannot wait any longer, I am sure, to hear from our excellent President his annual message of comfort and distress. [Laughter and applause.] He will tell you all that the college in the last year has done for you, and all that you in return in the year to come are expected to do for the college. [Laughter and applause.] It will also be your privilege to hear from the people of Massachusetts, as represented in the person of his Excellency the Governor [prolonged applause and cheers], who has come here to-day by the invitation of the President and Fellows, which he accepted in deference to an ancient custom not easily to be broken. [Applause and laughter.] You all remember, gentlemen, that intimate and honorable alliance that has existed between the college and the State for nearly two centuries, out of tender regard for which tradition assures us that every Commencement, beginning with that of 1642, has been graced by the presence of the Governor of the Commonwealth. [Applause.] And, for one I hope the day may be far, very far, distant when the Governor of Massachusetts shall fail to be welcomed on Commencement day within the walls of Harvard. [Prolonged applause.] In the name of Massachusetts we greet him, remembering, as we may fitly remember in this place sacred to heroic deeds, that it was he who, at the call of Andrew, led the advanced guard of Massachusetts, in which certain sons of Harvard were a part, to the rescue and the relief of the besieged capital [applause]; that Lincoln set his seal upon that service by commissioning their commander as a major-general of the United States [applause], and that it did not need that diploma to prove that he bore, and they followed to the front, the ancient standard of Massachusetts, in the spirit of Sidney's motto,

which the State has made its own,—*Ense petit placidam sub libertate quietem*.

And now, gentlemen, I give you the first regular toast, "Our Beloved Alma Mater," and I propose with it the health of the head of her great family, President Eliot, who will now address you to your lasting benefit. [Loud applause.]

EVACUATION DAY

SPEECH AT THE BANQUET OF THE CHAMBER OF COMMERCE OF THE
STATE OF NEW YORK, NOVEMBER 26, 1883, IN COMMEMORATION
OF THE EVACUATION OF NEW YORK CITY BY THE
BRITISH, NOVEMBER 25, 1783 *

Mr. President and Gentlemen: I came here to-night with some notes for a speech in my pocket, but I have been sitting next to General Butler and in the course of the evening they have mysteriously disappeared. [Loud laughter, in which Governor Butler joined.] The consequence is, gentlemen, that you may expect a very good speech from him, but a very poor one from me. [Laughter.]

Your Committee, Mr. President, found me amid the ruins of the temple of Golgos, into which the Federal Court has, for the time being, been converted, engaged in the study of Cypriote antiquities, and they did me the very great honor of asking me to come here to-night and take part in the merchants' celebration of the Evacuation of New York by the British. Well, it is hardly to be expected that a man whose whole soul is absorbed in the study of ancient art and in the resurrection of gods and demi-gods that have slumbered in the dust of Cyprus for fifteen hundred years, until their very identity is brought in question, [laughter,] should have much thought or emotion left for such an event of yesterday as the evacuation of New York by the British, which occurred but a century ago. [Laughter.] And so if my thoughts prove to be wandering and scattered, and even little better than a "patchwork of unrelated parts," [laughter,] why, gentlemen, you will not lay it to any want of patriotism, but only to the pressure of circumstances. [Laughter.]

When I read this toast which you have just drunk in honor of her gracious Majesty, the Queen of Great Britain, and heard how you received the letter of the British Minister that was read in response,

* At 1 p. m., the Chamber unveiled a statue of George Washington on the steps of the Subtreasury Building, corner of Wall and Nassau Streets. The banquet in the evening at Delmonico's was attended by many notable persons, including Chester A. Arthur, President of the United States, and the following State Governors: Benjamin F. Butler, Massachusetts; William T. Hamilton, Maryland; Grover Cleveland, New York; Thomas M. Walker, Connecticut; Samuel W. Hale, New Hampshire; Eli H. Murray, Utah; Augustus O. Bourne, Rhode Island; and Frederick Robie, Maine. Mr. Choate responded to the toast, "The Day We Celebrate—The Second Birthday of New York."

and how heartily you joined in singing "God save the Queen," when I look up and down these tables and see among you so many representatives of English capital and English trade, I have my doubts whether the evacuation of New York by the British was quite as thorough and lasting as history would fain have us believe. [Laughter.] If George III., who certainly did all he could to despoil us of our rights and liberties, and to bring us to ruin—if he could rise from his grave and see how his granddaughter is honored at your hands to-night, why I think he would return whence he came, thanking God that his efforts to enslave us, in which, for eight long years, he drained the resources of the British Empire, were not successful. [Applause.]

The truth is, the boasted triumph of New York in getting rid of the British once and forever has proved, after all, to be but a dismal failure. We drove them out in one century only to see them return in the next to devour our substance and to carry off all the honors. [Applause.] We have just seen the noble Chief Justice of England, the feasted favorite of all America, making a triumphal tour across the Continent, and carrying all before him at the rate of fifty miles an hour. [Applause.] Night after night at our very great cost we have been paying the richest tribute to the reigning monarch of the British stage, and nowhere in the world are English men and women of character and culture received with a more hearty welcome, a more earnest hospitality, than in this very City of New York. [Applause.] The truth is, that this event that we celebrate to-day, which sealed the independence of America and seemed for the moment to give a staggering blow to the prestige and the power of England, has proved to be no less a blessing to her own people than to ours. [Applause.] The latest and best of the English historians has said, that however important the independence of America might be in the history of England, it was of overwhelming importance in the history of the world, and that though it might have crippled for a while the supremacy of the English nation, it founded the supremacy of the English race [applause]; and after tracing the growth of America from three millions of people, scattered along the Atlantic coast in 1783, to fifty millions of people, filling the whole continent to-day, he declares that in wealth and material energy, as well as in numbers, it far surpasses the mother country from which it sprang; that it has become the main branch of the English people, and that the history of that people, henceforth, is to run along the channel, not of the Thames and the Mersey, but of the Hudson and the Mississippi. [Applause.] And in the same spirit we welcome the fact, that those social, politi-

cal and material barriers that separated the two nations a century ago have now utterly vanished; that year by year we are being drawn closer and closer together, and that this day may be celebrated with equal fitness on both sides of the Atlantic and by all who speak the English tongue. [Applause.]

The Chamber of Commerce, gentlemen—our noble host of to-night—has its own appropriate method of celebrating great public events. It cares for no grand processions; it delighteth not in long orations [laughter]; but I must beg pardon both of Mr. Beecher and General Butler for saying that—I did not mean to tread on either of their corns [laughter]—this Chamber indulges in no fireworks, but being made up of none but solid and prosperous men, it comes directly to the point and celebrates, at the same time, its own virtues and merits, [laughter,] and the event or the scene which it seeks to commemorate by a glorious and gorgeous banquet, such as it has spread before us to-night. Thus it reaches the sympathies of its members [laughter] in a way that could not otherwise be done, through the broad avenue of the stomach [laughter], which Emerson long ago said was, with all the branches of the Anglo-Saxon race, the direct and shortest cut to their hearts. [Laughter.]

Now, this genial method of celebrating, gentlemen, is another charming trait which we have derived, with our blood, from our remote English ancestors; for a celebrated Venetian traveller, visiting England as long ago as 1500, wrote home to a friend: "The people of this island are so given to hospitality that they really would rather spend ten ducats in entertaining a stranger handsomely than give a single groat to aid him in distress." [Laughter.] But when we remember how promptly the hands of the New York merchants leap to their pockets, to relieve distress wherever it appears, it must be said that the race has marvelously developed, and that if these are Englishmen, why, they are Englishmen with all the modern improvements. [Applause.]

This fine method of celebration, gentlemen, derives double strength from the charming power of contrast. It was a very hungry and thirsty day that we now commemorate. New York was pretty nearly starved out by those seven years of hostile occupation. It was to no such bill of fare as this that Washington, and Hamilton, and Clinton, and their compatriots, sat down, in Fraunces' Tavern, a hundred years ago to-night. But this, I hope, gentlemen, that the same ardent love of liberty and the same undying devotion to country serves as the same relish to both feasts. [Loud applause.]

But I must return to the particular subject of my toast. I am a little off the track. [Laughter.] The Chamber of Commerce, then, which owns everything in New York, and which always does what it likes in its own way, thinks what it pleases, says what it pleases, and, above all, eats and drinks what it pleases—the summit of ordinary human ambition—has invited us, to-night, to celebrate the day that the toast very truthfully describes as the “second birthday” of this great City in which we live, and which this mixed company of Yankees, Germans, Hebrews, Scotchmen, Irishmen, Southerners and Danes, with here and there a scattered and lost Knickerbocker [laughter] are proud to call our home.

It has been the misfortune of all the great cities that have preceded us, that their origin was lost in the mists of tradition, in a time that runs beyond the memory of man. But, fortunately, the art of printing preceded by nearly two centuries the settlement of New Amsterdam, and every step of its progress is recorded in the imperishable letter of history, so that we can turn to the book and the page for each one of the red letter days in its annals. We not only know the day, but the hour, and the very time of the tide, when Hendrick Hudson anchored in the “Half Moon” inside of Sandy Hook, and hoisted the Dutch flag, to take the sovereignty of the soil for Holland. We preserve the parchment by which the first settlers purchased from the Indians the whole Island of Manhattan for the sum of \$24. We can trace, in the veracious history of Washington Irving, the truthful details of all the sixty years of the period of the Dutch Dominion, until that fatal day when Charles II., exercising that time-honored prerogative of a British monarch, to give away what did not belong to him, (which he had, you know, from William, the Norman, who gave away all England without owning one foot of it,) handed over the whole City and Province together, in a fit of generous liberality, to his brother, the Duke of York, and he straightway imposed upon the unwilling inhabitants a name which in time was to redeem his own from dishonored oblivion. We can trace, too, year by year, the annals of the hundred years of English dominion, during which, the people of this City so learned the principles of English liberty that when the hand of oppression was laid upon them it merely awoke them to independence, and the best statesmen of England at once conceded that it was impossible to conquer America. [Applause.]

This memorable day, gentlemen, closes the long series of Centennial memories, which began in April, 1875, at Lexington, and has marked and illuminated each historic spot, each scene of trial and of conflict, each field of victory that, together, make up the glory of our

Revolutionary struggle. We should have been base ingrates, indeed, if we had neglected any of those golden occasions to record our gratitude and admiration for the services by which our fathers laid the foundations of that liberty and union which, in a single century, have brought us to where we now stand. But of all the historic jubilees, there is not one which New York can celebrate with greater spirit or more hearty enthusiasm than that day which saw the last remnant of the British and Hessian army embark at the Battery, and Washington's tattered and war-worn veterans treading upon their heels, to raise upon Fort George, for the first time, the stars and stripes, as the emblem of a free Nation. [Applause.]

The people understand this a great deal better than words can describe it, as their swarming millions in the streets to-day have testified. The clouds might lower and the tempest might break upon them, but they defied the elements to do their worst; these could not dampen their ardor, nor chill the enthusiasm with which they waited to see and cheer the President of the United States and General Grant at the head of the procession; the President as worthily representing the majesty of that country which they love, [applause,] and General Grant as the living champion of the struggles that have maintained it. [Applause.]

Although Yorktown, two years before, had ended the great battles of the war, although the preliminary treaty had been signed a year before, and its final exchange in September had formally introduced the thirteen colonies to the world as free, sovereign and independent, yet, as long as New York, the great seaport of the country, remained in the hands of the enemy, the fruits of the treaty and of the peace were not realized; and their final departure, on the 25th of November, 1783, was a signal demonstration to the people that peace at last had really returned, and that the independence for which they had been struggling and suffering for so many years was at last actually achieved. [Applause.]

In April, 1775, Joseph Warren had written, "America must and will be free. The contest may be severe, but the end will be glorious." He sealed the words with his blood, and took his place in history as the first great martyr of the great cause. And now the people saw that the contest, severer far than Warren ever dreamed of, was over, and that the end, all glorious as he hoped, had come. [Applause.]

Of all the thirteen States, New York, in the struggles and sacrifices of the war, had suffered incomparably more than any of the rest. Its soil had been overrun and occupied in succession by both armies; its

rich capital had been seized, and made for six long years the base of British operations; the people had been driven from their homes, and their property despoiled and destroyed. From the beginning the British Ministry had made the most desperate efforts to debauch them from their loyalty to their brethren of the other colonies. A Royal Council and a Tory Legislature had refused to represent them in the Congress; but the outraged people took their own affairs into their own hands, and, thanks to a free press, that could neither be muzzled nor bought, and to such men as Jay and Hamilton and Clinton, names never to be forgotten on days like this, they linked their fortunes indissolubly to those of the other colonies. The great majority of the people of the colony were true to themselves and their country; another disproof of the fallacy which the great English critic is now preaching among us, and to which, I believe, our friend, Governor Butler, has recently become a reluctant convert, that majorities are in the wrong. [Laughter and applause.] On every field of victory or defeat the sons of New York stood or fell with the rest; but their beautiful City, nevertheless, the pride of the whole province and country, had been blasted by the ravages of war; fire had destroyed its fairest portion; its people had been driven from their homes; its population reduced one-half, and the remnant had been handed over to foreign soldiers and Tory refugees. And now the day of their deliverance had come, and their home, in ashes and in ruins as it was, was about to be surrendered to its loyal and long-suffering owners. The scene which this day commemorates summed up, as it ended, the whole history of the war. You remember what Lord Chatham said; probably every member of the Chamber of Commerce used to speak it at school: "If I were an American, as I am an Englishman, while a single foreign soldier remained in my country, I never would lay down my arms." [Applause.]

Now, America had been true to that cheering word, and, at last, at last the saving hour had come. Of the departing troops, one equal half were foreign mercenaries; a signal proof that the war, from the beginning to the end, was a war of the King and the Ministry, and not of the people [applause], and that Chatham and Burke and Conway, and their great associates, the friends of America in Parliament, had a large backing behind them in the hearts of the English people, when they declared that the liberties of England, no less than those of America, were staked upon our success. Throughout the war, from the beginning to the end, the Ministry could not find Englishmen enough to fill up the army, but had to depend upon German mercena-

ries, hired at so much per head from petty princes, to do their distasteful and hopeless work. [Applause.]

Who can conceive, then, with what infinite exaltation and pride the returning citizens of New York, on that glorious day, saw the last of these foreign invaders and hirelings depart from these shores, which their hostile feet had so long desecrated and profaned? Who can imagine with what gratitude and love they turned, on the afternoon of the same day, to greet the battered remnant of the Continental army, bearing the flags that had triumphed at Lexington, at Bunker Hill, at Saratoga and at Yorktown—those veterans whose bronzed and scarred faces told the whole story of the war? And who, above all, can realize with what boundless enthusiasm and adoration they hastened to welcome Washington—Washington, whose great soul had been the beacon light that had led all America on its way to liberty, from that far distant day, when he first unsheathed the sword under the old elm tree at Cambridge, until now, that the great goal was reached? [Applause.] He came not in uniform; he came not at the head of the army, but leading the civic procession in the plain clothes of a citizen, in token that there was no more war, no more need of the soldier or of the general; and, after seeing the last foot of American soil purged from the presence of the invader, he was about to bid a last farewell to his companions in arms and to hasten to Annapolis, to lay down his sword and his commission at the feet of that Congress from whom, eight years before, he had received them. [Cheers.] And Washington came not alone. By his side there marched another hero, whose name no native or adopted citizen of New York can fail to recall whenever her part in the Revolution is remembered—her great War Governor, George Clinton—[cheers]—whose grateful task it was on that day to represent the sovereignty of the State of New York over its recovered capital. Very well, then, and truthfully may we say, as the toast says, that this day we celebrate was the second birthday of the City in which we live. All its bright destiny dates from that happy hour of triumph. Its mighty commerce, its boundless wealth, its vast population, its majestic proportions, all trace their origin to the day we celebrate.

It is not for me, gentlemen, to relate its subsequent progress. "Then and Now" has been reserved upon your programme for wiser and more eloquent lips than mine. But I may say, in conclusion, that if wealth and numbers are the end of civilization, New York may rest content; but if, as Mr. Arnold declares, and as every man in his senses must agree, these, great as they are, are but the means for higher ends,

then New York has but just begun the great work that lies ready for her hands to do, and has thus far only been laying the foundations of her future greatness.

I do not know, Mr. President, how the Committee who had the Banquet in charge could have better decorated these walls for this occasion than by hanging upon them these striking portraits of George Washington and George Clinton. As now they appear before you, standing side by side, so on that great day they rode into the City, the one representing the State of New York and the other the imperial majesty of the United Colonies, soon destined to become the United States of America. [Applause.] As they look down upon this festival in their honor, upon these citizens of the great City which has shared in such rich measure the fruits of their joint labors and sacrifices, upon this scene so fitly graced by the presence of the President of the great Republic which they did so much to found, and by the presence of so many of the Governors of the old thirteen States which they welded into one—could these dignified and majestic lips but speak, how fervently would they thank God for permitting them to labor and to suffer for such results, and how urgently would they exhort us to hand down untarnished and unbroken to posterity the liberty and the Union which they so stoutly fought for and maintained. [Applause.]

LOWELL'S RETURN

SPEECH, AS PRESIDING OFFICER, AT THE HARVARD ALUMNI DINNER,
CAMBRIDGE, MASS., JUNE 24, 1885, ON THE OCCASION OF THE RE-
TURN OF AMBASSADOR JAMES RUSSELL LOWELL FROM ENGLAND

Now that you have banqueted upon these more substantial dainties, which the Delmonico of Harvard has provided, I invite you to partake of the more delicate diet of tongues and sounds—the favorite dish at every Harvard dinner—where, of course, every alumnus expects to get his desert. We have assembled for the two hundred and forty-ninth time to pay our vows at the shrine of our alma mater, to revel in the delights of mutual admiration, and to welcome to the commencement of actual life one hundred and seventy-five new brethren that our mother has brought forth to-day. Gentlemen, it is your great misfortune, and not a little to my embarrassment, that I have been called upon on two occasions to stand here in the place of the president of your choice, and to fill the shoes of a better man, and if I shuffle awkwardly about in them, you will remember that they are several sizes too large for me, and with higher heels than I am accustomed to wear. On a former occasion, in view of the incompatibility of sentiment among high authorities, I did what I might to stem the tide of a seemingly irrepressible conflict, and, by your counsel and aid, with apparent success. “Grim visaged war” did smooth “his wrinkled front,” and peace and harmony prevailed where blood had threatened.

But how, gentlemen, can I hope to fill your expectations to-day, when you have justly counted upon the most popular of all your divines and the most fervent of all your orators, who should now be leading your counsels here? But Phillips Brooks, having long ago mastered all hearts at home, has gone abroad in search of new conquests. When last heard from he was doing well in very kindred company; for he was breakfasting with Gladstone, the statesman whose defeat is as mighty as victory, the scholar and the orator, who would exchange for no title in the royal gift, the lustre of his own great name. But I have no fears for the success of this occasion, notwithstanding the absence that we deplore, when I look around these tables and see who still are here.

In the first place, you are all here, and when the sons of Harvard are all together, basking in the sunshine of each other's countenances, what need is there for the sun to shine?

And then, President Eliot is here. I remember that, sixteen years

ago, we gave him his first welcome to the seat which had previously been occupied by Quincy, Everett, Sparks, Felton and Walker, and to-day, in your names, I may thank him that he has more than redeemed the pride and promise of his earlier days. While it cannot exactly be said that he found Harvard of brick and left it marble, it can truly be said that he found it a college and has already made it a university, and let us all hope that his faithful reign over us may continue as long as he has the strength and the courage to carry on the good work that he has in hand.

And then, the Governor of the Commonwealth is here, always a most honored guest among the alumni of Harvard. Governor Winthrop attended our first commencement, and I believe that all the Governors in unbroken succession have followed his example.

To-day, too, we are honored with the presence of the Vice President of the United States, and now that Harvard has assumed national proportions, what can be more fitting than that we should welcome to our board one of the chief representatives of the national government? He comes to us fresh from Yale, and if we may believe the morning papers—a very large if, I admit—if we may believe those veracious journals, the eminent Vice President yesterday at New Haven gave utterance to two brief and pithy sentiments, one of which we shall accept with absolute, unqualified applause, and the other of which we must receive, if at all, with a modification. “Yale,” said he, in short and sententious words, which are the essence of great men, and which we are all so fond of hearing and reporting, “Yale,” said he, “is everywhere.” Gentlemen, I would say with this modification, “Yes, Yale is everywhere, but she always finds Harvard there before her.” Gentlemen, the rudeness of your manner broke off my sentence—“She always finds Harvard there before her, or close alongside or very closely in her rear; and let us hope that her boys at New London to-morrow will demonstrate the truth of that.” The other sentiment that he uttered, and that which needs no qualification, is that public office is a public trust. Gentlemen, in saying that, he stole Harvard thunder. That has been her doctrine since the days of John Adams; and I am sure that you must be perfectly delighted to hear from this eminent man that old doctrine of ours reinforced.

But, gentlemen, better than all the rest, once more at home in his old place among us again is James Russell Lowell. Eight years ago he left us for the public service. Men who did not know him wondered how poetry and diplomacy would work together, poetry, the science of all truth, and diplomacy, that is sometimes thought to be not quite so

true. Well, if you will allow me, I will explain his triumphs abroad by a wise saying of Goethe's, the fitness of which, I think, you will recognize. "Poetry," said he, "belongs not to the noble nor to the people, neither to the king nor to the peasant; it is the offspring of a true man." It is not because of the laurels that were heaped upon him abroad, not because he commanded new honor for the American scholar and the American people, and not because his name will henceforth be a new bond of union between the two countries; but we learned to love him before he went away, because we knew that from the beginning he had been the fearless champion of truth and of freedom, and during every year of his absence, we have loved him the more. So, in your names, I bid him a cordial welcome home again.

You will also be pleased to hear that Dr. Holmes has been inspired by this interesting feature of the occasion to mount his Pegasus once more and ride out to Cambridge upon his back; and soon you will hear him strike his lyre again in praise of his younger brother. But these are not all the treasures that are in store for you. Dr. James Freeman Clarke, after twenty-five years of continuous service on the Board of Overseers, from which he now retires by the edict of the Constitution, will tell you frankly what he thinks about you and about them. And then, to the Class of 1835, on the fiftieth year of its graduation, the crowning honors of this day belong, and I am pleased to say that their chosen spokesman, although pretending to be for the moment an invalid—he wrote to me that he was no better than he should be—he is here to speak for them. For us who have been coming up to Cambridge for the last thirty years, I would like to know what Harvard commencement without Judge Hoar would be. Who can forget the quips and cranks and wanton wiles with which he has beguiled many an hour that promised to be dull; and how he has, I will not say sobered, but dimmed some of our lighter moments by words of wisdom and power. So, in your name I say: "Long life and a green old age to Judge Hoar, and all the members of the class of 1835."

Then, gentlemen, all these new doctors of law—why, Harvard, returning to an ancient custom, has been selecting them from her own sons, and to-day it may truly be said that the University has been growing rich and strong *by degrees*. You will be glad to hear all of them speak for themselves. Of one of them, Dr. Carter, I will say from intimate knowledge, that he leads us gallantly at the Bar of New York, and all his associates rejoice in his leadership. He has recently rendered a signal service to the jurisprudence of that great State by contributing more than any other man to the defeat of a code which threatened to

involve all the settled law of that community in confusion and contempt.

And now, as I have told you who are to speak to you, I should sit down. I believe, however, it is usual for the presiding officer to recall any startling events in the history of the college. Gentlemen, there have been none. The petition of the undergraduates for what they call a fuller civil and religious liberty, in being relieved from compulsory attendance on morning prayers, was denied. The answer of the overseers was well conceived—that, in obedience to the settled rules and regulations of the college, of which that was one, they would find an all-sufficient liberty. That idea was not original with them; they borrowed it from Mr. Lowell, when he said and sung in his sonnet upon the reformers—

“Who yet have not the one great lesson learned
That grows in leaves,
Tides in the mighty seas,
And in the stars eternally hath burned,
That only full obedience is free.”

The only other incident in the history of the year is the successful effort that has been made in searching out the history of John Harvard, and about that the president of the college will tell you in good time, who he was, whence he came, and where he got the fortune and the library which he contributed along with his melodious name to the college. He gave half of all he had, gentlemen, and out of that modest fountain what vast results have flowed. May no red-handed vandal of an undergraduate ever desecrate his statue that stands at the head of the Delta.

And now, brethren, would you have your statue crowned? Would you, too, become immortal? Would you identify your names with the glory of the college? The way is open and easy. Follow exactly the example of the founder. Give one equal half of all you are worth to the college, and if you wish to enjoy your own immortality, do it to-morrow while you are yet alive. If you shrink from that, die at once and give it to them now. Other people possibly will rise up and call you blessed, whatever your own may do; so you will relieve the president of more than half the labors of his office.

I did want to say a word about another matter—the elective system—but President Eliot tells me I had better not. He says that the Board of Overseers of the college are incubating on that question, and that there is no telling what they may hatch out. Now, don't let us disturb them, gentlemen, at any rate, while they are on the nest. We might crack the shell, and then the whole work would have to be done over

again. But, as you now seem to be in good mood, let me say one single word about this elective system. I don't care how they settle it. I hope they will give us the means of sustaining and fortifying their decision when they make it. We alumni at a distance from the college are often stung to indignation by the attacks that are made upon us by the representatives of other colleges. One would think, by the way they talk down there at Princeton that Harvard was going to the everlasting how-wows; that the fountains of learning were being undermined and broken up; that, as Mr. Lowell again said:

"The Anglo-Saxondom's idee's breakin' 'em to pieces,
And thet idee's thet every mon doos jest wut he damn pleases."

I suppose the truth about the elective system is that the world moves on and colleges move with it. In Cotton Mather's time, when he said that the sole object of the foundation of a college was to furnish a good supply of godly ministers for the churches, it was well enough to feed them on Latin and Greek only. Now that young men when they go out into the world have everything to do about taking part in all the activities of life, for one, I say let them have the chance to learn here anything that they can possibly wish to. And I hope that our president will persevere in one direction at least, until he can say truly that whatever is worth learning can be taught well at Harvard. This is well expressed again in an idea of Mr. Lowell's, who always has ideas enough, if divided, to go around even among us:

"New occasions teach new duties;
Time makes ancient good uncouth;
They must upward still, and onward,
Who would keep abreast of truth."

I hope you will be very patient with all the other speakers. I advise them, as the hour is late and the afternoon is short and there are a great many of them in number, each to put a good deal of shortening in his cake, which I have omitted. That is a rule that never is applied to the presiding officer, and I am afraid it never will be.

JOHN JAY

SPEECH, AS PRESIDING OFFICER, AT THE DINNER GIVEN BY MEMBERS
OF THE UNION LEAGUE CLUB, NEW YORK, ON THE OCCASION OF
THE SEVENTIETH BIRTHDAY OF HON. JOHN JAY, JUNE 24, 1887

Gentlemen: Overlooking many a better man, my associates on the Committee have compelled me, in obedience to the kind suggestion of Mr. Jay, to occupy the Chair this evening. These walls have looked down on many a festive banquet, but I believe never upon such a genuine love-feast as this. [Applause.] We have assembled to-night to celebrate the seventieth birthday of an honest man. [Applause.] It was Washington, I believe, who, after achieving higher honors and more enduring titles than ever fell to the lot of any American, expressed the hope that he might always have the firmness and the virtue to deserve what he considered the highest distinction to which human nature could attain,—the character of an honest man. [Applause.]

I am no master of the language of flattery, and I do not propose to use it on this occasion; but as I have had the honor to propose this tribute of friendship, I may perhaps be permitted, on your behalf, to say to our distinguished guest, that he owes it, not so much to the fact that he has attained the limit of threescore years and ten, honorable as that distinction is. Other men have done that without receiving such a reward as this. He owes it not altogether to the exalted position that he has always occupied, or to the excellent public service that he has been able to render; but he owes it first and foremost, to the love we all bear him. [Great applause.] It is a tribute to that warm heart and that cheerful temper which has always commanded the admiration and affection of his associates, no matter how spirited the controversies, in which he was never slow to take an active part. [Applause.] There is hardly a gentleman within the sound of my voice, I suppose, who cannot recall and acknowledge with pleasant memory many a kind word and act, many a courteous attention that he has received from the hands of Mr. Jay. For myself I may say that when I came to this city, an absolutely homeless stranger, thirty-two years ago, he welcomed me, for no reason that I could discover, but the warmth of his own heart, to his own hospitable home, the Jay mansion at Bedford, rich with the traditions of his historic race; and at his fireside, and by his table, I enjoyed many of the happiest hours of my youth. And I have no doubt that many a gentleman here can recall many a similar act of

kindness and courtesy received at his hands. And so with gratitude and affection we congratulate him upon his honorable life. We express our hearty sympathy with him in the almost royal jubilee of his golden wedding; and we extend to him here to-night, the right hand of fellowship. [Great applause.] As the Chairman on such an occasion as this is nothing if not personal, I may be permitted further to refer to that spotless purity of life, which is the richest possession that any man can attain, in the light of which all the glitter of wealth and all the glories of office fade wretchedly away. When I read in my boyhood that matchless tribute that Daniel Webster paid to the Chief Justice, when he said that "the spotless ermine of the judicial robe touched nothing less spotless than itself when it fell upon the shoulders of John Jay"—[great applause]—when I read that, I supposed that it was a personal tribute to a personal and individual trait in that great historic American; but when I came to know these Jays of later time, I discovered that it was only the regular family trait exhibited in the noble person of the sire, and which, according to the true law of heredity, has been transmitted with the Jay homestead in the regular line of family descent. [Laughter and applause.] Why, some of us have known five of these generations: some by repute and tradition, and some by personal contact and acquaintance; and never once have we known that shining talent to fail. How strong and how true then must the strain have been in this our honored guest, in his heart and his loins to enable him to transmit it to his descendants as pure as he received it from his sire. [Applause.]

While the time for this occasion has been happily chosen (for when a man reaches seventy all his faults as well as all his virtues have certainly been found out), this place where we are gathered is also the only place where it could have been properly celebrated. [Applause.] As one of the founders of this historic Club; as its President for a longer period of years than any other incumbent of the office; as the unswerving champion of its principles, and the promoter of its dignity and its usefulness, his life for the last twenty-five years has been among its happiest traditions. And when you look upon the eventful period of his administration, comparing it with all that went before and after, I think we may fairly say, at least those of us who have enjoyed the same distinction after him, that however faithfully we have tried to follow in his footsteps, the administration of each one of his successors has only tended by the contrast to make his shine all the brighter and the stronger. [Applause.]

You will hardly expect me to review all the public services which

our distinguished guest has been able to render; but I think in all modesty it may be said that he always, whatever might be the consequences, has been true to his own convictions, and has always lived up to his light. [Applause.] His service has been an unselfish service, and he has never sought office or honor as a reward for what he has been able to do. [Applause.] When I first made his acquaintance he was of the age of thirty-eight, active at the Bar, and the well-known and much-abused counsel of the Underground Railroad. [Laughter.] Now, railroad lawyers, as you know, have always been subjects, more or less, of suspicion and abuse. [Laughter.] But I believe that no one of them in all history ever suffered the obloquy which fell upon Mr. Jay for his self-sacrificing devotion to that mysterious client of his. [Laughter.] His fees, too, I fear, in that splendid service, were quite inadequate when compared with the compensation which other railroads pay. [Laughter.] Our friend, Mr. Depew, will correct me if I am wrong. [Laughter.] But I think they were miserably small in comparison with what other railroads have sometimes in later times been compelled to pay. [Laughter.] But the verdict of history has transmuted all that abuse and ignominy into lasting honor and glory. [Applause.] To have stood forward as the champion of the downtrodden fugitive slave; to have borne with silent submission the contempt of a depraved public opinion, the abuse of a corrupted press, and even the cruelties of the law itself; yes, to have courted even social ostracism among his own friends rather than to abate one jot of the service that his conscience told him that he owed to the poor negro, this itself is eulogy to-day. [Great applause.]

Then came the war; and in this presence I need not say how well he acted his part; how he wielded the united influence of this Club always to maintain that principle of unconditional loyalty on which it was founded, which was its motto and its watchword. Standing thus in the midst of an almost hostile city, we may modestly say that it did render some service to the Government in the days of peril; and I know of no one man who is entitled to so large a share of that common glory as he who sits by my side. [Applause.] It is true, gentlemen, that some of Mr. Jay's highest titles to honor and distinction have come out of attempts that have been made to brand him for doing his duty in the face of an unjust public opinion; and even in the Church, of which he has ever been a loyal son, when he vindicated the rights of the colored churches to a representation and a vote, according to their strength and their numbers, even there he lost caste. I will not detain you by dwelling on what may seem to be mere flattery to him. It is merely

telling the truth in regard to his exertions. Why, look at it in these later days, when Mr. Jay has enjoyed the extreme felicity of being able, without severing any of the precious associations of his previous life, to join hands with honest men of all parties and all factions in fighting that subtle and insidious foe that has been sapping at the root of our free institutions; I mean to say corruption and incompetence in office. [Applause.] And to-day, as the President of the Civil-Service Reform Association of the State of New York, he is daily demonstrating that in spite of all that is said to the contrary, it is still even possible to be a steadfast Republican and an honest reformer at the same time. [Laughter and applause.] He has demonstrated, too, that the private station is the post of honor, and that a patriotic citizen seeking nothing for himself can render real service every year and every month to his country. And if I were called on to point out to my sons the type of citizen best worthy of imitation on their part, I should pass over all the great generals, all the great magistrates, all the great public officials, whose places are so largely filled by accident, and point them to the private citizen who was ever ready to render service in any good cause; to promote any needed reform; and who, seeking and taking nothing for himself, yielded every thing to the public good. [Great applause.]

And so, gentlemen, in your names I congratulate our distinguished guest, that his seventy years find him still having a sound mind and a warm heart and a cheerful temper, in a sound body; and find him, too,

"Possessed of all that should accompany old age,
As honor, love, obedience, troops of friends."

And so, in your name I welcome him, and I ask you all to fill your glasses and to drink a bumper to his health. [Three cheers for John Jay.] Now, gentlemen, I have the extreme felicity of presenting to you our guest of the evening, Mr. John Jay. [Great applause.]

HOME RULE

SPEECH DELIVERED AT THE ONE HUNDRED AND NINTH ANNIVERSARY
DINNER OF THE SOCIETY OF THE FRIENDLY SONS OF ST. PATRICK,
DELMONICO'S, NEW YORK, MARCH 17, 1893 *

The toast of "Ireland" was allotted to Joseph H. Choate, who, looking over the long range of thirty-five years since he first dined with the society, recalled the names of many distinguished Irishmen, now dead, with whom he had been associated on those occasions. He paid an eloquent tribute to the noblest characteristics of the Irish race, and the deeds they had wrought for civilization, both in European countries and in America. Then, suddenly departing from seriousness, Mr. Choate plunged into wit and satire:

"Home Rule! I understand Mr. Depew is already illuminating another gathering now on that subject, and will come in later. I shall leave that to Depew and Gladstone, who understand the question so much better than I. I prefer to speak upon a kindred subject more familiar to me; that is, how Irishmen rule away from home. [Laughter.]

"This is the day we celebrate. This is the day all Americans celebrate. This is the day that makes the streets all over municipalities impassable. This morning I put on my tall hat and my shamrock scarf and set out with the idea of joining in the celebration. The first man I met was Recorder Smyth. I met him at a barber shop. He was preparing for the day that smooth, that smiling, that implacable, that terrible face of his. [Great shouts of laughter.] I will not call upon him to stand up and be identified, because I conscientiously believe that it would be an invasion of his constitutional rights," continued Mr. Choate, and it was twenty seconds before he could get a further hearing, so joyously was this allusion to the Gardner trial and the Goff Contempt Proceedings received.

"But, gentlemen, you missed one feature for your procession. How your parade would have been glorified (here Mr. Choate waved his hand towards the representatives of the New England, the St. Andrew, the Holland, the Southern and the St. George Societies present) if you had led captive and bound at your chariot wheels the representatives of

* A composite report from the New York Sun and New York Tribune, with comments by the reporters.

these downtrodden nationalities. How my brother of the New England Society would have looked marching there with the badge of his society upon his breast. And my brother of the Holland Society, Mr. De Peyster, the representative of the last remaining relic of the Dutch who once thought New York belonged to them. And this representative of the Southern Society, of the Southerners who have come here to see what they could find, and have captured and captivated New York.

"All these might well have been at your chariot wheels. For what offices, great or small, have the Irishmen not taken? What have they not done to adorn and illustrate American politics? Where is the Department of Public Works? (Laughter.) What flesh pots in every part of the land have they not exhausted? What spoils, rich or poor, have they not carried off? From Mayor Gilroy—I am glad to hear your applause. I am the only man here to-night, I doubt not, who didn't vote for him. I voted for the other man. I've forgotten who he was. But it is no matter who he was. No man could stand against Thomas F. Gilroy and his 75,000 majority.

"But, gentlemen, now that you have done so much for America, now that you have made it all your own, what do you propose to do for Ireland? How long do you propose to let her be the political football of England? Poor, down-trodden, oppressed Ireland! Hereditary bondsmen, know you not who would be free themselves must strike the blow?"

At this there was laughter and several cries of "We can't," and "There isn't any way to do it." Mr. Choate went on:

"You have learned how to govern by making all the soil of all other countries your own. Have you not learned how to govern at home; how to make Ireland a land of home rule?"

There was a confused murmur in the room, some laughter, some excited gesticulation, a few angry looks, several cries of "That's too strong, Choate is carrying his sarcasm too far." Mr. Choate went on with a sarcastic smile of good humor on his face:

"There is a cure for Ireland's woes and feebleness to-day. It is a strong measure that I advocate. But I am here to-night to plead for Ireland with the retaining fee in my possession, and I propose to plead. I propose that you should all, with your wives and your children, and your children's children, with the spoils you have taken from America in your hands, set your faces homeward, land there, and strike the blow."

At this there was some laughter, the representatives of the other societies doing most of it, there were many angry looks, several cries

of "No! No!" and two or three hisses, half suppressed. Mr. Choate, still smiling and sarcastic, went on:

"Gentlemen, the Grand Old Man needs you. He is clamoring for you. And the Grand Old Party, to which I belong, has been so severely disciplined that it can get along without you. Think what it would mean for both countries if all the Irishmen of America, from the Atlantic to the Pacific, should shoulder their muskets and march to the relief of their native land! Then, indeed, would Ireland be for Irishmen and America for Americans!"

There was some applause, but scarcely any laughter. The banqueters were receiving Mr. Choate's good-humored sarcasms silently and were waiting anxiously to see just how far he would go. Mr. Choate went on:

"As you landed the Grand Old Man would come down to receive you with pæans of assured victory. As you departed the Republicans would go down to see you off and to bid you a joyful farewell. Think of the song you would raise: 'We are coming, Father Gladstone, fifteen millions strong!' How the British lion would hide his diminished head! For such an array would not only rule Ireland, but all other sections of the British empire. What could stand before you?

"It would be a terrible blow to us. It would take us a great while to recover. Feebly, imperfectly, we should look about us and learn for the first time in seventy-five years how to govern New York without you. But there would be a bond of brotherhood between the two nations. Up from the whole soil of Ireland, up from the whole soil of America, would arise one pæan—"Erin go bragh!"

HASTY PUDDING CLUB

SPEECH, AS PRESIDING OFFICER, AT THE CENTENNIAL BANQUET OF
THE HARVARD HASTY PUDDING CLUB, NOVEMBER 24, 1895

Brethren: We have come together to celebrate the foundation of the Hasty Pudding Club, a signal event in the history of Harvard, for it has certainly done a vast deal to mitigate the austerities of college life, and to alleviate its "most distressing occurrences"—perhaps as much as all its other institutions combined.

We call it our centennial, but the mists of tradition have thrown a halo of uncertainty about the origin of the club which probably can never be quite cleared up. If we can recall the words of Theodore Lyman's Pudding Song (and you will permit me to adopt it as part of my address to-night), its first conception was in the good Old Colony days soon after the landing of the Pilgrims on Plymouth Rock, and Miles Standish himself took part in its foundation in company with a famous Indian warrior. Some words in the song are a little archaic, but you will like it none the less for that.

This song had a great currency in the club in the old days, although it seems since to have fallen into "innocuous desuetude," but I am sure that it will set the keynote for this august occasion, if we all join in singing it under the lead of Lyman's classmate, Reed, who knows its history well.

"Long since, when our forefathers landed
On barren rock bleak and forlorn
They left their little boat stranded,
To search through the wild woods for corn.
Soon some hillocks of earth met their gaze,
Like altars of mystical spell;
But within finding Indian maize,
Amazement on all of them fell.

"Quoth Standish: 'Right hard have we toiled,
A dinner we'll have before long;
A pudding shall quickly be boiled
By help of the Lord and the corn.'
At that moment the warwhoop resounded
O'er mountain and valley and glen,
And a Choctaw chief savagely bounded
To slaughter those corn-stealing men.

"'Ha! vile Pagan!' the Captain quoth he,
'Tis true that we've taken a horn,
But though corned we all of us be,
We ne'er will acknowledge the corn.'

Then, a wooden spoon held in his hand,
He seized his red foe by the nose,
And with pudding his belly he crammed
In spite of his struggles and throes.

"The victor triumphantly grasped
The hair of his foe closely shorn,
While the savage he struggled and gasped,
O'erpowered by heat and by corn.
'Be converted!' the good Standish said,
'Or surely by fire you'll die,
Though on boiled thus far you have fed,
We quickly will give you a fry.'

"Then straight was the savage baptized
In pudding all smoking and warm,
While the Parson he him catechized
Concerning the cooking of corn.
Then the Puritans chanted a psalm
With a chorus of, 'Hey—rub-a-dub,'
And amid gentle music's soft charm
They founded the great Pudding Club."

And now that in this delightful harmony we have all mellowed together, from Dr. Wyman of the class of 1833, whom we joyfully greet here to-night as the patriarch of us all, to the latest neophyte of 1897, we can take our stand on the solid groundwork of history and locate the actual organization of the club in 1795 by Horace Binney, of Philadelphia, and Judge White, of Salem, who shared with him the first honors of the class of 1797, and Dr. John Collins Warren of the same class, all three of whom afterwards became very eminent citizens of the United States. These men certainly in their youth thus rendered a great service to the college for their own day, and for all coming time, by the promotion of sociability and by advancing good fellowship among the members of the club. From that day to this the club has been true to its original motto of "*Concordia discors*" and has well maintained the standard of innocent and reasonable recreation amid the serious duties of life. The only wonder is that the students of a college in which the curriculum included Horace had not learned long before how "*dulce est desipere in loco.*" That is exactly what we have been doing in the last hundred years, and we mean to go on doing it forever.

Now, brethren, a word of explanation. When I came here this evening I found that no arrangement had been made as to who should sit at the central table, and I took the liberty of inviting these venerable men who sit around me, following the old rule of the college that the members should enter the banquet hall and take rank according to the

years of their respective classes, much as Lowell laid down in his essay, that those should have the best chance to eat the dinner who had the poorest teeth to eat it with, and the poorest ears to hear the speeches.

My first duty is to tell you how deeply sensible I am of the honor that you have conferred upon me in asking me to preside over your deliberations this evening. It is an honor that can come only once in a hundred years. It came in a most opportune time for me, as testifying to the respect that the rising generation entertain for those of us who are passing beyond them in the march of years, for I had just read in a New York newspaper that some of the younger legal lights had spoken of Mr. Carter and Mr. Choate as "moss-grown old fogies" who must soon yield their places to the younger members of the Bar.

It is not the first time that I have had a difficult honor thrust upon me by the Pudding. In 1851 I was classed among its lyric poets, and then, like Horace, I struck the stars with my head sublime. But the stars were not damaged. I had a big head for a few days or more, but nothing came of it. That was my first and last poetic utterance.

Doubtless the grim discipline of the Puritans held on too long at Harvard. But even in the grimmest of Puritan days we might have borrowed the chaste language of Milton, who invented the most excellent motto for the cardinal principle of the club:

"Mirth, admit me of thy crew,
To live with her and live with thee,
In unproved pleasures free."

Or what will you say to the words of our own American bard, Joel Barlow, who, as tradition tells us, first suggested the rich inspiration of Hasty Pudding:

"I sing the joys I know, the charms I feel,
My morning incense and my evening meal;
The sweets of hasty pudding.
Come, dear bowl, glide o'er my palate, and inspire my soul."

Never was there an association of men who had so good a right to celebrate their centennial as this club. A century looks down into the pot and finds it bubbling and singing and gurgling with the same jovial note that it had when Horace Binney ladled it out to feed the men of 1795.

It was not their hungry palates, but their hungry souls that were aspiring for food. How busy our College had been in the process of gestation before the time we celebrate to-night in breeding heroes for the State in the coming days that were to try men's souls! You all remember how Harvard suffered, when those deadly days of peril

came. There were men present at the foundation of the Club whose fathers had seen the college buildings converted into barracks for the colonial soldiers. There were buxom matrons, who, as maidens, had seen the handsome Virginia General flourish his sword under the shadow of the old elm as he took command of the New England troops, or, as Lowell put it, always putting the right word in the right place, "he had come to wield our homespun Saxon chivalry."

But better days had come. Those days of want and famine and pestilence had passed away. Those trying days of hardship after the war, almost as perilous as the war itself, had been struggled through. Washington was president, and Jay's treaty, which caused so much strife and commotion, had just been ratified by the Senate. It was a time of far brighter days; it was the dawn of a new era for America, the time of a new departure.

I am always accused, at Harvard dinners in New York, of speaking by the catalogue. Well, let the names upon the Pudding catalogue of this century tell their own story; let us see if, by the mingling of play with work, anybody has suffered. Let us see whether, by making out of duty itself the merriest play, we have failed in any instance. What say you to this? Did Channing and Buckminster and James Walker and Phillips Brooks, lead their followers into the verdant pastures with less of divinity itself, because they had disported themselves in former years in the club?

Did our historians, Bancroft and Prescott and the recently lamented Parkman contribute any less delightful lessons to their countrymen, because they had gathered around the crackling fire of the Pudding? Did our orators, such men as Wendell Phillips, Charles Sumner and Robert C. Winthrop, speak with less inspiration because, in their boyhood days, they had indulged in the ribald laugh and tried their first eloquence before their brethren of the Pudding? Were the lips of our two great poets, Holmes and Lowell, touched with less divine a fire because they had lisped their first numbers to their brethren of the club, in whose records they stand imperishably recorded?

Now I am not inclined to claim for the Hasty Pudding Club all the success that has come to Harvard College. But when I see its history outlined as we have to-night, when we see the cream of the college in successive generations enrolled in its ranks, and participating in all great deeds, all great services, all great triumphs for the public good, it behooves us to keep this club pure and sweet and good as it always has been, and one of the great influences for education and truth and good morals at Harvard for all time.

THE BAR OF THE STATE

SPEECH AT A BANQUET OF THE NEW YORK STATE BAR ASSOCIATION,
ALBANY, NEW YORK, ON JANUARY 19, 1898, IN HONOR OF CHARLES
ANDREWS AND ALTON B. PARKER, JUDGES OF THE NEW
YORK COURT OF APPEALS

Mr. President, unlike my brother Carter, I have not been thinking all the time I have been sitting here; for thinking to me is such a painful process that I always postpone it to the last possible moment, which is the true explanation of my constant habit of uttering so many thoughtless words. (Laughter.) I would say one thing, however, in regard to the statement pronounced by your Chairman, repeating what was thoughtfully attributed to a learned judge in New York, that there are so few of us alive. On his behalf I wish to deny that he ever said any such thing, but in one respect, when he said that there was but one real and perfect representative of the American advocates of old times, if he had said it, it would have been true in reference to my brother Carter, and it would have been the actual survival of the fittest. (Laughter and applause.) Now, when I look around me upon this great company, all whom either are now or have been, or wish they might be, judges of the Court of Appeals, I confess that I feel more proud than ever before, of the noble profession in which my lot has been cast, and as I suppose I have been put up here between Mr. Carter and my friend from Buffalo as a kind of breakwater, to turn aside this overwhelming torrent of taffy showered upon the heads of your two distinguished guests, I think I may suspend for a moment the strain of eulogy and talk about something else. I have no doubt that Judge Andrews and Judge Parker both will feel very grateful to me for this interruption. I want to express my gratitude to the New York State Bar Association for conceiving the idea of this noble and sumptuous banquet in honor of these two great public servants. There is one respect, as I believe, in which the Bar has fallen off from good old times, and which I hope that this will be taken as a new departure, a step toward the consummation of that more fraternal union, that social union, that ought to bind the members of our great profession together. (Applause.) Let us not wait until a judge has served twenty-seven years, or until another judge comes on who is in the hopes of the people to serve twenty-seven years more, but whenever any judge

comes into or goes out of the Court of Appeals let the Bar of the State meet and revel in the occasion as they have a right to do. (Laughter.)

We would learn a great lesson from our friends of the English Bar, who from time immemorial have not forgotten that one of their great functions was to get all the entertainment they could out of their profession, as they went along. (Applause.) I have attempted to follow at a great distance that example. It didn't seem to me worth while to postpone entertaining until I had got through with the practice of the law. So in season and out of season, in the courts of first instance especially I have had my fun. I have found this business of arguing cases in the Appellate Division and in the Court of Appeals a most dry and dreary business. How they can be bored by our dull and tedious argument week in and week out, and year in and year out, I cannot conceive. The only fault I have to find with the Court of Appeals is the utter absence of any sense of humor in that body. (Laughter.) I will give you a little illustration of it, to show how incapable of a joke they are. I had a cause which had excited, in the trial of it, universal attention not only in the city but in the State and throughout the country. It was the trial of a poor and afflicted plaintiff against an overwhelmingly powerful and rich defendant. Well, we got a good verdict, and my unfortunate client wanted to get the money, but the defendant appealed to the Court of Appeals with its calendar of 1,200 cases, and I sent up an application to have it advanced to the head of the calendar because it was a cause of great public interest. Judge Andrews, issuing the order, denied it without a word, or even a smile. The English Bar have known how to get fun out of their profession as they went along. You have all read of the comic drama they got up in the days of Charles I; the four Inns of Court united their resources, their genius, their wit, their music and their beauty for the purpose of organizing a comic dramatic procession that should take London with it by storm, as it were; all the great lawyers, great advocates of the age were in it; such men as Hyde, and Attorney General Noye, and Selden, whose beautiful talk has come down to us through two centuries and a half, that organized that great procession. They started out from Chancery Lane as soon as night came on, illuminating their way with thousands of torches, and visited the King and Queen at Whitehall Palace, and the King looked out from that very window from which sixteen years after he stepped to his death, to enjoy and reciprocate the delights of that occasion. So it has been the barristers of England who have been the shining lights that have been the leaven that leavened the lump of English life from that time to this, and we

had a grand illustration of it only two or three years ago, when Sir Frank Lockwood, who has so suddenly come to his death, came I believe as a guest of this Association, or of the American Bar Association, and we saw one of the grandest specimens of manhood, one of the best possible representatives of the English Bar. What I have to say in that regard is that we ought to follow more of that example; we ought to cultivate the fraternal feeling among ourselves. We are so infernally busy, we rush up here to Albany and argue our cases, and rush down for the next train, grip-sack in hand, and never think of a social reunion, so let us have more of these. (Applause.)

We have every reason to be proud of our great profession. In the first place, our moral standard is equal to the best that can be found to actuate any calling or any profession that exists among men. There has always been an inquiry, a sneer running through the newspaper every year and almost every week, at lawyers defending what they know to be an unjust side. Let me state one or two instances. At the beginning of this century one Jeremiah Evarts, a great man, the father of that illustrious man who so long maintained his place at the very head of the Bar of New York, when he had graduated at Yale he had conscientious scruples as to whether he could honestly practice the profession of law, and he had a conversation with Chief Justice Ellsworth, who was a great man in his own State, discussing this question, and Ellsworth explained to him the whole situation, just as we now all understand it, that he had no right to prejudge his clients, because every man had a right to be heard in a court of justice, and that any side of any cause that was fit for any court to hear, any advocate might honorably present, and he told him of Lord Hale who had taken this youthful aspirant's ground at first, and refused to take cases because he believed that the wrong side was presented, but he said he found in several instances the court decided in favor of the side that he had rejected, and afterward he changed his mind. (Laughter.) I couldn't help thinking, when I read that, of another man who hesitated about another profession, and that was John Milton, when he had taken his second degree of Master of Arts at Cambridge, and his father, who had brought him up for the one purpose of entering the church, had to meet his fatal disappointment, when the young man said to his father, "I will not enter a profession where I have to advocate more than half the time what I cannot believe." Which of the two standards is the highest? Where is the true morality, the true conscience by which you can give a preference to one over the other?

Another thing that I think about our profession is, that it is not only

the most exact science, but the only exact science that is practiced or followed among the three learned professions. Theology used to be thought a stable science and study. Look at it now. How are the foundations of our faith shaken every day? It isn't more than a month ago that the great Congregational minister of Brooklyn, who stands in the shoes of Henry Ward Beecher, said that the story of Jonah and the whale was nothing but a myth. I have been brought up on that story for the last fifty-five years as one of the most stable things upon which to pin my faith. (Laughter.) Well, he was followed within two weeks afterward by another distinguished divine of New York, Dr. McArthur, who told his congregation that it wasn't true that the deluge actually covered the whole earth. If there was one thing that I thought I could believe with absolute certainty it was the story of the deluge. How the waters rose and overwhelmed the wicked, and how they hoped to save themselves by clinging to the skirts of Noah, and how at last he threw off his skirts and put on a roundabout so that nobody could hold on. (Laughter.) And only yesterday's paper announced that Bishop Potter had declared, at a dinner, it is true, but still he declared that nobody now except printers believed in the existence of a personal devil. (Laughter.) Rob me of that faith, I couldn't practice law any more. (Laughter.) But all that remains, it seems to me, is for Bishop Doane or some other great ecclesiastic, to deny that Nebuchadnezzar did actually go out and eat grass. That was not only one of the greatest pieces of religious history, but it was one of the greatest pieces of political triumph that was ever worked over offending rulers. But what an example is set for all of Nebuchadnezzar's followers, for all nations and States since the fall of Babylon, that if you find a ruler, or a governor, or a president unsatisfactory, turn him out to grass. (Laughter.)

Before I sit down I ought to say something about the court. The Court of Appeals is with me to-night. As I have to argue a case before them tomorrow I hope they will be with me then. It is a rare opportunity to get these judges on an even keel with us and at short range, and tell them just exactly what we think. Well, I won't venture upon that. I want to say before I sit down a single word about Judge Andrews and another about Judge Parker. Everything has been said that was possible about Judge Andrews' noble career, about his personality, which the Bar not only to a man honors, but loves him and will as long as he lives. (Applause.) I want to thank him not only for the learning that is evinced in his opinions, but for another thing. Just think of what a body of learning that is. Those young gentlemen at

the law school, that Mr. Carter has spoken of, might take the 100 volumes of which he jointly with his associates has been the author, and have the whole body of English and American law and equity there condensed. (Applause.) But that isn't all. We owe him this, I think, that he has been strenuous and careful always to cultivate a clear and lucid, transparent utterance of pure and undefiled English in all of his opinions. I do not believe there has been any medium between his brain and the written word, except his hand that wrote it. We had a surrogate once in New York who always decided his cases; he knew how to decide them, but he couldn't give the reasons, and so he would announce his decision to his stenographer and ask him to write the opinion above it. Now that is one extreme, and you have Judge Andrews' habit of writing English, every sentence of which is perfectly transparent, so that he who runs may read and understand it.

Another thing I want to thank him for. I want to thank this court from the beginning, because I have been practicing before it from its beginning, and that is that never once has it been a respecter of persons. (Applause.) It has treated the most obscure, the most unknown, the youngest advocate that came before it with equal consideration, and with as attentive an ear as the oldest and most celebrated advocates that could be gathered from this or any other State. I would like to give as an instance in my long experience why I always loved Judge Martin Grover, that rugged-minded, tender-hearted man. He always looked out especially for the young man. I remember it was my first appearance in the Court of Appeals. They came down and sat in what were afterward the surrogate's rooms, in the unfinished courthouse, that temple of injustice as it afterward proved to be, and it was my first appearance before that court, presided over by Chief Justice Church. The case was called, and, of course, I was on hand, cocked and primed, for it was my first case, and a young man got up on the other side and said that Mr. David Dudley Field was in the case and would come up from his office. That rather touched the temper of the chief judge, and he says, "We are here to hear these causes. We cannot wait for Mr. Field or anybody else to come up from his office, who is on the other side?" Then I piped up and said I was for the respondent. "Well, you must go on." "Well," I said, "I don't like to go on in the absence of the appellant to open the case." "Well, you will have to go on." Then I started in and said I thought it would be a fair thing for me to state the appellant's side of the case first, as I understood it, so I might answer it. I had about completed that when Mr. Field came in, a good deal out of breath, a little out of temper, and began to complain that a

youthful stripling should have trespassed upon his right of opening, when Judge Grover lifted his hand, appeasing the wrath of my distinguished adversary; says he, "Mr. Field, this here young man has been stating your case for you as he understood it, and we rather think that he has done it about as well as you could if you had been here." (Laughter.) Judge Andrews has had the great good fortune to enjoy the society and share the labors of some very distinguished and powerful lawyers and judges who sat with him upon the Bench who, on an occasion like this, we cannot easily forget. (Applause.)

There was the first chief justice of the court, Sanford E. Church, who came to it not with a great judicial reputation, but rather supposed by the profession throughout the State to have come to his place from political power and influence. He was better known, in fact, as a politician than as a judge when he first took his seat, and he expressed, with great modesty in his address, his distrust of his power to fulfill the duties of his office, but the long experience we had of him I believe satisfied everybody that he was a great, and powerful, and honest and a faithful judge. (Applause.) Then there came that clear-minded man, that man that had such a clear vision of legal propositions, clear vision of the truth, Charles J. Folger. (Applause.) And then that rugged lawyer, strong-minded, stiff-willed, ready for any judicial service, and always performing it well, Chief Justice Ruger. (Applause.) It was the good fortune of Judge Andrews to inherit all their graces and their virtues, and to add to them that lofty personality and character of his own which have endeared him so much to the people and to the profession of this State. We part with him with the utmost regret, and may I say this in closing, this word of good cheer, a good omen for his successor, that he may inherit the calm judicial wisdom of Church, the sweet temper and the clear vision of Folger, the rugged strength of Ruger and the lofty character of Andrews, and he will to a distant posterity transfer a fame not less great and glorious than theirs. (Applause.)

ANGLO-AMERICAN RELATIONS

SPEECH AT A BANQUET GIVEN IN HIS HONOR BY THE ASSOCIATED
CHAMBERS OF COMMERCE, LONDON, MARCH 15, 1899, IN RESPONSE
TO THE TOAST "OUR GUESTS"

Mr. President and Gentlemen: In the first place let me protest against the unequaled manner in which the response to this toast has been assigned. That I, a total stranger among you, should have been called upon to respond to it in priority to the Lord Chief Justice of England—at whose feet I have sat, at a great distance off [laughter], and whose example I have vainly tried to follow—that I should have been called upon to speak before him overwhelms me with embarrassment. Then another thing I would have you understand, which is that I feel that when the British lion is about to roar, even the American eagle should hold his peace. [Cheers and laughter.] When I received, before I left America, a very kind note from Sir Stafford Northcote, inviting me to attend this banquet of the Associated Chambers of Commerce of England—realizing as I did that this company would embody the whole might of the commerce of Great Britain [cheers], I felt that I ought to accept it in the same cordial spirit in which it was given. [Cheers.] To be sure, I am not at liberty to discuss British commerce; my general instructions from my Government are not to speak about political questions, and only on extraordinarily festal occasions. [Laughter.] I am sure that your manifestations bring this occasion within the latter clause. [Laughter.] I was assured by my President that this Association in all its doings was absolutely non-political.

I have read one or two of your publications—not all through [laughter]—I take the liberty to skip the figures, statistics, and most of the speeches [laughter]—but I read what Lord Salisbury said to you two years ago, that the first duty of the Government for which he then spoke—was the maintenance of British interests and of British obligations; and what is there in that which commerce does not embrace? Truly commerce is the mainstay of the British Empire, and I was glad to hear from the rear admiral that the sole object of maintaining your splendid fleets and splendid armies is to preserve peace for the encouragement of commerce. [Cheers.] But I felt that, anyway, I might properly and with all modesty avail myself of this occasion—the first public occasion to which I was invited on my arrival—of

expressing the appreciation of my countrymen, of the forbearance, the good will and the friendship which have been manifested to them so freely by the people of this country. [Cheers.] It is true that peace between the United States and Great Britain is the first interest, not only of these two nations, but of the rest of the world together. [Cheers.] I have to express my gratitude for the cordial greeting which I have received since my landing, from all sorts and conditions of men. ["Hear! Hear!"] Everywhere I have been treated as a friend and brother and as a representative of your friends and brothers. [Cheers.]

I find that England never fails to practice what she preaches; and this open door I have found was broadly open in such a way and to such an extent as would satisfy, I have no doubt, the yearnings even of the rear admiral who has swung the circuit of the globe to find it. [Cheers and laughter.] I have read carefully the speeches which he made in the various hemispheres which he has visited [laughter], and I find that he is a good deal troubled, not about the open door, but about the people inside and behind the open door. He has said many times that there is no such great difficulty in getting or holding the door open as there is in managing the people inside the door, who, as he has often said, have really no capacity to take care of themselves [laughter]; but I have found, so far as my observation and experience go—extending over only two weeks [laughter]—that the people inside or behind the door which has been thrown open to me are not only capable of taking care of themselves but of nearly all the rest of mankind together. [Laughter.] I think I may say, as testimony and as witness of the good feeling which is sought to be encouraged on our side of the water, that the President gave, as I thought, the best illustration of it when he said in my letter of credence that he relied with confidence upon my constant endeavor during my stay in this country, to promote the interests and prosperity of both nations. [Cheers.] And then I want to take issue with Lord Charles Beresford on one further point, and that is that I have found not only the open door, but that I am able to combine with it a new and enlarged sphere of influence ["Hear! Hear!" and laughter]—a sphere of influence in this era of good feeling peculiarly open to the American people and its representatives; for in this cordial and overflowing demonstration of brotherhood which greets me, what is there that either of us could ask from the other, that we should ask amiss? [Loud cheers.]

I beg you not to mistake my meaning in what I have said. I do not believe that although friends we shall ever cease to be rivals in the future as we have been in the past. ["Hear! Hear!"] We on our

part and you on yours will still press every advantage that we can fairly take, but it shall be a generous and a loyal rivalry, and all questions, disputes, controversies that may arise—may we not all say so?—shall be settled by peaceful means [cheers], by negotiation, by arbitration, by any possible and every possible means, except that of war. [Loud cheers.] I want to say one word more about this state of good feeling that prevails among us, and of which we are all so proud. It is not new sentiment; it is as old almost as the existence of the Republic. It is now eighty-four years since the last armed conflict between the United States and Great Britain came to an end, and any of you present who are old enough to remember that [laughter] will recall that that conflict of three years ended by a sort of petering-out process, and that no question upon which either side had taken up arms was settled by means of war; showing that between brothers war is the worst possible means of settling any controversy. [Cheers.] But then, during these eighty-four years, what tremendous questions we have had, what heated words, what threatened demonstrations on both sides, and yet while those questions were such as would inevitably have brought any other two nations into open and frequent conflict, they have all been arranged and adjusted between us without even a resort to arms. [Cheers.]

Look at some of those questions—the Oregon boundary, the North-East boundary, the Confederate cruisers, the Trent seizure—what one of those would not between other nations have given rise to war? And even at last this little unpleasantness about Venezuela. [Laughter.] I am glad, gentlemen, that we can laugh at that now. [“Hear! Hear!”] You know that on our side of the water we love occasionally to twist the British lion’s tail [laughter], for the mere sport of hearing him roar. [Renewed laughter.] That time he disappointed us—he would not roar at all. [“Hear! Hear!”] He sat as silent and as dumb as the Sphinx itself, and by dint of mutual forbearance, of which I have no doubt you claim the lion’s share [laughter]; only by virtue of your national emblem, by our sober second thought aiding your sober first thought, we averted everything but a mere war of words. [Cheers.] And now the Chief Justice of the United States [Melville W. Fuller] and an ex-President of the United States [Benjamin Harrison] are shortly coming over to Paris in connection with similar great representatives of your own jurists to settle that vexed question which has agitated the remote and obscure corners of the world. [“Hear! Hear!”]

Before I sit down I should like to refer to two or three events which have happened since I have been in England, which are illustrations of this era of good feeling. Something happened here that I read a great deal about in the newspapers, which was talked about as a great crisis, and when the first fresh breeze blew away the fog,—which is one of the ornaments of your town [laughter]—that crisis had disappeared by means of peaceful diplomacy. [“Hear! Hear!”] That is what we in America want to imitate and learn; and that is the kind of diplomacy which I, just entering upon the diplomatic career, desire very much to extend. For I am fresh enough to believe that if these two countries labor together for peace and unite their voices in demanding it, it is almost sure in every case. [Cheers.] Peace is our paramount interest, and it is also yours; and I would like to quote my President again, for the last words I heard from him were that the United States were to-day on better terms with every nation upon the face of the earth than they had ever been before. [Cheers.]

I do not know that I ought to say anything more about our country. [“Go on.”] America, our young republic, has had a great deal to do during the last hundred years; she has had to subdue a continent, and to convert the wilderness from the Atlantic to the Pacific into a smiling and healthy garden. That business has pretty nearly been finished off. [“Hear! Hear!”] And so last year your Brother Jonathan started out to see the world. [Laughter.] He put on, not his seven-league boots, but his seven hundred-league boots, and planted his footsteps on the islands of the sea. [Cheers.] And what gigantic strides he made! To Hawaii, Manila, and another step would have brought him to Hong Kong. [Laughter and cheers.] Our interests in commerce differ from those of England, not in kind but in degree only. [Cheers.] And it is certainly by a common purpose and a united voice that we can command peace everywhere for the mutual support of the commerce of the two countries. [Cheers.]

Now, gentlemen, let me say one word more—a serious word—in illustration of this happy union which now prevails between our two nations. I should not be satisfied myself if I resumed my seat without referring to that universal expression of grief and disappointment which overcame the American people at the sudden and untimely death of Lord Herschell. Lord Herschell sacrificed his life in the common service of both nations. [Cheers.] I first had the pleasure of meeting him nearly twenty years ago, when he was Solicitor-General, at the house of Lord Frederick Cavendish, who was soon afterwards enrolled

in the noble army of martyrs. I have watched his career ever since with that admiration and that adoration which all lawyers, I think, felt for him. The American Bar has followed in his footsteps—has read his opinions, has admired his judicial work; and when he came over as chief representative of England on the Commission, which was to settle all disputes between the two countries, the nation felt that it must put forth its best faculties to meet him, and so the event did prove. [Cheers.] He maintained the trust committed to him with infinite zeal and absolute fidelity, and when he fell the obsequies which were performed over him in the Capitol of Washington, in the presence of the President, and of all the great officials of the nation, were as sincere and as sacred as those which will be celebrated in a few days by his own countrymen in Westminster Abbey. But this union is not confined to these two limited countries, if I may speak of England as a limited country. We have had another event in the last two weeks which has provoked an emotion unspeakable on every continent and in every land where the English language is spoken, and in the heart of every man and woman. I refer to the sudden, startling and almost fatal illness and the happy recovery of Rudyard Kipling. [Cheers.] Somehow or other he had reached the hearts, I think, of more English-speaking men, women and children of the world than any other living writer. He was cherished equally in the palaces of Queens and Emperors, and in the cabins of the poor; and when the sorrowful tidings went out—borne to all quarters of the globe—of his sad condition, the response came back to him, which if he has now been able to read it, must have thrilled his heart with gratitude and pride.

Gentlemen, we are almost one people. [Loud cheers.] What I say is, let our voices always be lifted together for the cause of human progress and the advance of civilization; and take my word for it, if that can always be followed, law and order and peace and freedom—which are the wants of commerce all the world over—will prevail and the cause of humanity will be far advanced. [Loud cheers.]

FAREWELL TO THE ENGLISH BAR

SPEECH AT A DINNER GIVEN IN HIS HONOR BY THE BENCH AND BAR OF ENGLAND, AT LINCOLN'S INN, LONDON, APRIL 14, 1905

My Lord Chancellor, my Lords, and Gentlemen,—I may say brothers all, for I accept your presence here to-night as a signal proof that neither time, nor distance, nor oceans, nor continents can weaken the ties of sympathy and fraternity between the members of our noble profession wherever the English law has reached or the English tongue is spoken. On this spot, consecrated for centuries—I was going to say for unnumbered centuries—to the study and development of the law, I feel that we are gathered to-night for a veritable professional love-feast, if I can judge from the kindly words of the Lord Chancellor and the Attorney General and from your genial countenances. No profane presence of laymen, no troublesome affairs of clients, can disturb us here to-night. We are all lawyers, except the Judges, and they, too, are lawyers who have soared in ascension robes to a higher and nobler sphere. I thank you all from the bottom of my heart. For an American lawyer who long since withdrew from the arena to find himself the guest of the united Bench and Bar of England, supported by the presence of all that is illustrious and famous among them, is a position which only overcomes me with a sense of my own unworthiness of the compliment you have paid me. I cannot but feel that in my person and over my head you desire to pay an unexampled honor to the great country that I represent, to its Bench and Bar, that daily share your labors and keep step with your progress, and to the great office that I am about to lay down.

Let me say a single word about the altogether too lavish compliments that the Lord Chancellor has paid me in respect to my official career in England. My task has not been the difficult work of diplomacy to which he has referred. It has all, from the day of my arrival here until now, been made absolutely easy by the spirit with which I have been received. The two representatives of this great country with whom I have had to do at the Foreign Office—Lord Salisbury and Lord Lansdowne—have made my task perfectly easy, not only because they have always practised the modern diplomacy, meaning what they say and saying what they mean, with never a card up any sleeve on either side, but because in every single incident they have met me more than half-way in all that went towards conciliation, harmony, and union

between the two countries. It was also easy for us on both sides for other reasons—because the two great chiefs of State on either side, the late illustrious Queen and the present occupant of the Throne, his not less illustrious Majesty, upon the one side, and President McKinley and President Roosevelt upon the other, have all the while been determined that the two countries should be friends; and, back of all that, a circumstance which gave great force to everything that either has ever said, the rank and file, the great mass of the people on either side, were determined that nothing should happen to impair the friendship of the two peoples.

I cannot tell you how much I thank you for your presence here to-night. I am especially proud that the chair is occupied by the Lord Chancellor, whose name in both countries is a synonym for equity and justice. In spite of his thirty-five years at the Bar and his eighteen years upon the Woolsack, he is the very incarnation of perennial youth. Time, like an ever-rolling stream, bears all its sons away, but the Lord Chancellor seems to stem the tide of time. Instead of retreating like the rest of us before its advancing waves, he is actually working his way up stream. He demonstrates what I have been trying to prove for the last three years, that the eighth decade of life is far the best, and I am sure he will join with me in advising you all to hurry up and get into it as soon as you can. He gave me his personal friendship immediately after my arrival here, which has all the time been growing stronger and stronger; and, while he has been drinking at some mysterious fountain that always renewed his mind and his body, I can answer for it that his heart has all the time been growing younger and fresher and warmer. I must also acknowledge with gratitude the presence of the Lord Chief Justice to-night. He, too, has graced my life in England with his friendship. His name is a household word in America. He is held in the highest esteem and honor; and I only hope that he will yield to my repeated persuasions to come over and give us a chance to show how much we like him.

The occasion and the Lord Chancellor's and Attorney General's most kindly words, I am afraid, will make me a little egotistical. I must disavow what they have so strongly pressed—my great prominence in the profession. I only tried always to keep my oath to do my duty by my client and the Court; but I will confess that from the beginning to the end of my forty-four years at the Bar I loved the profession with all the ardor and intensity that that jealous mistress the law could ever exact, and was always trying to pay back the debt which, as Lord Bacon says, we all owe to the profession that honors us. In

my youngest days I could not resist the attraction of those historic and dramatic scenes and incidents in the lives of the world's great advocates which everybody knows. Who would not have given a year's ransom, a year of his life, to have heard Somers, in the case of the seven Bishops, in a speech of only five minutes, breaking the rod of the oppressor, winning the great cause, and at one bound taking his place, the foremost place, among the orators and jurists of England; or Erskine, the greatest advocate anywhere and of all time, when he dared to brave even the mighty Mansfield's admonition that Lord Sandwich was not before the Court? "I know he is not before the Court, and for that very reason I will bring him before the Court." He entered the tribunal that morning an absolutely briefless barrister, and went out of the Court with thirty retainers in his pocket and followed by a crowd of solicitors engaged in a race of diligence to see who could reach his chambers first. Who would not have given a year of his life to have heard Webster pleading before the Supreme Court of the United States for the little college in the hills, where his intellectual life began, and throwing successfully round it the shield of that most beneficent of all constitutional provisions, that no State shall pass any law impairing the obligation of contracts?

I started in life with a belief that our profession in its highest walks afforded the most noble employment in which any man could engage, and I am of the same opinion still. Until I became an Ambassador and entered the *terra incognita* of diplomacy I believed a man could be of greater service to his country and his race in the foremost ranks of the Bar than anywhere else; and I think so still. To be a priest, and possibly a high priest, in the temple of justice, to serve at her altar and aid in her administration, to maintain and defend those inalienable rights of life, liberty, and property upon which the safety of society depends, to succor the oppressed and to defend the innocent, to maintain constitutional rights against all violations, whether by the Executive, by the Legislature, by the resistless power of the Press, or, worst of all, by the ruthless rapacity of an unbridled majority, to rescue the scapegoat and restore him to his proper place in the world—all this seemed to me to furnish a field worthy of any man's ambition.

The relations between the Bench and the Bar of England and those of the United States are far more intimate and enduring than I think even you can suppose. I wish you could enter any of our Courts in America anywhere between Boston and San Francisco. You would find yourself on familiar ground and perfectly at home—the same law, the

same questions, the same mode of dealing with them. You would find always and everywhere the same loyalty on the part of the Bar to the Bench and on the part of the Bench to the Bar. Some things you would miss. You would miss, I think, some of that dignity, some of that picturesqueness, at least, which prevails in your own tribunals. Our barristers appear in plain clothes in Court. The Judges—some of them—wear gowns, but never a wig. I think it would be a very rash man that would propose that bold experiment to our democracy. If the Lord Chancellor had wished that our primitive and unsophisticated people should adopt that relic of antiquity and grandeur, he should not have allowed his predecessors in his great office to tell such fearful stories about each other in respect to that article of apparel. We have read the story of Lord Campbell, as given in his diary annotated by his daughter, as to what became of Lord Erskine's full-bottomed wig when he ceased to be Lord Chancellor—that it was purchased and exported to the coast of Guinea in order that it might make an African warrior more formidable to his enemies on the field of battle. We have a great prejudice against anything that savors of overawing the Court, overawing the jury; and if any such terrors are to be connected with that instrument our pure democracy will never adopt it.

Now, gentlemen, these ancient Inns of Court, and, above all, Westminster Hall, with its far more ancient and historic associations, which have been the nurseries and the home of the Common Law for ages, are very near and dear to my countrymen, and especially to my brethren of the Bar in America. There is nothing dearer to them. They flock to Westminster Hall immediately on their arrival here; and they wish—I wish for them—to acknowledge that infinite debt of gratitude that we owe, that the whole world owes, to the Bench and Bar of England, who have been working out with untiring patience through whole centuries the principles of the common law which underlie alike the liberties of England and of America. It was the Bench and Bar of England in the Inns of Court and in the Courts in Westminster Hall, and more lately in the Royal Courts of Justice, that established those fundamental, those absolute principles that lie at the foundation of our common liberties. What are they? That there is no such thing as absolute power, that King, Lords, and Commons, President, Congress, and people, are alike subject to the law; that before its supreme majesty all men are equal; that no man can be punished or deprived of his dearest or any of his rights except by the edict of the law pronounced by independent tribunals, who are themselves subject to the

law; that every man's house is his castle, and though the winds and the storms may enter it, the King and the President cannot; in other words, and the sublime words of the great Sidney, that ours, on both sides of the water, is "a government of laws and not of men." Indeed, we claim these venerable structures as in large part our own.

I believe that William Rufus held his first Court in Westminster Hall at Whitsuntide, 1099. Well, when John Winthrop, of the Inner Temple, went over to America to found the State of Massachusetts in 1629, those Courts, that great Hall, these Inns of Court had been as much ours as yours for hundreds of years; so that you see we claim a very great interest, a personal and immediate, and direct right in all that has contributed to the growth and development of the law in England. You had been in these very Inns of Court, studying and teaching the law, for at least a century before Columbus made his great discovery, which opened the dawn of a new creation and put an end to the dark ages. In Magna Charta and the Petition of Right our colonies carried with them the germs of what has grown to be American law and American liberty. At the beginning there were no lawyers in America. They had an idea of a Utopia which could be carried on successfully by the help of the clergy, without them. But we have made great progress since then, and our last census shows in America more than 100,000 lawyers. I can give the exact number—104,700, of whom 1,010 are women. Now, I am afraid the Lord Chancellor, who is so conservative, would hesitate a little at the admission to the Bar of 1,010 women; but I assure him that if he will go over there and hold a Court in which they may be heard, and if you, gentlemen of the Bar, will go over there, and take retainers with them or against them, you will be so fascinated that you will embrace every opportunity afterwards of repeating the experiment.

Now, our Declaration of Independence, which the Lord Chancellor seems to have a little doubt about, our Constitution of the United States, which he has no doubt about, are only the natural sequence of Magna Charta and the Petition of Right. Our Revolution only followed suit after your Revolution of a hundred years before. We stood for the same principles, we fought the same fight, we gained the same victory. Our Jefferson and Franklin and their associates in declaring independence, our Washington and Hamilton and their associates in organizing the Government of the United States and setting its wheels in motion, were only doing for us what Somers and his great associates had done for you in 1688. Now you will not be surprised that in these fateful events, which meant so much for the welfare of the world, and

in which the lawyers took a very great part, these Inns of Court contributed their *quota*; and that there were five of the signers of the Declaration of Independence who had been bred to the law in the Middle Temple, and three of the framers and signers of the Constitution of the United States who had been bred in the same Inn, and one of them was afterwards nominated by President Washington as Chief Justice of the United States.

So you may well imagine with what delight I was informed a day or two ago that I had been made a Benchers of the great American Inn, the Middle Temple. I do not think any American lawyer has ever had such a success as that. They may have won more cases, they may have got more fees, but they never have been made Benchers of any of the Inns of Court. In fact, this incident, so touching to my heart, has almost changed my mind. I have a great mind not to go back to America, but to remain here and resume the practice of the law where those five signers of the Declaration and those three signers of the Constitution left off 125 years ago. I should like to cross swords and join conclusions with some of these distinguished Benchers of the four Inns of Court who grace these tables to-night. I do not know what my brethren of the Bar at home would say, but I think they would say, "If you have achieved such a success as that make the most and the best of it at once."

Well, there is no difference between American law and liberty and English law and liberty. I should like to mention two responsibilities which have been thrown upon the Bench and the Bar in America in a greater degree than here. One is that on the Bar the whole burden of legislation from the beginning has been thrown. In a country like ours, where the executive and the legislative departments are kept asunder by impassable constitutional barriers, it is justly considered, and has always been considered, that, for making and amending and expanding the law, the men best qualified are those who are already skilled in the law, and so from the beginning the majority of lawyers in Congress and in each one of the Legislatures of our forty-five States has been uniformly maintained.

And then upon the Bench there has been thrown another very great responsibility, growing out of our peculiar form of government, exercised by all the Judges and culminating in the unique power of the Supreme Court, to which the Lord Chancellor has referred, to set aside, to declare null and void, any Act of any Legislature or of Congress itself which comes in conflict with the provisions of the Constitution. I believe it has been exercised by that Court about twenty-four times in the case of Acts of Congress, and something like two hundred times

in the case of State enactments, and it has been the balance wheel upon which our complicated and dual system of government has turned. There we have over every foot of the soil of our great territory and over every living being within it two distinct and independent Governments, each supreme and absolute in its own sphere and working in absolute harmony because of this harmonizing function of our great tribunal.

I said a little while ago that perhaps you excelled us in your tribunals in dignity, in the control which the Court exercises, and ought to exercise, over the Bar. It is all illustrated by a single difference of phraseology. In America we say that the counsel try the case and that the Judge hears and decides; but, if I understand your common parlance here, the Judge tries the case and the counsel hear and obey. That is where we have got a good deal to learn from you. It is exactly as it should be. But do not believe for a moment that there is any abdication on the part of our tribunals, from the Atlantic to the Pacific, of the functions and authority that belong to the judicial office. If anybody should go over there and try it on he would find that he was very much mistaken indeed. There is an example set by that august tribunal to which I have referred. No Court could be looked up to with so much reverence; no Court, I think, receives the homage and deference, not only of the community, but of the Bar, in such a signal way as that; and the influence of its example is widely extended, and other tribunals follow as they may.

Now, gentlemen, I must not occupy any more of your time. I cannot express the overflowing feelings that are welling up from my heart at this moment when I find myself thus honored by the most illustrious men of the Bench and Bar in England, and that such words of affection for me should have been spoken on every side. I can only thank you again and again. Let me tell you of what one of my predecessors said—I think many of you knew him—himself a very great lawyer, Mr. Phelps. Before I left America to come and take up my office here he called upon me and he said, “Mr. Choate, the best nights that you will have in England are those that you will pass with the Bench and the Bar.” “The lawyers,” said he, “are the best company in England, and I advise you to lose no opportunity of cultivating their friendship. You certainly will have your reward.” My Lord Chancellor and gentlemen, I have faithfully followed his advice and I have my reward to-night. No one ever had one more rich and generous. I shall carry the memory of it with me as long as I live, and I think I shall be attracted by the love of my professional brethren to visit these shores as often as I can.

FAREWELL TO ENGLAND

SPEECH AT A BANQUET IN HIS HONOR GIVEN BY THE LORD MAYOR OF
LONDON AT THE MANSION HOUSE, MAY 5, 1905

My Lord Mayor, Mr. Balfour, My Lords and Gentlemen: Certainly this is the crowning hour of my life. At any rate, it is positively my last farewell benefit upon the English stage. To be received and fêted by the Lord Mayor of London, who holds the most unique and picturesque office in the kingdom, who bears upon his breast the badge which his predecessors in direct succession have worn for more than seven hundred years, the Chief Magistrate of this wonderful City, the centre of the world's commerce and the seat of the British Empire; to have my health proposed and my obituary pronounced by the Prime Minister, who bears upon his ample shoulders all of this great globe which the British drum-beat encircles, supported as he is too by such a number of possible Prime Ministers of the future, all ready and willing in the fulness of time, with consummate self-sacrifice, to relieve him of this great portion of his duty; to see present also so many members of that august but occult body, the Cabinet, who labor in secret, but to-night for my sake have come out into the full glare of the bright electric light; to be honored by the presence of the Foreign Secretary with whom I have had such delightful intercourse, Lord Lansdowne, from whom no secrets are hid; and then to find that so many of the famous men of England of all professions, parties, and opinions have come here to-night as my friends—I could look almost every man in this company in the face and claim him almost as an old friend—I do not dare trust myself to speak at all about it. I can only thank the Lord Mayor for his magnificent hospitality, and you, all my fellow-guests here, for your inspiring presence. I am sure that you will indulge me, before I say the fatal word "Farewell," in a few words in response to what has been so eloquently said to you by the Prime Minister. Altogether too much credit has been attributed to me for the happy, the delightful relations that now exist between our two countries. If I have contributed in the least degree to maintain and preserve what I found already existing, the last six years will be the proudest of my life.

But, gentlemen, the real credit of this happy state of things belongs not to me or to any Ambassador, but it belongs to the two men who are

responsible, and have now for some years been responsible, for the conduct of our relations, no longer foreign relations—I mean Lord Lansdowne and Mr. Hay. The diplomatist who should try to pick a quarrel with Lord Lansdowne would be a curious crank indeed; because he would have to pick it all himself; Lord Lansdowne would be no party to it. And, happily, so it is with Mr. Hay. Never were two statesmen more happily matched, for the noble game that is entrusted to them. When the noble marquis escapes from the *ennui* of Downing street and the tiresome visits of Ambassadors, to his beloved retreat in the extreme southwest of Ireland, he finds himself in the next parish to the United States, with nothing between us and him but fresh air and salt water. And I think I have noticed that he catches and reflects the breezy influences of that close neighborhood. At any rate, I have always found that my best time for dealing with him on American questions was when he returned refreshed and invigorated from that near approach to the Western World. Always, the policy of the Foreign Office, so far as I have observed it, has been one of fairness, frankness, justice and simple truth, and I hope that he has found our State Department the same.

No single man can claim exclusive credit in this happy result. You all know how constant, how unceasing your gracious Sovereigns and our high-minded Presidents have always been in the same direction. I wish to say here to-night that I have never been called into the presence of his Majesty the King or of his illustrious mother that I did not find them full of expressions of sympathy and friendship for the country that I represent. I well remember the last interview that it was my honor to have with your late illustrious Queen. It was immediately after a frightful conflagration had occurred in America, where many lives were lost. She knew all about it, she had studied all its details, and was as full of sympathy and sorrow as if the disaster had occurred in her own dominions. And as for his Majesty, the King, why, his instinct for peace is so unceasing, his genius for conciliation so perfect, as he has been showing to the world in this very last week, that it will be impossible hereafter as long as he lives for any of the other nations to quarrel with his own people.

I have been asked a thousand times in the last three months, "Why do you go?" "Are you not sorry to leave England? Are you really glad to go home?" Well, in truth, my mind and heart

are torn asunder by conflicting emotions. In the first place, on the one hand, I will tell you a great secret. I am really suffering from homesickness. Not that I love England less, but that I love America more, and what Englishman will quarrel with me for that? There is no place like home, be it ever so homely, or, as the old Welsh adage has it, "east and west, hame is best." My friends on this side of the water are multiplying every day in numbers and increasing in the ardor of their affections. I am sorry to say that the great host of my friends on the other side are as rapidly diminishing and dwindling away. "Part of the host have crossed the flood, and part are crossing now," and I have a great yearning to be with the waning number. And then, on the other hand, to make a clean breast of it in this family party, I am running a great risk, if I stay here much longer, of contracting a much more serious disease than homesickness—I mean Anglomania, which many of my countrymen regard as more dangerous and fatal than even cerebro-spinal meningitis. To a young man it is absolutely fatal, but to one who has well-nigh exhausted his future, the consequences are not quite so serious. It was wisely said by one of the Presidents of the United States that he would not trust a Minister or an Ambassador in England more than four years, because those English would be sure to spoil him, and you have done your best to spoil me—not as the children of Israel spoiled the Egyptians, by taking from them all they could lay their hands upon, but by heaping on my undeserving head all the honors and compliments and benefits that you can lay your hands upon. And so it is hard to say whether I am more glad or more sorry, or on which side of the water I shall leave or have the largest half of my heart. Mr. Balfour has spoken of the advantages that I have had in studying the English people, and he wondered what sort of impression I should carry home. Well, I shall carry, in the first place, the most delightful personal memories—memories of exalting and enduring friendships formed, of many happy homes visited, of boundless hospitality enjoyed.

But I shall carry away something better than that. I shall carry away the highest appreciation of those great traits and qualities which make and mark your national life—the reign of law absolutely sovereign and supreme in all parts of the land; individual liberty carried to its highest perfection, perfected by law and subject to it; that splendid and burning patriotism which inspires your young men when their country calls to risk life and all they hold dear for her sake.

I recall that lofty stanza of Emerson applied to our young men when they responded to a similar call:

"So nigh is grandeur to our dust,
So near is God to man;
When duty whispers low—'Thou must,'
The youth replies, 'I can!'"

I shall carry with me the recollection of that splendid instinct for public life which animates and pervades those classes here from whom public duty is expected, and the absolute purity of your public life which is the necessary result. There are so many other things that I witnessed here. I wish I could spend time in recalling more of them.

One thing that has struck me from first to last here in England is the loyal devotion of all the people to the integrity of the Empire, conforming, as it does, exactly to our fundamental idea of American life that everything must be sacrificed, everything else must be sacrificed, if necessary, to maintain the sovereignty and integrity of the Republic. I came here believing that you were a cold and phlegmatic people, not capable of those mercurial outbursts of emotion which sometimes carry away my own countrymen and those of other nations. But I have lived here long enough to change my mind and to know you better. I have seen you, as Mr. Balfour has said, in all the vicissitudes of peace and war, under the strain of a tremendous anxiety and apprehensions of disaster, and in all the exultation of victory. I found that under your cool exterior, your serene repose of manner, the hall-mark of the English gentleman, which other nations may well envy, you carry hearts as warm as ever inspired the enthusiasm of any people. I was brought up to believe that work, hard work, was the end and aim of life—that that was what we were placed here for. But on contemplating your best examples I have learnt that work is only a means to a higher end, to a more rational life, to the development of our best traits and powers for the benefit of those around us, and for getting and giving as much happiness as the lot of humanity admits.

Six years ago I came among you an absolute stranger upon a mission wholly new to me, but from the moment I landed I was no longer a stranger. All doors were open to me, endless hospitality was showered upon me, and I learnt that I had really some useful work to do here. In these days of cables and wireless communications, when the Foreign Office of each nation is brought into actual presence in the capital of every other, an American Ambassador who confined himself to official duties would have very little work to do. I was instructed

by President McKinley to endeavor to promote the welfare of both countries by cultivating the most friendly relations between them; and in obedience to that instruction I have gone to and fro among the English people, coming in close contact with them, studying them at near range for the purpose of discovering the distinctions and differences, if any, that exist between us. I have endeavored to make them better acquainted with my own country, its history, its institutions, its great names, for the purpose of showing them that really the difference between an Englishman and an American is only skin deep, that under different historical forms we pursue with equal success the same great objects of liberty, of justice, of the public welfare, and that our interests are so inextricably interwoven that we would not, if we could, and could not if we would, escape the necessity of an abiding and perpetual friendship. I have no doubt now, and can have no doubt, about the permanence of the peace which now exists between us. War between these two great nations would be an inexplicable impossibility. We have got along without it for the last ninety years; we shall get along perfectly well without it for the next nine hundred years—absolutely so.

The gravest questions have risen during this protracted period of peace, questions which other nations might have made causes for war, and we have settled them all without a single exception by resort to the peaceful mode of arbitration, to the principle of which Senate and people are all equally committed. You must not be troubled by hearing of any domestic discussion as to how this happy result of leaving every question that may arise between us to final settlement by arbitration can best be brought about. In the practical application of the principle we have never yet failed in the past, and we shall never fail in the future. Of course, as you all know, there are questions which are not capable of arbitration, but no such questions are possible, as it seems to me, to arise between your nation and ours. Our good understanding is now complete and perfect; our interests are more interwoven than ever before; our knowledge of each other is greater and closer than ever before, and every year and every day it is growing closer. It means very much that our multitudinous visits to your shores have been responded to in a single season by return visits of such men as the Archbishop of Canterbury, the Bishops of Hereford and Ripon, Lord Dartmouth, Mr. Bryce and Mr. Morley; and, if I am rightly informed—if I am not mistaken—in the event of any change of Government the retiring Ministers would follow their example, and they would find in the capacious bosom of our

broad Republic the rest for which they were seeking and the new life and inspiration which would bring them home for the next rebound. And I really believe that, if you follow the advice of his Grace and these returned statesmen, a visit to America might be made hereafter an absolute qualification in the education of a British statesman.

Our literature on both sides is filled and saturated with our good understanding. The most recent eminent historian of Great Britain exhausts the power of eulogy in dwelling upon the merits of those arch Republicans, George Washington and Alexander Hamilton, and even of Benjamin Franklin, who snatched the lightning from the clouds and the sceptre from tyrants. And it has also been discovered what we always knew—that my predecessor, Mr. Adams, who stood here like a rock for the interests of his country in days most perilous to our peace, has really proved to be in the end the best friend of both countries, as Mr. Herbert Paul, in his last volume, for which I thank him, declares him to have been. He says that at Geneva he saved the arbitration from collapse and the two nations from falling apart, and he boldly suggests that he is entitled to have a monument at Westminster as well as at Washington. I thank him for that. Then, on the other side you have heard a good deal, and I have heard a good deal, of the rancor and bitterness that had grown into the American school-books, especially the school histories, bringing down to present times the hard feelings of our former conflicts; but Mr. Goldwin Smith, whose name you will all respect as an historian, in his very recent address before the American Historical Association, declared that, having heard a great deal about this vice in the school histories in use in America, he made a collection of our school books of the present day and examined them, and he expresses the positive belief that there is very little in them which could give offense to any reasonable Englishman.

Then you heard what my successor, Mr. Whitelaw Reid, who will soon be with you, said recently in New York. Let me read it to you, for it is a very good introduction of him to this audience. He said that international good will “after all is no longer a subject of much concern. We do not continue to worry over an object of national or international desire when it has already been attained. We are content to enjoy it.” The good will between your country and this already exists. Never at any stage of our history has it been so generally taken as a matter of course on both sides of the Atlantic. And let me say here that you will find my successor—you will recognize him as a lifelong advocate of friendly relations between England and our own coun-

try. He will come among you as an old friend. You have received him before on several most distinguished and brilliant missions. His experience and diplomacy, his knowledge of affairs, his versatility are well known, and I am sure that you will give him a good old-fashioned, hearty British welcome.

Now, serene and secure as our peace is, I am not so foolish as to indulge the hope that it will never be disturbed. Untoward events will happen, unfortunate things will be said, something or other will happen that will for the moment disturb the serenity of our peaceful relations. And how are these threats of disaster to be avoided? Standing here by the side of your predecessor, eight years ago, Lord Salisbury said that there was nothing in the traditions of Government, nothing in the tendencies of official life, which was any danger, if any existed, to good relations. "Take care," he said, "of the unofficial people, and I will see that the official people never make any war;" and he went on to speak of that public opinion which dominated Governments then and which has since grown to dominate them still more. If any such unhappy occurrences do arise, we are to be tided over them by public opinion and by that great exponent of public opinion and guide of the public conscience—a high-minded and patriotic Press on both sides of the Atlantic. If the Press does its best to minimize such untoward events and to keep the people cool till sober second thoughts come we shall all be glad; but if they stir up the embers and fan the flames and pile on the fuel, they may get up a conflagration which will tax all the international powers of the fire brigade commanded by Lord Lansdowne and Mr. Hay to extinguish.

And now why waste a night in words when I only came here to say a single word? I bid you, and through you the people of England, farewell with infinite regret, carrying with me the most precious memories and the best opinions and a mind enlarged and improved by my six years here, having learned to take a broader and a happier view of our relations and the possibilities of our two peoples than I had before; and I end as I began, by thanking the Lord Mayor for his boundless hospitality and for giving us this splendid occasion for the interchange of friendly sentiments between two great and friendly peoples.



© BRADLEY STUDIOS, N. Y.

*Mr. Choate at 84
A year before his death
1916*

WELCOME TO AMERICA

SPEECH AT A BANQUET IN HIS HONOR GIVEN BY THE PILGRIMS SOCIETY OF NEW YORK, ON THE OCCASION OF HIS RETURN TO AMERICA, JUNE 9, 1905

It is quite impossible for me to make an adequate reply to your most affectionate and flattering address of welcome.

Five weeks ago to-night, at the Mansion House, in London, I could not express half I felt of gratitude, of friendship, of pain at parting, when, in the presence of an assembly truly representative of all that is great and good in Great Britain, Mr. Balfour and Lord Lansdowne, in behalf of the English people, among whom I had lived so long, bade me godspeed and farewell. And now, in an equally representative assembly of all that I honor and love in America, made up, indeed, of the men with whom I have summered and wintered for more than forty years, with a sprinkling here and there of young men who have, as it were, grown up at my feet and who are very dear to me, you, in behalf of my countrymen, give me an equally affectionate welcome home.

If I could feel that I deserved half of the praise and benediction lavished upon me on either occasion I should be so vain that my head would strike the stars; but in truth and in deed I do not.

It was my unique privilege to serve as Ambassador in two centuries, in two reigns, and under two of the most celebrated Presidents of the United States, and all the time my duties in England were very easy, very simple, and extremely pleasant. Toward my own countrymen who visit England in such increasing number every year, there was, of course, but one cardinal rule to follow: That the Ambassador represented no party, no section, and no social class, but was the equal servant of all alike.

So that whether Mr. Bryan came, who fairly represented 6,000,000 of our countrymen, with whose political faith I was at variance, or a Republican ex-President whom I had heartily supported, I was at the service of both alike—to bring them in contact with the leading men of the nation, and to put the limited resources of the Embassy at their command. And I am bound to say that in these two instances they were objects of equal interest to British statesmen, although I confess a feeling of disappointment when I had taken Mr. Bryan to

the Bank of England, and saw him handling gold bullion in its famous vaults with apparent zest, to find that it seemed to have no effect on his political faith.

Sometimes indeed the more exacting of my countrymen demanded a little more than I could do for them; as to breakfast with the King, or to stay at Windsor Castle, or to visit private establishments, to which I had myself no access, but on the whole, they were habitually reasonable, and I found it a great pleasure to minister to the wants and convenience of my countrymen as far as possible. And the American Society in London, which plays a great part in that city in aiding distressed and stranded Americans, was always a great help to the embassy.

Then, as to the people of England, I had express instructions from President McKinley to do all that I could to maintain and promote the friendship and good will that already existed between them and our people, and, following the example of my distinguished predecessors, I moved freely among them and studied their institutions, their customs, and their social life, and from the day that I landed until I left, I met with nothing but kindness, hospitality, and good will extended freely and cordially to me as the representative of my countrymen.

And I feel sure that almost every man, woman, and child in Great Britain is friendly to us, and that, as a people, they are determined always to be on good terms with the United States. I did what I could to make them better acquainted with our institutions, our history, and our great men, being assured that better acquaintance is all that is needed to perfect and perpetuate our mutual friendship. They manifested great interest in our National heroes, in such men as Washington, Franklin, Hamilton, and Lincoln.

But there is one living American who appeals very strongly to their imaginations and is the universal subject of interest, curiosity, and applause, and if his name were submitted to their suffrages it would command the same overwhelming support that it does among his own countrymen. You will not require me to mention his name.

The history of our diplomatic relations with Great Britain in the last six years is familiar to you all. Two great and difficult questions which threatened to disturb, which did, in fact, disturb the perfect harmony which ought always to prevail, have been forever disposed of and set at rest, and there is nothing left of sufficient consequence to disturb the happy repose of Lord Lansdowne and Mr. Hay, who are the responsible authorities, and entitled to the credit of all that has been done.

Their conduct of our relations which are no longer regarded on either side as foreign relations, has been on both sides fair, square, and aboveboard, frank, honest, and sincere, and it will be happy for both countries if the same spirit shall continue to animate our official intercourse.

There is another potent factor at all times exercising strong influence for harmonious and cordial relations between the two countries. I mean the happy and earnest influence of his Majesty, the King, derived, I am quite certain, from both his father and mother, and greatly strengthened by his pleasant recollections of his early visit to America.

You will remember that at the time of the Trent affair, which brought such tremendous strain upon our peaceful relations, the Prince Consort, then I believe already overtaken by his mortal illness, acting of course for and with the Queen, rendered a great service to both countries and saved the situation, by modifying a hostile dispatch which had been prepared for transmission to America. And I desire to bear witness that on every occasion, of which I had knowledge, the late illustrious Queen and the present sovereign of Great Britain have been steadfast in the faith, that any trouble between England and America would be a calamity to be avoided by all honorable means, a belief in which both the Presidents under whom I have served have fully shared, and on which I have always acted.

So I may sincerely disavow the somewhat lavish praise which your Chairman has bestowed upon me, in giving me altogether too much credit for the happily almost perfect relations which now exist between the two nations. They have been drawn together by the force of political gravitation, their interests are largely the same, their principles are identical, their civilization is one and the same, and it will be strange indeed if, when in pursuit of the same object of common interest to both, while each moves in its own independent orbit, they do not confer, concur, and co-operate to bring about the same ends.

So if you ask me to tell you in a word the result of my present knowledge of both countries, I would say that each has a vast deal to learn from the other; that each has infinite reason to be proud of its own institutions which it has worked out by itself by historical evolution, and that each can confer priceless benefits on the other and upon the world by constant intercourse and hearty cooperation.

The American Embassy and its successive incumbents have every reason to be grateful to the English Court, Government, and people for their constant friendship. There is but one drawback to its complete success and perfect prestige, and that is the want of a permanent

home, the property of its own Government, where the residence of the Ambassador shall be fixed and all the business of the Embassy be conducted. While all the other great powers who maintain embassies in London have such permanent homes, each its own property, the United States and Turkey alone lead a floating and nomadic existence; each successive Ambassador hunting for a house which shall suit the length of his own personal purse.

I believe that hardly two successive Ministers or Ambassadors of the United States in London have occupied the same house. They have wandered from Baker street to Portland place, from Cromwell road to Lowndes square, and from Eaton square to Carlton House Terrace, and I myself had to move from one house to another in the midst of my term, because the owner, naturally enough, wanted to live in his own house. At last, however, by the courtesy and sufferance of my landlords, the Viceroy of India and the Prime Minister of Great Britain, I found places from which to float the Stars and Stripes. But what I maintain is that a great Nation like ours, rich, powerful, and ambitious, should have a house of its own on which to float the National flag on the Fourth of July and on all other great days, without leave or license from Viceroy or Premier or anybody else.

My own position in the matter was graphically depicted, after I had been house hunting for about a month, by a poem in a newspaper, which represented a forlorn and travel-stained stranger wandering about the streets of London, always hunting, hunting, hunting, but finding nothing. At last at midnight the police, having grown suspicious of him, touched him on the shoulder and said: "You must move on, Sir; you must go home." "Home," said he, "home? I have no home; I am the American Ambassador."

The present arrangement by which our country, almost alone among the nations represented at London by embassies, goes without a home of its own is undemocratic, unrepublican, and unbecoming to the dignity of a great nation. It is unfair to the President, because it limits his choice every time. He ought to be able to lay his hand upon the shoulder of whomever he considers the very best man among our eighty millions to represent the nation in each of the capitals of Europe, whether he has a dollar of his own or not.

What we ought to have is a permanent embassy, spacious in area and simple in character, suitable for the representative of a republic, properly equipped and adequate for the purpose, in which each successive Ambassador would reside as a matter of course, the Nation alone being responsible for its dignity and fitness, and I hope that all of you who have any political influence will urge this modest reform.

ENGLAND AND AMERICA—THE BRITISH LION AND THE AMERICAN EAGLE

SPEECH AT THE ANNUAL BANQUET OF THE CHAMBER OF COMMERCE
OF THE STATE OF NEW YORK, DELMONICO'S, NOVEMBER 21, 1905

Mr. President and Brethren of the Chamber of Commerce: For, by your kind partiality, I, too, am a member of this great body. This most cordial reception which you have given me, this applause with which you have overwhelmed me, of which I hold myself wholly undeserving, has completely driven from my head all that I intended to say; [laughter], but I have done the next best thing—my friend, Pierpont Morgan, has lent me his notes with the understanding that they are to be honored at maturity and not to be returned. [Laughter.] So I feel fairly well fortified at the start. I did hope to escape this moment. This is the third time within the last thirty days that I have been called upon to address this great Chamber of Commerce, but the relentless hand of your President has allowed no escape, no possibility of escape, and I am here reluctantly from my extreme modesty to respond to this toast of "England and America. The British Lion and the American Eagle." I can take all that I have to say on this subject from this magnificent frontispiece upon the menu which some distinguished artist has prepared for this occasion—you have seen it; here is the goddess that represents commerce, holding out her arms in benediction over the British Lion and the American Eagle. Did you ever see such a peaceful lion? [Laughter.] Did you ever hear of such a tame eagle? [Laughter.] Well, they have been nourished and prepared for this occasion. The beast of prey and the wildest of birds! See to what they have been reduced. For the purposes of this occasion, that they might lie down peacefully together they have been furnished with nothing to feed upon but pineapples, bananas and grapes. [Laughter.] What wonder then that for the moment they are peacefully inclined. But I notice that one keeps a sharp eye upon the dome of the Capitol at Washington, and the other, with his paw extended, is ready to go to the relief and rescue of the Parliament Building at Westminster, each keeping a jealous watch upon his own capitol. And yet here they are, and this is my text. Here they are lying down peacefully together, and under their protection the goddess of commerce is achieving her victories all the world round. [Applause.] I am entirely at a loss to understand how the President of the Chamber of Commerce could have

lavished upon me praises so wholly undeserved. I disavow the considerable share that he imputes to me in that magnificent state of good feeling that now prevails between ourselves and the mother country. Why, they have been growing together for the last ten years, and every revolving year has brought them nearer and nearer together. [Applause.]

I think during the last week there was a demonstration in this city and country which must carry home to the minds of our friends across the water the conviction that the peace that exists between these two countries is never likely to be broken. [Applause.] It is upon the united action of these two great nations in peaceful employments that the peace of the whole world depends, and we did not too freely lavish upon the visitors who have just left our shores, Rear Admiral Prince Louis of Battenberg and the officers of his squadron, demonstrations of affection from all of our people who came in contact with them.

When I look around me upon this sea of upturned faces, all sober [laughter], all earnest, all devoted to this cause of which I am now speaking, of peace between these two great English speaking nations of the world, I am satisfied that here, in this body, in this very company, that represents the wealth, the commerce, the patriotism of this nation, we have a guarantee of the preservation and perpetuation of that peace. [Applause.] The Chamber of Commerce—I wish I could give you a realizing sense of the good that it did by the visit of its representatives to London while it was my good fortune to be residing there as Ambassador, and of the lasting impression which your representatives made upon the entire community to which you sent them. From the King and Queen at Windsor, who received them so cordially, when they went as the real representatives of the life and vigor of this nation from the countless societies and associations who received them with honor, from their fellow Chamber of Commerce in London, which welcomed them at a banquet such as I have hardly seen excelled in splendor and cordiality, there was one uninterrupted, unbroken manifestation of welcome and applause that should make the Chamber of Commerce proud of its existence for all time. [Applause.] And when your President addressed them, when he told as he told so plainly, and at the same time so eloquently, of their friendly and loyal disposition, and of the real common interest that bound the two countries together, he spoke words which have not yet been and will not soon be forgotten in London. That banquet at which your representatives, whose quality, I think, was a surprise to the people of that commercial metropolis, were

entertained by the Chamber of Commerce of London, has really become historical.

It was there that Lord Lansdowne, the Secretary for Foreign Affairs, gave them that noble welcome, and it was at the close of that welcome that he uttered this sentiment: "The President of the United States will in the years that lie before us be not only in his own country, but in the world, a potent influence for the good of the human race." [Great applause.]

Within a few short weeks of the utterance of that sentiment the President for the time being, of whom he spoke, fell by the hand of an assassin. But the King never dies, and the President never dies, and what he said on that occasion has been exemplified with marvelous force by the important work of our present President. [Great applause and cheering.]

How truly he has been "a potent influence for the good of the human race!" Seldom does it fall to the lot of any man—any president, any king, any emperor, to render to mankind the service that it has been his good and great fortune to render during the past year. [Applause.] When the part that he had in bringing about the peace that terminated that frightful war, which was ravaging the other end of the world, when that comes to be known—if it ever does become fully known—it will be seen that he deserves the name of Peacemaker, as greatest of all his titles. [Applause.]

And now what shall I say of the mission of this Chamber? The mission of this Chamber of Commerce? Chamber of Peace; Chamber of Conciliation—not only between this nation and the nation from which we sprang, but with all the nations of the world. How gloriously it has fulfilled its mission! For one hundred and thirty-seven years—is it, Mr. President—for one hundred and thirty-seven years, it has filled its place in this community. For all that time—four generations of men—it has done what in it lay to promote the commerce and necessarily with the commerce to promote and advance the peace of the world. Peace is inseparable from commerce, and commerce fails the moment that peace fails. I know not how you regard the career of this Chamber, but it does seem to me that it is one of those bodies that reflect ever new and growing credit upon the city and the country, of which it is a noble representative. [Applause.]

I think it would bear investigation [laughter] by any Legislature [laughter], by any Committee [laughter], by any Examining Counsel under calcium light, who might probe to the bottom the facts of its history from its beginning until now, and not one flaw in its record be

discovered. [Cries of "Good!"] I hope that the history of this Chamber of Commerce for this last one hundred and thirty-seven years will sometime be fully written. There will not be found a single blemish upon it. There will be nothing but devotion to the prosperity and the welfare of the City, the State and the Nation. [Applause.]

There is no need for me to recall the great things with which this Chamber of Commerce has been identified. One of the greatest, one of the last, one of the best, is what it has accomplished in the way of relieving and extending, and making possible, and successful, the marvelous traffic of this wonderful city. [Applause.] This subway, which is very largely its work, has made possible the development of this city on a scale that never has before been dreamed of. I will not recite the names of the members of this body, who have been so largely instrumental in bringing about this wonderful result, a result which, now, that it is done, as is already manifest, is only the beginning of what they have yet to accomplish. [Applause.] One would have supposed that when this subway, which was so largely the work of the members of this Chamber, was opened, that there would be no more any fear of any need in the future of enlarging our facilities of transportation. And what is already manifest? You find it choked and crowded at every hour of the day, and a constant demand for still new and enlarged facilities. It is not possible to keep up, apparently, with the growth of this wonderful city, which is only developed and magnified by every introduction of new means of progress and transportation within it. Too much credit cannot possibly be given to the skill, the energy, the enterprise, which this Chamber has contributed in carrying through that great enterprise. It is only one of the great things to which this Chamber and its leading members are entitled to credit. So far as I can see there is no graft in this Chamber. [Laughter.] There is no possibility of anybody making anything out of this Chamber; but it has always devoted itself with unerring skill and wisdom to the development of the resources of the City and the Nation. [Great applause.] Its voice is potent on every great public question, and, so far as I have observed, it never fails to make that voice known on every critical question.

Much as it has done in the past there is vastly more for it to do in the future. Let me refer to one subject only—the development of American commerce, which is itself your peculiar duty and mission. I wish that all the members of Congress who have to vote on the question could visit the ports of Europe and Asia and Africa and South America, and search for the American flag. They would find it now

and then on a squadron, on a ship of war, under the command of my friend Admiral Coghlan, or some of his brave assistants. [Applause.] They would find it now and then on a yacht that Mr. Morgan [laughter] or some other of our great yacht owners might be navigating to the uttermost corners of the world. But as for its having any share in the carrying on of our foreign commerce, why all that is yet a thing of the future. [Applause.] Something has got to be done to restore our flag to the seas where it belongs [great applause] and for one, I think the voice of this Chamber will always be potent in demanding that that something shall be done. [Great applause.] I do not know that it is to be. There I tread on dangerous ground. [Laughter.] Some people would like to have every American entitled to the right, that the Englishman enjoys, of securing a ship wherever he honestly can, and putting the American flag over it. [Great applause.] Other people can see no better use to which a little of the money in our National Treasury can be put than supporting by subventions and subsidies American ships, which shall answer for the service of the American people. [Great applause.] For one, I believe that this people will not be satisfied until, for the great transmission of their thousands of millions, is it, Mr. President?—thousands of millions of exports and imports they have to rely, not on the English flag, or the Dutch flag, or the Irish flag, [laughter], or the Swedish flag, but are made certain that under our own stars and stripes our business shall be done. [Great applause.]

But you see, as I said when I got up, gentlemen, I have nothing to say. I feel immensely grateful personally for that cordial manifestation of good will which you have shown to me. One of the greatest delights of my return to this country was to find how my countrymen everywhere, and especially in this City of New York, how glad they were to see me at home again. [Applause.]

And so, Mr. President, I won't occupy any more of your time. There are a great many things that I should like to say to you.

[Cries of "Go on. Go on."]

How can you urge me to go on when it is time for me to go off? How can you urge me to go on when all these distinguished gentlemen are here—the Governor of the State of Virginia, and my friend and colleague, General Porter [applause and cheers], who has done far more than ever I had the opportunity of doing, in the splendid position that he occupied in France, for the protection of American commerce—how can you ask me to go on when all these gentlemen are waiting and burning to address you!

Mr. Morgan's notes are not yet exhausted. [Laughter.] I never felt so rich; I never expected to feel so rich. Why, they would support me, those notes in my pocket, and in my head, if I were to talk to you until your next annual celebration in 1906. It is hard to let go; I enjoy the feeling of having them as my vouchers. [Prolonged laughter.]

But there is a time for all things. I have had my time, and now I shall give way to General Porter, my colleague, who is equally entitled to his. [Applause.]

FIFTY YEARS AGO

SPEECH AT A DINNER OF THE NEW ENGLAND SOCIETY, NEW YORK
CITY, DECEMBER 22, 1905

I thank you for this cordial greeting. Nothing that I experienced in England gave me more pleasure than this welcome from my old friends and companions in this Society which is so dear to my heart. I am sorry to find myself for the first time before you so situated that I do not feel at liberty to play to the galleries—the most absorbing, the most fascinating, the most bewitching game that man can play. You have only to look into the galleries to see that neither bridge, nor golf, nor foot-ball with all its drawbacks and halfbacks and quarterbacks, furnishes any sport so delightful as that.

I listened very carefully to what your President in his eloquent and impressive opening address said, and I got one idea from him that bore directly upon this subject. He said—and he will correct me if I misunderstood him—that the whole object and result of the Puritan training was to fit us better for companionship with superior beings. I listened most faithfully to what our great President of Harvard said, and he told you how much we had improved under collectivism and under individualism, and he hardly knew under which the more, and yet, in this respect of training for companionship with these superior beings, it does not seem to me that we have made any progress at all in these two hundred and eighty-five years that have elapsed since the landing on Plymouth Rock. That is, if Longfellow rightly tells us the history of the relations of John Alden and Priscilla Mullen.

I am a little sceptical on this question of a steady and permanent improvement, upon which President Eliot and Mr. Crothers have lavished so much earnestness and enthusiasm. That last result of scientific culture in Massachusetts that Mr. Crothers has told us about—the gypsy moths imported first, their destructive work, and then the hostile insects that were imported afterwards to prey upon them—that was not a new idea at all. That is not an advance on New England science; it is merely a repetition in another form of the story of the triumphant scientific experiment of the New England farmer one hundred and fifty years ago, who crossed his bees with fireflies in order that they might work all night.

To-night I have been recalled here from a remote past, a veteran who lags superfluous on the stage—I believe the only survivor present of

those who attended the festival of this Society fifty years ago. If there is any other gentleman who was present on that occasion let him now speak. None? Then none have I offended or overlooked. When I was in Egypt they showed me the bodies of some prehistoric men who had been resting in the sand—not mummies, but people who had been resting in the sand for somewhere between five and ten thousand years; and they had been dug up and brought to the Medical Museum for the purpose of teaching the men of to-day lessons in anatomy, physiology, archæology, and human history. And so the President has summoned me—and he had a right to—because I was actually present and he has asked me seriously to tell you some of the incidents and details of the celebration of this Society fifty years ago—in 1855.

Well, the circumstances, and especially the political circumstances, that surrounded the Society and this city at that day must be recalled. It was half way between the passage of the compromise measures of 1850, fugitive slave law and all, which were believed to have settled the slavery question forever, and the election of Lincoln in 1860, which, as history proved, did settle it forever. The Kansas-Nebraska bill had just been passed, and had shown the utter futility of moral means (or immoral means) for putting an end to that evil which lay at the very root of the honor and the life of the nation. Men's minds were divided, distracted. Some clung to the traditions of the past and cried, "Peace, peace!" when there was no peace, or possibility of peace. Some looked to the inevitable and irrepressible conflict as the only cure for existing evils, and the great majority were still halting between the two opinions, thinking one way one day and the other the next. And New York was the neutral ground on which it was easy and safe to express every form of opinion; but her commerce, her destiny as the one great port of the continent, pleaded always that there must be no disturbance of existing conditions, and, above all, that there must be no war. She was then a comparatively small city—only 500,000 inhabitants, all living below Forty-second street—as compared with her present expanded area of 330 square miles, I believe it is, and four millions of people. There were no great fortunes yet in those days. There were some rich men—I doubt if any as rich as the richest citizen of Cambridge to-day; but they were paltry in comparison with the colossal accumulations of to-day. Men came here in those days to make their fortunes, and not a single one had yet appeared of those millionaires, of every race and nationality from every part of the country, who, having made fortunes elsewhere, now come here to spend them, and who have thus changed the whole social life of the city.

State rights were still largely asserted, and pride of State birth was strongly felt and strongly maintained. That great drift of power and authority to Washington, which began with the war and which has grown stronger and stronger ever since and is growing more rapidly to-day than ever, had not yet begun.

It was in such a situation that the members of this Society assembled in 1855 to celebrate the day that is so dear to us. It took two days then to celebrate the memory of that little band of colonists who now are recognized as the most famous ever known in the world. The place selected for the celebration was Dr. Cheever's church on Union Square—on the very spot, I believe, where afterwards the golden house of Tiffany was erected—and there came to conduct the celebration two great citizens, two great New Englanders, Dr. Oliver Wendell Holmes, beloved by everybody, and that noble old champion of liberty, John Pierpont. There could not by any possibility have been selected two men who more fitly illustrate the contrast of ideas that then divided the nation.

We assembled to hear the orator and poet of the evening on the 21st of December. The orator, Dr. Holmes, was the best embodiment of New England culture and refinement. Tender-hearted and unwilling to offend anybody, he delivered the most eloquent discourse, in which he spoke for harmony between the threatening sections of the country, so soon to be divided. He pleaded for a closer union between New England and the rest of the country, and between the North and the South. He deprecated all extreme ideas, and one of the themes on which he laid most stress would have interested our President, General Hubbard, if he had been there; for he even denounced the Maine law which had recently gone into operation. He spoke for a continuance of compromise, and for the strict observance of all constitutional obligations, and although he was then, as he always was afterwards, as I think, the most popular man in the country, his audience was so divided that distinct hisses were heard at many of his emphatic periods.

Dr. Holmes was one of the most loyal and patriotic of men, and no man was more devoted to his country, as the result soon proved; but he never could have dreamed, as he stood there pleading for harmony between Freedom and Slavery, that in less than seven years, immediately after the bloody battle of Antietam, a telegram would arouse him from his slumbers at midnight, telling him that his first-born son, whom he had given to the service of his country and the cause of liberty, had been shot through the neck, but that the wound was not thought to be mortal; that next morning he would have to start on

that famous search for his captain, "The Hunt for my Captain;" and that after a week's journey over hundreds of miles, visiting hospitals and camps and railway stations, he should find him at last among the wounded in a baggage-car entering Hagerstown in Maryland, and should exchange those greetings so characteristic of the self-contained Bostonian, but which he has made so classical and historic. As they came together, the father and the son, their first words were: "How are you, boy?" "How are you, dad?"

When Dr. Holmes sat down, then up rose old John Pierpont and blew a mighty blast for freedom. Why, you would have thought that his own withers had been wrung by slavery. At any rate, the iron of slavery seemed to have entered into his soul. I think he must have been in State street when Anthony Burns was hurried down on his way from the Court House in the hands of federal officers and federal troops, to be carried back to bondage in the South.

After Mr. Pierpont had most pathetically spoken of the sufferings and troubles of the Pilgrim mothers and the Pilgrim fathers, he broke out into a splendid apostrophe to the spirit of liberty, of which the Pilgrim fathers had been the finest exponents in history, and he concluded with that stanza which he made historic:

"Oh, thou Holy One, and just,
Thou who wast the Pilgrims' trust,
Thou who watchest o'er their dust
By the moaning sea;
By their conflicts, toils, and cares,
By their perils and their prayers,
By their ashes, make their heirs
True to them and Thee."

Well, next day came the dinner at the Astor House, which compared with this banquet of yours to-night very much as that ancient and simple hostelry of that day compares with this glorious House of Mirth, the Waldorf-Astoria.

Harmony prevailed there, absolute harmony, in spite of all that had happened the night before. Dr. Holmes had improved the occasion over night to prepare some verses for the reunion and show how little he had been disturbed by what had taken place the evening before. Let me read you two or three of his stanzas:

"New England, we love thee; no time can erase
From the hearts of thy children the smile on thy face.
'Tis the mother's fond look of affection and pride
As she gives her fair son to the arms of his bride.

"Come, let us be cheerful, we scolded last night,
And they cheered us and—never mind,—meant it all right.
To-night we harm nothing, we love in the lump.
Here's a bumper to Maine in the juice of the pump!

"Here's to all the good people, wherever they be,
That have grown in the shade of the liberty tree.
We all love its leaves and its blossoms and fruit,
But pray, have a care for the fence round the root.

"We should like to talk big, 'tis a kind of a right,
When the tongue has got loose as the waistband grew tight.
But as pretty Miss Prudence remarked to her beau,
'On its own heap of compost no biddie should crow.'"

Well, the night before Dr. Holmes had told his audience the story of Io, beloved of Jupiter and changed by him into a heifer, to protect her from the wrath of Juno, but Juno was too much for him, and for her, and sent the gadfly to torment Io and to drive her carceering over seas and continents, until at last she brought up in the Valley of the Nile, resumed her original form, became the mother of kings and the founder of a new dynasty, and was ever afterwards worshipped by the Egyptians as the goddess Isis. He had likened to the gadfly the edicts of Elizabeth and of James, which had driven the Pilgrims, and the Puritans, out of the English Church, and had sent them over the broad ocean to found a new empire. And when Mr. Pierpont found in what a delightful frame of mind Dr. Holmes had come there in spite of the discomfort of the night before, he responded to his verse with this:

"Our Brother Holmes's gadfly was a thing
That Io knew by its tormenting sting.
The noisome insect still is known by this,
But geese and serpents by their harmless hiss."

And Dr. Holmes immediately jumped to his feet, and replied, impromptu:

"Well said, my trusty brother, bravely done;
Sit down, good neighbor, now I O you one."

That is the way we celebrated the day fifty years ago, and we had as good a time as I have ever known the New England Society to have since.

But now, I have another duty very briefly to perform, by right of seniority, as an ex-President of this Society; and that is to say a few words about the ex-Presidents. Considering that I was elected President of this Society thirty-eight years ago, and that all my predecessors and my seven immediate successors have already crossed the Great Di-

vide, I think perhaps I had better avail myself of my chance while I have it, to say a few words for the ex-Presidents. Not all. The living ex-Presidents—General Woodford and Mr. Bliss and Judge Howland needn't be afraid of that—they can speak for themselves. When we retire from the chair we pass into the ranks, and eat our Boston baked beans and pumpkin pie with that humility which is characteristic of all New Englanders. But of the departed ex-Presidents, and of three of them, who were very dear to me, I wish to say a few words. I think this can be said of all without any invidious distinction, without singling out any from the list, of all the ex-Presidents of the Society, that they were most typical New Englanders in New York, and because of the qualities which they showed in that way, they were elected your Presidents. What do I mean by typical New Englanders in New York? Let me see if I cannot state it in a very few words, in a way which will commend itself to many of you, from your own personal experience.

In an humble old homestead in New England, in town or country, presided over by God-fearing and man-loving parents, where both plain living, very plain living, and very high thinking prevailed, the whole object of the family life from the beginning to the end was to create a future for the sons and daughters. The whole of every year was dedicated to that, and every sacrifice that was necessary was made to give the boys and the girls the finest education which their times afforded. I remember one such household where the struggle was strenuous and unceasing, and it was the proud boast of the parents that they did succeed, on a modest professional income, in keeping four sons, Mr. President, four sons at once, in one single year, in one annual catalogue of Harvard College.

How were such triumphs achieved? Of course, it was by absolute self-denial; by utter self-sacrifice; by subordinating always the present to the future; by really merging the entire lives of the parents in the success and future career of their children. All honor to such fathers and mothers, who are and always have been the great glory of New England! They are entitled to the chief part of the credit, rather than the children. A shame would it be to the children, if conscience, and duty, and enterprise, and public spirit, and patriotism were not quickened and nourished by such nurture and such discipline.

Thus bred and trained, the boy comes to man's estate and looks about him. The world is all before him where to choose, and if health be sufficient and courage dwell within him, and that stern tenacity of purpose, which is indispensable to success anywhere, as he looks out

upon the world, New York with its teeming life and its splendid prizes holds out to him an irresistible fascination. Leaving his home, followed by the blessings and the hopes of those dear ones who have done so much for him, he comes to New York empty-handed: but with a courage all his own, and bearing perhaps one letter of introduction from some prominent person in his neighborhood to some New Englander of a preceding generation, whose success here has found an echo in his native region. The letter gives him all the credit it can, and commends him to this friend to smooth his first steps. By this, or by some means, getting his foot upon the lowest round of the ladder; he can do his own climbing after that. If he has good fortune—for after all “the race is not always to the swift nor the battle to the strong, nor riches to men of understanding, but time and chance happen to them all”—if he has good fortune, he can reasonably be certain of success here, and possibly may become President of the New England Society.

Such is my idea of the typical New Englander in New York. There were three of your ex-Presidents who were very near and dear to me. I grieved at their absence when I came home from abroad, and remembered the warm hand-grasp which each gave me when I went away. All were distinguished ex-Presidents of this Society. I refer to Mr. Evarts, Mr. Carter, and Mr. Beaman.

What a splendid example of New England culture and New England training was Mr. Evarts! I owe him more than words can tell. My connection with him was very close, from my arrival here in 1855 until his death in 1901. I brought to him a letter of introduction, such as I have described, from Rufus Choate, who was then at the very zenith of his fame. A few years before he had delivered before this society his famous oration, of which the refrain was “A Church without a Bishop and a State without a King.” He was most beloved and most honored by all New Englanders, as well as by the rest of the country. When I handed that letter to Mr. Evarts he took me by the hand and said: “Join the New England Society, and come into my office.” And my fortune was made! My first steps were most effectively smoothed by him.

What a great professional career he enjoyed; how he leaped to the front almost at the beginning of his life here in 1840, and maintained his place to the end against all competitors, and with the entire confidence of the profession and the community! His career professionally was as fortunate as it was well deserved. It was most unique, for certainly never in this country before, and never since, did four great

forensic causes occur in the short time while one and the same man was at that professional height which commended him as a leader in all of them. I refer to the impeachment of a President, the Electoral Commission, the Geneva Arbitration, and the trial of the Beecher case—all testing professional capacity in the very highest form and in every varied way, and in each case he was found fully equal to the occasion. Then what a leader he was of public sentiment! Courageous, conservative, learned, he was always willing to give his service and his advice and guidance to his fellow citizens. Many of you remember his sparkling wit, how it lightened and enlivened all the meetings of this Society, of which he was the life and the soul for many years. He was, in truth, the quickest-witted man that I have ever met on either side of the water. Character is what tells. It was that grand, unfailing Puritan character, guided by conscience, devoted to duty, that gave him predominance among his fellow citizens and made him dear to their hearts. So that he, if any man, deserves some public monument in New York to transmit to future generations the knowledge of his great character and his invaluable public services.

What shall I say of Mr. Carter, another of your great ex-Presidents and another of the great products of New England soil and of Harvard culture? When I entered Harvard College in 1848 I found him there already a marked man, where he had been for two years, dominating the minds and affections of his fellows. When he came to New York at the time of his graduation it was the certain expectation and hope of all in his college that he would meet with great success here. Carter had a hard, up-hill fight from the beginning, but he reached the goal of his ambition, which was the leadership of the New York Bar and the American Bar. He was one of those pure lawyers, who owed nothing to the adventitious aid of title or of office; one of that little group of great untitled advocates of whom America is so proud, like Mr. Horace Binney, and Mr. Sidney Bartlett, Mr. Daniel Lord, and Mr. Charles O'Connor. He was one of that famous galaxy and was equal to the best. On great public questions he was always at the service of the community, but he could never quite keep step with any party. He never narrowed his mind to give up to party what was meant for mankind—I mean his great personal character, and influence, and wisdom. It is but yesterday that he was taken from us, and it does seem to me that the New England Society and the City of New York have met with no greater loss in recent years, and that as long as manly character, great mental endowments, and sublime public spirit are to be rewarded with admiration he must be accounted among your truly great.

A word now about Mr. Beaman, another most typical New Englander in New York, trained under the very discipline that I have described to you and showing all its best merits and results. He was nearer to me than a brother, and I cannot sit down without saying a word or two about him. When Walter Scott was dying he said to Lockhart as his parting blessing, "Be a good man, my dear, be a good man;" and that is exactly what Beaman was in a preeminent degree—with the biggest of hearts and the warmest of sympathy, and the most far-reaching sense of the brotherhood of man. I think that he had more friends in New York and more friends in the country than any man I have ever known. He had a singular and marked capacity, a genuine instinct, for friendship. He had a full, great-hearted sympathy, and he touched human relations at more points than any other man among us. All the people that he met were his friends, and, besides that, he had a nobility of character which gave his judgment and opinion vast and beneficent weight with all with whom he came in contact. I know that his intuitions of law were, nine times out of ten, better than the results of other men's study. He was a most delightful and beautiful character, and he was one of those men of whom this Society and this city can well cherish the memory. "He that would be greatest among you, let him be the servant of all," and that is what Beaman always was, and was always trying to be, and so I think I have a right to class him among your great Presidents.

HARMONY OF THE BAR

SPEECH, AS INCOMING PRESIDENT, AT A BANQUET OF THE NEW YORK
STATE BAR ASSOCIATION, ALBANY, NEW YORK, JANUARY
17, 1906

Mr. President and Gentlemen of the Bar Association: We are all lawyers here to-night except the Bishop and—the Judges. (Laughter.) So as I rise at this late hour to address this great company of exhausted receivers (laughter) I suppose that I can freely speak my mind. A great privilege, which I enjoy more and more every day I stay at home, because for six years I occupied a position in which I was absolutely tongue-tied and never free to say exactly what I thought. All limits of time have been removed from me now. This Association was summoned to sit upon the 16th and 17th of January, 1906, and now the 18th has long since commenced and I am free to occupy it all. (Laughter.) Well, I want to say one thing, and that is that never until to-night did I really know the lawyers of New York. I thought I had a familiar acquaintance with them, having wrangled with them, played with them, worked with them, rubbed shoulder to shoulder with them for fifty years. I knew the good fellowship that prevailed among you, but I never knew you were such absolute masters of harmony until I heard you sing to-night. (Laughter.) We might have expected it in time among lawyers, but such absolute harmony never has been heard before as when led by His Honor, the Chief Judge, you sang these delightful songs together. (Laughter.) It reminded me when I tried to join in it and found myself successful (laughter), of a little incident in the lives of two of the most honored and beloved of our profession in New York, who have unhappily been taken from us. Two who were very near and dear to me; I refer to Mr. Evarts, whom you all honored, and to Mr. Beaman, whom you all loved. I went many, many years ago to Windsor to attend the wedding of Mr. Beaman to the daughter of Mr. Evarts, and that jovial spirit, the bridegroom, as soon as he had returned from the church, sat down at the piano and played with great gusto "I would I were single again." (Laughter.) Well, the next morning Mr. Evarts was heard coming down the stairway from his bedroom making a horrible noise, and the whole family rushed to the foot of the stairs. "Why, father, father! we didn't know you could sing." He said, "Well, I never knew it myself until I heard Beaman." (Laughter.) Hereafter I think the Ju-

diciary and the Bar of New York will be surrendered to harmony altogether, and when I next enter the Court of Appeals I shall expect to hear a chorus led by His Honor, the Chief Judge, concluding

"For it's always fair weather when good fellows get together.
With a stein on the table and a good song ringing clear."

(Laughter.)

And when I rise to address the Appellate Division I am sure I shall carry with me the judicial echo of

"Sweetheart, your tears are falling,
Blue Bell, we two must part."

(Laughter.)

And if I shall be honored ever again in trying a cause before the Supreme Court I shall preface my address to that tribunal by asking them to join with me in singing

"Do, do, come and have a stein or two,
Under the Anheuser Bush."

(Laughter.)

Well, gentlemen, let me say with all modesty and all pride that I consider it the greatest honor I have yet received to be elected President of the Bar Association of the State of New York. (Applause.) You will wonder that I hesitated a little before taking up the responsibilities and the burdens of this great office. I asked the gentleman who waited upon me to urge my acceptance many questions. I asked him what was your President's salary. (Laughter.) I asked him what patronage he wielded, what perquisites he could enjoy himself and distribute to his sons and his sons-in-law. (Laughter.) I asked him if this Association still maintained a high-minded Committee on Grievances to whose bosom I might fly in case I was myself aggrieved, and having received satisfactory answers to all these questions I came to make myself your servant and to do your bidding for the next year. (Applause.)

Well, now, having been so long abroad I suppose you expect me to give a brief account of my stewardship. (Laughter.) I believe you were all perfectly delighted when I went away as an ambassador to exhaust my estate in the service of my country. (Laughter.) The experience of going and the coming and the returning of an ambassador, of an American ambassador, is very like the history of the Prodigal Son. (Laughter.) Bishop Doane will excuse me if I do not state the facts correctly, but I believe that the narrative is that he took his portion of his substance and went into a far country and there he wasted

his substance in generous living. (Laughter.) General Porter, I know, can stand by me in verifying that statement, and then my return was just like the Prodigal's. I believe the story is that when he was yet a great way off his father saw him and had compassion on him, and ran and fell upon his neck and kissed him. Isn't that right? Somewhere in Bracton or Fleta, I don't remember which, I wish some young brother of mine will find me the sentence, there is that charming statement that the common law is like a nursing father, making void the part where the fault is and preserving the rest.

Now, this profession of the law, my nursing father, who gave me all that I had, all that I spent and all the little that I had left, saw me when I was yet a great way off and had compassion on me, and ran to me by cable and offered me an earnest and warm welcome home, and when I came here you fell upon my neck and kissed me with the seal of this great office of President of the Bar Association of the State of New York. (Applause.) I congratulate you, gentlemen of the Bar, on the great accession that we have made to our ranks to-day, and I congratulate General Porter that in joining our ranks he has but completed a great career. He was practicing international law to my personal knowledge for eight years to the great benefit of his country in protecting their interests in the great republic of France, and now, General Porter, you have received to-day another of the rewards which your countrymen have delighted to heap upon you. You have been enrolled in the glorious ranks of the Bar. Having become a member of this Bar, General Porter, all the bars in America are open to you now. (Laughter.) You can drink freely at their copious fountains, and if you can absorb and appropriate their warming and inspiring influence you will be a better and a fuller man each day. (Laughter.) It is perfectly outrageous in me to go on with these remarks. It is cruel to those dear inhabitants of the gallery. What martyrs they have been to the great cause of law and eloquence to-night. They gathered early, while you were still filling the inner man, regardless entirely of the inner woman, providing nothing for them but this post-prandial feast, to them really a Barmecide's feast.

I wish I could have time to tell you of my rich experience with the great Bench and Bar of England. I wish I could give you an idea of their cordial hospitality. It would require a long discourse to tell you of the learning, the lofty character, the great ability, the immense efficiency of that great Bar, of the dignity, the serenity, the wisdom of those great Courts. They welcomed me on your behalf, they honored me because I was your representative and because they were in full

sympathy every day with the profession in New York. I found constant reminders of that close connection that binds the profession everywhere together, and nowhere more strikingly than when I was honored by being permitted to enter my name on the roll of the Benchers of the Middle Temple. I found before me on the rolls of that ancient inn the names of five Americans who were signers of the Declaration of Independence, of three Americans who were signers of the Constitution of the United States, one of whom was afterwards nominated by the President for Justice of its Supreme Court. But I cannot keep you any longer. I shall try to discharge the duties of this great office. I cannot hope to fulfill them satisfactorily, but I will do my best. Our profession occupies a most unique position in America. Besides the strictly technical and professional functions that rest upon it and which it shares in common with the Bar of other countries, and especially of England, it is responsible as no other Bar that I know anywhere is for the creation, the preservation, the maintenance and conduct of the government under which we live and of which we form a part. It is stated as a remarkable fact that seven members of the Bar in England are members of the new cabinet. It is a notable increase of their numbers in the House of Commons when they are found to constitute fifteen per cent. of the whole body. But when you remember that in every legislative assembly that has ever gathered in the United States, Federal or State, I think hardly without exception the lawyers have formed and do still form a working responsible majority; they are the creators and authors of all our Constitutions, of all our statutes, of all our laws; they are charged with the responsibility really of preserving the liberties and the institutions under which we live. (Applause.) Now this great Bar of the State of New York whose merits have been so courteously stated by our brother from Montreal has its full share of this great responsibility. I think an immense service can be rendered by an association like this, and I am glad to hear that its members are increasing, that its influence is growing, that its conscience, force and power are yearly advancing, and I will do my part to help that onward movement. (Applause.)

EARL GREY AND BENJAMIN FRANKLIN

SPEECH AT A DINNER OF THE PILGRIMS SOCIETY TO EARL GREY,
GOVERNOR-GENERAL OF CANADA, WALDORF-ASTORIA, NEW
YORK, MARCH 31, 1906

Mr. President and Brother Pilgrims: The pleasant duty has been assigned to me to propose the health of our distinguished guest Earl Grey, Governor-General of the Dominion of Canada. (Applause.)

I hope that Lord Grey understands and appreciates who these gentlemen are of whom I am thus made the mouth-piece. These, Lord Grey, are "The Four Hundred" of New York, with a sprinkling of about forty more from Philadelphia, Boston, Great Britain and the other outlying parts of the world. (Laughter and applause.)

But I do regard it as a very great privilege to be able to perform this service and a very great honor is conferred upon The Pilgrims by the presence of our distinguished guest. We welcome him not only on personal but on public grounds, and on both we give him the heartiest greetings. (Cries of "Hear! Hear!" and applause.)

Lord Grey is no stranger in the United States. Long before he was called to the exalted office which he now fills, he had been a frequent visitor among us. He had made the acquaintance of many of us in divers parts of the land, and as wherever he goes he is sure to make friends, he had found that he left behind him on his last voyage home before he became Governor-General of Canada, a host of admiring friends. (Cries of "Good! Good!" and applause.) And then we welcome him, on public grounds, because he is the personal representative of his august sovereign the King of England, who ever since he came among us as a youth in 1859 or 1860 has been the constant and steadfast friend of the United States. (Great applause.) Since his accession to the throne he has lost no opportunity to manifest his good-will to our country, its government and its people. So that if we failed to welcome his personal representative with all the honors, we should indeed be guilty of great neglect and ingratitude.

And then he comes before us as the representative of a great nation—the Dominion of Canada, our nearest neighbor, whose boundaries march with ours for thirty-five hundred miles from the Atlantic to the Pacific.

In the presence of the Secretary of State I speak with bated breath. But as I no longer live under his instructions or by his will, I can, for

the first time in many years, enjoy the great privilege of being without a master and of saying what I think and what I feel. (Laughter and applause.) And I do feel that this great Dominion of Canada is a nation with which we ought not only to be at perpetual peace, but that all possible questions remaining unadjusted between us should be settled as soon as possible. (Cries of "Hear! Hear!" and applause.) She is not only our nearest neighbor, but our most spirited and ambitious rival and her prosperity is advancing with leaps and bounds quite as vigorous as our own. It was well said by her distinguished Prime Minister in the eloquent fervor of the last campaign in Canada that while by the concession of all mankind the nineteenth century belonged to the United States, the twentieth century so far belonged to Canada. And she is certainly showing it. The development of her vast resources of every possible description, the opening of her wonderful agricultural lands—so rich, they say up there, that if you scatter grains of wheat in the morning a whole harvest is ready for gathering before night; and this is attracting thousands and tens of thousands of our own fellow citizens over the border in exchange for those whom our counter attractions draw away from her. I do not say which way the balance lies; I shall leave that for Lord Grey to determine, and no doubt he can.

But we have a neighbor there to reckon with, such as we never thought long years before the twentieth century began. She is likely to become very soon not only a formidable but very successful competitor, and if she goes on as she has been proceeding for the last five or ten years, we shall soon find her able to feed the mother country without any help from us and we shall have to find new markets for our surplus products. One civilization, one law, one hope, one aspiration pervades the people of both countries, and they are so much alike that on my recent visit to Canada I found that when you crossed the border you could only tell by the change of flag under which jurisdiction you still were. (Applause.)

I have referred to the fact, or opinion or hope that I entertain—I won't express any opinions in the presence of the Secretary of State—but I referred to the hope I entertain that, for the purpose of maintaining and making absolutely sure for all the future peace and harmony between us, every unsettled question should be brought to an early determination.

Nobody knows, nobody can ever tell how soon an international question of trifling importance may become of serious consequence. It was

my recent privilege, on a visit to Lord Grey at Ottawa, to come into personal contact not only with the distinguished Premier, that great orator and statesman, Sir Wilfrid Laurier (applause), but also with most of the other members of his government; and I found, so far as I could judge from constant and repeated conversations, a tone not only of sympathy and of friendship but of a great desire on their part that all questions that lie between us should be forever removed. I believe they all can be. I don't know that you can ever settle the fisheries question as long as fish swim, so that some new form of question as to bait or sinker may not afterwards arise. But with that exception I believe it is possible to place the relation of these two great rival friendly nations on a basis that will secure harmony without any fear of interruption for all the future. And it is on that ground that I particularly welcome the presence here of the distinguished Chief Magistrate, the Governor-General of Canada. (Great applause.)

Lord Grey's ancestors, several of them, have been persons of great interest to the American people. When the second earl, his grandfather, achieved that wonderful performance in statesmanship of carrying the Reform Bill in '32, sweeping away the whole system of rotten boroughs that had existed from the days of the Plantagenets and the Tudors, and substituted in its place a more reasonable and equitable distribution between the different parts of the kingdom, he accomplished a work that, while it regenerated England, appealed directly and immediately to the sympathy and to the admiration of the American People. (Applause.)

But it is to a more remote ancestor of his that I wish particularly to call your attention to-night, I mean his great grandfather Major-General Sir Charles Grey, who afterwards was raised to the peerage and became the first Earl Grey; because his experience in America furnishes us with an incident which I believe will be the chief feature of this notable occasion and will give complete pleasure and satisfaction not only to you but to all the American people.

When the British forces were in possession of Philadelphia in that dismal winter of 1777, this celebrated ancestor of Lord Grey, second in command under Lord Howe, or Sir Henry Clinton, I forget which it was, was in occupation of the City and his Aide-de-Camp, Captain John André, were, I believe, in the actual possession of Franklin's house on Market street, in that city. They had for a while a very good time there, and in the dining-room, where they carried on their revels, there was a fine portrait of Benjamin Franklin himself which

he and his family regarded as one of the best that had been painted. Well, after a few months they had to leave Philadelphia a little more suddenly than they had entered it, what loose-tongued soldiers call "skeedaddling" they had to execute in a hurry; and somehow or other in the confusion of their departure this fine portrait of Franklin disappeared from the walls of his dining-room, and was packed up with other miscellaneous baggage and was seen no more in Philadelphia.

Franklin could stand it very well, for he was over in Paris achieving that wonderful performance of his which secured the independence of America, in the form of the Treaty Alliance with France. (Applause.) I suppose that as they could not get hold of him they regarded it as a very suitable mode of capture to make a prisoner of his portrait to show to their friends at home. Well, how it got to England exactly nobody can tell, it is so many years and ages ago. Richard Bache says, in a letter to Franklin, "Captain John André took excellent care of the house and everything in it, but when he went away he took your portrait that hangs in the dining-room." I suppose that André before his death—for he never returned to England—gave it to Lord Grey. And since that time, for one hundred and thirty years, it has hung upon the walls of Lord Grey's ancestral mansion in Northumberland and has been as an heirloom, a cherished treasure, generation after generation in his family. And now Lord Grey, in full sympathy with that universal enthusiasm for the memory of Franklin which has animated all the world in commemoration of the two hundredth anniversary of his birth, in full recognition of the happy feeling that prevails now and ought always to prevail between the two peoples, and with the purpose of doing all that he possibly can do to promote and advance the harmony of the English-speaking world as represented by these two nations, has concluded to restore to the United States as a free-will offering this portrait that has hung for so long upon his ancestral walls. (Tremendous applause). About a month ago he wrote a letter to the President of the United States making formal presentation of this portrait, and it is now on its way to its original home, passing through the hands of our American Ambassador in London; and I hope that it will arrive in time to take part—as Franklin cannot himself, except in spirit, in that great celebration of Franklin's 200th birthday in Philadelphia, that is to come off on the 20th of April. (Renewed applause.)

Gentlemen, I envy Lord Grey this rare opportunity to perform such a signal act of grace and lofty purpose. I am sure that it will command the approval of his own people and will secure to our guest of this

evening the lasting admiration and affection of all the people of the United States. (Great applause.)

Gentlemen, I propose the health of the Right Honorable Earl Grey, Governor-General of the Dominion of Canada. Let us drink it standing with all the honors.

(The toast was drunk standing, with cheers.)

WELCOME TO JAMES BRYCE

SPEECH INTRODUCING AMBASSADOR BRYCE, AT A DINNER GIVEN BY
THE PILGRIMS, NEW YORK, MARCH 23, 1907.

Mr. President and Fellow Pilgrims: You see what a fine thing it is to be a young Pilgrim—(laughter)—young enough to be called upon to relieve our venerable President from the performance of the duty that should have fallen upon him. I should like to turn the tables, first, upon his Excellency, if you will permit me. I wish I could introduce you to him instead of introducing him to you. And I will begin by introducing to his Excellency this company of men and women; for if he only knew them as well as I know them he would understand that this demonstration is no idle compliment, that it is an expression of the best sentiment of this city and country and an outburst of enthusiasm and goodwill for him and the great country that he represents. (Great applause.)

It is a most pleasant duty that has been entrusted to me, to propose the health of his Excellency, the British Ambassador, and I shall endeavor to do it briefly and pertinently. I shall indulge in no abstractions. I shall say nothing to-night of "Hands across the sea." Partly because I have exhausted myself on that sentiment on many former occasions, and because that delightful but somewhat threadbare sentiment has been entrusted to another speaker, who will bring to it all the freshness of novelty and will sing that favorite old song to an entirely new hymn. (Laughter and applause.) Neither shall I venture to say anything about our common language, our common history and our common literature; nor will I claim any ownership in our Chaucer, our Shakespeare and our Milton, because I do not venture to encroach upon the province—the peculiar province—of the distinguished guest of the evening. (Laughter.)

I know very well that a living Ambassador in actual service, even he, has rights—rights that ex-officios and back numbers are bound to respect. (Laughter.) I speak not for myself only, but for these numerous back numbers and ex-officios who are about me on either side—Governor Morton (applause), General Porter (applause), and Mr. Shaw, and last, though not least, Senator Spooner (laughter and applause). We are all ex-officios and back numbers. We are really as good as dead, although we don't want to have that fact generally known.

Now, let me say a little about Mr. Bryce in the concrete and not wander off into these diversions, which might amuse you but would give you little light on the man that we are met to honor. I can appeal to a close and long-abiding friendship with our honored guest—six years of intimate association with him, in which my regard and affection for him were constantly growing. I remember also that he was among the first to greet me when I landed in England, and the last to bid me farewell when I left. (Applause and cries of "Hear! hear!") It would be strange indeed if I did not take great delight in this opportunity of presenting him on this first occasion of his appearance as an Ambassador before a public audience in America. I confess that long before I knew Mr. Bryce I was very much attached to him. I had a very ardent sympathy for him as a brother lawyer, and there are a great many in this room who know how close that tie is. The tie of the lawyer to the lawyer is close, although perhaps the tie of the lawyer to the client, or the client to the lawyer, is a little closer.

Now, in the year 1862, Mr. Bryce was admitted at Lincoln's Inn as a student of the common law—Lincoln's Inn, one of those grand old nurseries of the law and cradles of liberty; and he must have had a very, very long legal lineage, for I find on the same register that another James Bryce—if it was another—a man of exactly the same name, James Bryce, was admitted at the same Inn nearly four hundred years before, in 1478—fourteen years before Columbus discovered America. Now, think how far back he traces his legal line. You remember Dr. Holmes' answer to the anxious mother, that asked him how early a boy's education should begin. He said, "Why, ma'am, at least 200 years before he was born." (Laughter.) But this man has had 400 years of nurture and training in the law. What the Tudors planted and watered found its full fruition in the glorious reign of Victoria and of Edward VII. And who can wonder that, with such nurture and such origin, he has such extreme felicity in the handling of great social and constitutional and legal questions and knows our history all by heart? (Laughter and applause.)

Well, I love to study these registers of the Inns, and I found in this register of Lincoln's Inn another very striking coincidence and one very interesting to all Americans; for at the same time, on the very day before, there was admitted in the same inn another great friend of America—Sir George Trevelyan. (Applause.) They both came to great fame and distinction. Each was Chief Secretary for Ireland and each has contributed very greatly to the illustration of the history of America. While one has endeared himself to us by the "American

Commonwealth," the best book ever written about our political and constitutional customs and institutions, the other has found his way to our hearts by his "History of the American Revolution," the best narrative that has ever been given of that great conflict which secured our independence, and out of one nation, very small as it was then, has made two of the greatest nations of the world as they stand to-day. (Tremendous applause.)

To have practiced at the Bar of England, as our friend has for fifteen years, is a great education in itself, as I personally know. To have been for twenty-three years Regis Professor of Civil Law at Oxford surely was a sure foundation for the success that has followed him as statesman, as author and as citizen of the world. Certainly no more wholesome training could be had for public life in which he has been engaged, and for the many great offices which he has filled with so much distinction. Our whole experience shows that the law is the true entrance and avenue to public and political life. It was not always so, even in America—to-day the paradise of lawyers, and which everybody, from the President down, seems to be doing his best to make more and more of a paradise for them. (Great laughter and applause.) I say it was not always so, even in America, because in the good old colony days of New England there were no such things as professional advocates, and when John Locke, the celebrated philosopher, made his famous constitution for the Carolinas he expressly provided that there should be no lawyers and that nobody should plead for a fee. And in order to make sure that the constitution and the laws should be protected by the total absence of lawyers, he further provided—and I call Mr. Bryce's especial attention to this—that there should never be any comments or criticisms upon constitutions or laws, so that they might be perfectly easy and plain to be understood by everybody. (Great laughter.) Now, I would like to know what would have become of Mr. Bryce or myself if the Constitution of Locke had continued in force until this day? I am afraid neither of us would have made any considerable progress; but fortunately we have outgrown the wisdom of the philosophers, and I think that Mr. Bryce will agree with me in advising all aspiring young men of the English-speaking race that if they hope ever to become Ambassadors from either half of it to the other they shall begin by the study and the practice of the English law.

Well, now, we are under a tremendous debt of gratitude for the splendid gift that he gave us. I suppose you would like it better if I should state exactly what that gift was. It was a very rare gift. It

was a gift that so wise a man as Robert Burns seemed to have doubted whether it could ever be given to anybody, for it was his constant and never-failing prayer :

"O wad some Power the giftie gie us
To see oursel's as others see us!"

And that is exactly what Mr. Bryce gave us now nearly fifteen—yes, eighteen—years ago.

I believe it was Dean Swift who said that the man who made two ears of corn grow, or two blades of grass grow, where only one grew before, would deserve the everlasting gratitude of mankind. But what are we to say of the man who made all the people of a great nation think twice as much of themselves as they ever thought before? I believe when he began writing that book his original idea was to explain us to his own countrymen, but he ended in explaining us to ourselves. And it was a very great service that he did us in that way. Don't you see the comparison between Christopher Columbus and James Bryce? Christopher Columbus discovered America to all the rest of the world, but Mr. Bryce was the first one who discovered America to herself. (Applausè.) So if we ever think too much of ourselves, as some of his more critical and less indulgent countrymen are sometimes fond of saying—if we do think too much of ourselves, it is very largely his fault. It was he that struck the blow that first inflamed our bump of self-esteem.

I need not tell you how very richly his path has been strewn with civic wreaths and laurels, or what a commanding place he has taken among learned and scholarly men—what a great traveller he has been, how he has permeated the whole of South Africa, what Alpine summits he has mastered, how alone he reached the dreary top of Mount Ararat, seeking for some traces of the Ark and of our origin and common progenitors; and he has confidentially told me that he did find a stick of timber on top of Ararat that he thinks might possibly have composed a part of Noah's Ark. (Laughter and applause.)

Well, that is not all that can be said about Mr. Bryce, although I do not want to weary him by expatiating upon his merits. You know very well how his published studies in history, in literature, in biography, have enriched our literature, how many Universities have claimed him for their own. Why, it would take from now until after the hour that the President has assigned for our adjournment simply to enumerate them. To his own Alma Mater, Glasgow, you might add Edinburgh, Aberdeen, St. Andrews, Cambridge, London, Oxford, Bu-

dapest, Victoria, Toronto, and I really don't know how many more. And you know something of the great offices he has filled at home—member of Parliament for I don't know how many years—they never could get him out; and then besides that, he was Under Secretary for Foreign Affairs, President of the Board of Trade, Chancellor of the Duchy of Lancaster, and, last but not least, Chief Secretary for Ireland. I knew him for six years as one of a little band that constituted the forlorn hope of his party for all those years in the House of Commons; but, as Shakespeare says, "the whirligig of Time brings in his reverses" here as well as there, and now he has been taken away from one of the great offices under the British Government, and from a great place in the Cabinet to come and fill his post at Washington, which is the crowning honor of them all. (Great applause and cheering.) If a thorough knowledge of the people and the history and the character of both countries—the country from which he comes, and the country which he comes to visit, makes, as Machiavelli says it did, a perfect Ambassador, why, there could have been no happier choice than he. Think of the elements that go to the composition of the man! Born in Ireland, and yet not an Irishman; of Scotch descent—a thorough Scotchman; a long-life resident in England, representing for many consecutive years a great Scottish constituency—his knowledge of the people that he represents is only equalled by that keen insight by which he has seen through us—for he has seen all the way through us. He knows our merits, our failings, and we always hope that he will be "to our failings a little blind and to our virtues very kind," and do all he can to enlighten our minds.

It is nearly a score of years since he produced his book. He will find now great changes have taken place—tremendous developments. Some of the prophecies in which he indulged—for he was a prophet—some of his prophecies, I say, in which he indulged, have not turned out to be exactly as he thought, but most of them have been strikingly verified, and some of those perils which he foresaw for us in the far distant future are now already upon us. In all our hopes, in all our apprehensions, we may be sure always of his constant sympathy. Let us hope that he may long remain among us, and that both countries together, whose abiding friendship no man can doubt, will by his aid be found working together for the advancement of civilization and justice, and, above all, for the peace of the world. In the coming summer, at The Hague, we are to have a grand opportunity for co-operation in an earnest endeavor to limit the chance of war, to put an end

to the relics of barbarism which still disgrace it, to secure the rights of neutrals and to advance the great cause of arbitration and of peace. Let us embrace the opportunity and make the most of it, and I am sure that our distinguished guest will say "Amen!"

Gentlemen, I have now the very great pleasure of presenting to you and asking you to drink his health, His Excellency the Right Honorable James Bryce, the British Ambassador to the United States. (Wild cheering and great enthusiasm.)

JUSTICE HUGHES AND THE SUPREME COURT

SPEECH AT A DINNER GIVEN BY THE NEW YORK COUNTY LAWYERS'
ASSOCIATION IN HONOR OF MR. JUSTICE CHARLES E.

HUGHES, FEBRUARY 18, 1911

I thought Judge Parker had forgotten his chief duty, and had left me to introduce myself. Before taking up the serious theme of the evening, I should like to say that we all see now how Judge Werner spends the time in the Court of Appeals, which is supposed to be devoted to the preparation of learned legal opinions. No wonder he enjoyed his champagne and these rich viands that have been spread before us by the New York County Lawyers, while his neighbors and associates at this table were meditating upon what they should say, upon mere bread and water. No wonder he has had such a good time this evening, bringing down in his portfolio, under the disguise of a formal written opinion, this delightful Ciceronian oration with which he has entertained us all to-night. I do not think it is a misuse of his time at all; but what the voters of this State thought about it at the late election, when they declined to increase the salaries of the judges of the Court of Appeals, I do not know. I do not know whether it was because they had heard these orations or because they had not.

Like Judge Werner, I am most delighted to be here to-night to join with my brethren and sisters of the Bar in this splendid tribute so well deserved, paid to our late associate, who has now soared on silken wings to a higher and a nobler sphere. The brethren I have been in close contact with in former years, and on almost every one of them—yes, on every one of them I can see that the tooth of time has left its mark; but on the sisters, no such mark is observable. The brethren make up in numbers what they lose in attractiveness, and the sisters make up in attractiveness what they lack in numbers.

I wonder if it will do for me to repeat here what that grand old conservative Tory, the Lord Chancellor of England, Lord Salisbury, said in my presence about the women of the American Bar. He said it on a somewhat similar occasion, and I think I may venture to repeat it. It was when I was taking my leave of the Bench and Bar of England, by whom I had been treated, on your account, with such distinguished consideration. I was boasting, among other things, of the bigness of America, and the corresponding size of the American Bar, and I told them that it was made up, according to the then last

census, of one hundred and forty thousand men and eleven hundred women. Well, the shock that that aggregation of British judges and lawyers received on my stating those facts, was perfectly obvious. They had never heard of a female lawyer except as portrayed by Shakespeare in the dignified character of Portia. When I wanted to say the best word I could for my associates of the American Bar, I told them that if they would come over here and accept a retainer to act with one of these eleven hundred women, they would be so delighted that they would embrace every opportunity afterwards to promote a similar association. Well, the Lord Chancellor, when he got up to reply, said, expressing how shocked he was at the picture I had displayed of the American Bar—he said, well, he could not accept my invitation, if it was true that if he came over here he would have to embrace eleven hundred opportunities and appear jointly in court, he simply would not and could not come.

So much has been said about Mr. Justice Hughes without calling any observable blush to his face, that perhaps I might venture to add one word more, although I am quite reluctant to do it, lest I might overwhelm him, and in those hours before breakfast that Judge Werner spoke of he might wonder whether we meant every word we said. But every word that has thus far been spoken I know has been earnestly and truly felt. When I look back into the past history of the reputation of the Bar of the State of New York, in the Supreme Court, from John Jay, who was our first representative, to the honored and beloved Rufus W. Peckham, whose loss we so recently mourned, I think that the President not only made a wise selection, but paid us a great compliment, when he called upon Governor Hughes to add one more to that magnificent phalanx, and to take the place which we all believe—which we all know—he will fill as splendidly as any of his predecessors.

This splendid Court of which he has become a member,—what magnificent work it has done in the last one hundred and twenty years; transmitting, preserving, interpreting and maintaining that unique instrument, the Constitution of the United States, so that it has, without amendment, grown with the growth of the people, just as the hide of the animal grows with its growth from birth to old age. And how has this been accomplished, by his predecessors in the New York line and their associates on that great bench; with what aid, with what assistance have these great things been done? Why, as several of the speakers who have already addressed you—as Justice Hughes has himself said, it has been done with the aid and the assistance and the con-

stant co-operation of that great conservative body—the American Bar, in which our predecessors in New York have fully and nobly shared. Its growth has been wonderful. You will remember that Chief Justice Jay resigned his place in that Court to become Governor of the State of New York; but I think the patriotism of even Jay is excelled by him who resigned the governorship of the State of New York, in which he was doing such splendid service for mankind, to take his place in the Supreme Court of the United States.

Then, how that Court did grow. It was forty years, however, after Chief Justice Jay resigned before the first records of the Court were printed. Up to that time the original written manuscript that had come up from the court below, was handed along the bench from member to member, until all had seen as much of the outside or the inside of it as they pleased. What a great step forward that was, forced upon it by the necessities of the growth of the business of the Court, to have every record printed. What would happen to-day if the record, for instance, in the Standard Oil case or in the Tobacco case, the manuscript record, was passed from member to member of the Court until all the nine had devoured its contents—I am afraid there would have been very little physical strength left with any of them.

Well, as has been said, the whole Department of Justice—I hope the Attorney General has not gone—the whole Department of Justice has indicated also the growth of the federal judiciary and of federal jurisprudence. Why, it is within my own recollection, shortly before the Civil War, when the District Attorney, Judge Roosevelt, finding nothing to do in the office, sent in his resignation to President Buchanan; and, the President failing to accept it, he sent it in again, with the same result; and again, a third time. At last he found relief by writing a letter to the President and saying that if he did not accept his resignation before twelve o'clock on Saturday, he would lock up the office and leave the key with the marshal. Well, he was a real Roosevelt; he was not only a Roosevelt but a wit. It was he who, when on the bench of the Supreme Court of the State of New York, said he must resign because the salary was not enough to pay his taxes. It was he who adopted the habit of carrying home the papers in cases that he had heard at the Special Term or Chambers, in the tail pocket of his coat. All the lawyers and all the judges at that time wore dress suits, as you see in the pictures and the magnificent statue to Daniel Webster in the Central Park. Well, he didn't burden himself by this modern habit of having masses of papers carted up to the house, he did not approve of it—but his clerk detected, by tying a

peculiar knot, known and understood only by himself, that the papers came back the next morning in the coattail pocket, evidently not having been opened at all; and when charged with this by the clerk he said, "Yes, that is so, but somehow I find that without untying the bundle, by carrying them in that mode, I in some way absorb a knowledge of their contents." Now, how times have changed. There was not enough then for those federal officers to do; but now that government by indictment has become the order of the day, now that the affairs of all the people are open to the investigation of the Department of Justice under the authority of Congress, I do not see how they live from day to day; having no perquisites such as the District Attorney used to have in the days I speak of, when the moiety system prevailed. Why, if Mr. Wise had lived forty or fifty years ago, as District Attorney in the City of New York, enjoying not only the salary but his share of the moiety of all goods forfeited, he would have been able to decorate half a dozen wives with fur coats and diamond bracelets and pearl necklaces, and have had a good many to spare to give to his friends.

Oh, the world does move on, and we move with it. We have got now into the most dangerous and difficult of all the positions that we have ever yet been in; and upon whom are we to rely to carry us safely through this very serious journey that we are making? Upon whom but the judges of the Supreme Court, and upon whom are they to rely except, as Judge Hughes has said, upon the Bar, who, in exercising that conservative spirit which they have been maintaining now for the last hundred years, will aid and assist the Court by every means in their power.

I do not mean to detain you any longer. I think you have been very patient; you have listened to every word that Judge Werner said without a murmur. And so, on behalf of the Bar, I join with him in expressing the absolute confidence—the absolute knowledge that when President Taft laid his hand upon the shoulder of Governor Hughes and said, "You must come into that great tribunal," and he accepted, one of the best steps was taken for the promotion of the welfare of the American people that have ever yet been made.

FAREWELL TO JAMES BRYCE

SPEECH, AS PRESIDING OFFICER, AT A DINNER GIVEN TO AMBASSADOR BRYCE BY THE PILGRIMS, NEW YORK, APRIL 25, 1913

Gentlemen: In the presence of His Excellency—of Their Excellencies—all these Ambassadors who have heretofore enjoyed that title—I think I ought to begin by making, on behalf of the committee that had this dinner in charge, an humble apology for this omission, that they have not furnished you—that they haven't furnished Their Excellencies—with the new improved imperishable diplomatic beverage—the unfermented grape juice. [Laughter and applause.] How long it is warranted to remain unfermented after being taken, I do not know. [Renewed laughter.]

But our committee have a good excuse—the news came too late. It was only this morning that they learned from the press of all sorts—that are all so dear to us—that the Department of State had prescribed it and that all the ambassadors had received and drunk it in bumpers with great applause. [Laughter and applause.]

But I can promise Mr. Bryce that when he comes back again—and certainly he is coming back again—[Cries of "Hear! hear!" and applause]—we will give him full bumpers of this new beverage, and he shall find it a beverage that will never ferment.

It is a thousand pities that Mr. Bryce is going away from us now—now in these perilous days of the Republic; now when the American Commonwealth which he thought—which he evidently thought—he had finished in the last edition, is going all to pieces and nobody knows what is to come next. I am sure that he will have to publish hereafter an Annual American Commonwealth. [Laughter.] If he will promise us that, so as to keep us up-to-date with ourselves, we will forgive him for going away; because our country moves so fast, like his own country, that its history which was perfect a year ago is just now in the beginning of the making. There has been no such observer of us as Mr. Bryce for the last twenty-five years, and when he gets across the Pacific he will know no more about what is going on in Washington, in New York, in Albany, than he does of what is going on on the back side of the Antarctic. Why, in Albany our political leaders have dreams—nightmares—that are not yet cold from the heat of the brain that evolved them, but are already being crystallized into organic law day by day and night by night. [Laughter.] What is

going on in Washington I have asked both the gentlemen on my right and my left [Mr. Bryce and Mr. Walter Hines Page] who as I supposed, were well qualified, having just said good-bye at the Capitol, and one starting for the Antipodes and the other for the shores of Great Britain, to tell me what was going on in our wonderful metropolis, but neither of them has the least idea. [Laughter and applause.] But it is a very great thing that His Excellency Mr. Bryce has consented, in his gracious good humor to give us the last night of his stay in America, as I might call it, and say his last farewell word to the people of America from the dining table of The Pilgrims, just as he said his first word when he landed on our shores more than six years ago. [Applause.]

This is not the first time that I have said good-bye to Mr. Bryce, but this is positively his last appearance on any American stage. [Laughter.] Over and over again I have said it. But those were only dress-rehearsals. At the Century Club, at the New York Lawyers' Association, at the Genealogical Society, among all the assembled clerical world of America—but every time till now it was all only a rehearsal. This, however, is the real thing. "If you have tears prepare to shed them now." Some people laugh at The Pilgrims; they say we are only a sentimental body—amounting really to nothing; and that we have no real beginning or end. But these sentiments, of which some men are disposed to speak so lightly, especially if they are moral sentiments, sometimes grow and harden into fixed convictions and into that public opinion which, as Mr. Bryce has taught us, governs the world.

We have had one or two instances of this in our own history. Only in 1835 a citizen of Boston, who afterwards became one of the most celebrated citizens of the world, William Lloyd Garrison, was dragged through its streets with a rope around his body because he had just published the first number of the *Liberator*, which declared for the immediate liberation of the slaves. That was pure sentiment on his part. It was the worst kind of sentiment on the part of the people of Boston. But in 1863, in less than thirty years after that disgraceful spectacle, Lincoln signed the Proclamation of Emancipation of all the slaves, and Garrison lived to see his dream, his sentiment, realized and the whole object of his life accomplished. [Applause.]

So it was with the slave trade. I have forgotten the year when Wilberforce made his great speech in the House of Commons, up to which time a great part of England, and all of America, I might say, approved the slave trade. It was embodied in our Constitution which

our honored fathers made that the slave trade should not be interfered with until 1808. But in less than fifty years from the time when Wilberforce spoke, the slave trade was prohibited by almost every civilized country. Great Britain and the United States entered into the Treaty of Ghent in 1814 which put an end to the last war between them, by which they agreed that each should do all in its power to put an end to that horrible traffic, and again in 1842 by the Ashburton Treaty they agreed to fit out a joint squadron, consisting of an equal number of armed vessels belonging to each to pursue the slave traders and put an end to that horrible relic of barbarism. So there was another instance of mere sentiment—moral sentiment—growing into universal public opinion and compelling justice to be done. Well, nobody thought any harm in 1842 in a squadron of the English navy and a squadron of the American navy standing side by side out in the ocean to put an end to that unspeakable inhumanity; and some of us, I think, may live to see the representatives of the same navies standing side by side to put an end to some other great wrong. [Great applause.] Thus then, of our sentiments, for which they deride us. And what is the sentiment on which the Pilgrims are founded?

Why, it is that the English-speaking race is one, that there never must be any quarrel, any bad faith, between those two great nations whose union for peace will secure the peace of the world. [Cries of "Hear! hear!" and great applause.] It is another case of sentiment growing and waxing into public opinion which governs all mankind.

The abolition of unjust war is no more improbable to-day than the abolition of slavery or the abolition of the slave trade was at the date when those reforms were taken in hand. And, for one, I hope we shall never hesitate to work together for the good of mankind and to secure the common peace of all nations. [Renewed applause.] And I do not believe that the people of the United States are ever going to permit, at any rate, for any length of time permit, any action on the part of government, or president, or senate, that will tend to break the peace between Great Britain and the United States. [Vociferous applause.]

Now, Mr. Bryce, I have been putting off as far as I could what little I had to say in the way of good-bye for fear I could not control myself. You and I were friends long before I went to England in 1899. You were among the first to greet me when I arrived there as a representative of the United States. All the years that I was there you and Mrs. Bryce were among our dearest and nearest friends, and, then, our tenure of office was almost identical—six years and three

months; and in that six years and three months that you and Mrs. Bryce have been here that friendship has been renewed and continued and grown stronger and stronger. I believe, gentlemen, that Mr. Bryce has been a very great benefactor of the American people as well as of his own country. [Applause.] He has been a teacher of our youth, and many of you at this table are young enough to know how you learned from his books so much that was exalting and ennobling, and especially from his book on *The American Commonwealth*—how much you learned there that you could never have got from any other source. To the youth of this country he has been a constant living lesson. I believe we have got a university here for about every day in the year, and that Mr. Bryce has visited every one of them. He has lifted up the hearts and souls of those boys and young men all over the country, and all he has got for it is the satisfaction of doing a vast deal of good and carrying some highly colored hoods and gowns, which he will carry home as trophies—and they are so numerous and so highly colored that Joseph's coat of many colors could not begin to compare with them. [Laughter.]

Mr. Bryce, we are terribly sorry to lose you. England has sent other ambassadors, she will send many other ambassadors, but there is and will be only one Mr. Bryce in the whole list. [Applause.] You have made the American people from the Atlantic to the Pacific love you, and not only that, but they know you. They do not need this photograph that is so beautifully illuminated here on our menu to-night to introduce you. You cannot go into any city, town or village without being recognized at once. They all know that is Mr. Bryce, the British Ambassador, and they have learned to love you and to honor you; and all through this land on Wednesday, when you sail away from San Francisco for the Antipodes, every American heart will be weeping with sorrow, sorry indeed that we are losing you. You are not going straight home to Great Britain, because you might come in conflict with our friend, Mr. Page, you might cross lines, you might strike the same iceberg; you are going around by way of China and Japan, and when you have made that circuit, so great a traveler have you been, that you will have visited all the sections of the habitable globe and may well exclaim then—"Creation's heir; the world, the world is mine."

Ladies and gentlemen, when Mr. Bryce gets back to England he will be the one person of whom all Americans will inquire immediately on arrival. [Applause.]

He will be a perpetual and life-long memory. Since I have been back from England many Englishmen have come to see me and I have asked who there is you want to see, and one of them would say one man, and another another, and another another, and another another; but from now on as long as you are on the footstool the first man they will inquire about on arriving in England is James Bryce, who was Ambassador to the United States. [Applause.]

Now, gentlemen, this is a peculiar dinner; we are to have only two speeches. What a sense of relief I see coming over so many faces! One of them you have had already, and I am to have the honor of presenting to you the one man whom you have come here to-night to honor, and after him, for a few minutes, the very distinguished gentleman on my left who is going for the next four years to represent us at the Court of St. James. [Applause.] Now, Mr. Bryce, you have your opportunity; you want to tell these men how much you love them, these women how much you love them; and I can only say on the part of both that it is reciprocated mutually, cordially and most heartily. [Applause.]

Ladies and gentlemen, I have the honor of presenting to you His Excellency the Honorable James Bryce, British Ambassador. [Tremendous applause, cheers and music; the assembled company rising and singing "For He's a Jolly Good Fellow."]

ELIHU ROOT AND PUBLIC SERVICE

SPEECH AT A DINNER GIVEN BY THE NEW YORK COUNTY LAWYERS' ASSOCIATION, MARCH 13, 1915, IN HONOR OF ELIHU ROOT, RETIRING UNITED STATES SENATOR AND PRESIDENT-ELECT OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION, 1915

Gentlemen: I hope you are not making any mistake. I am not the prodigal returning. I am only his elder brother who has remained at home all the time. Or perhaps at this moment, in the last hour I may say, that I have been a portion of the fatted calf that is being served up for his entertainment. He said a great many things that I should like to answer if time permitted, but I cannot do that. He says that forty years ago when he came to the Bar he sat at my feet. I remember it very well, but from the time I first saw him I was afraid of his head, and I have been so ever since. Now I always look at my watch when I begin to speak so that I will know when to stop, which is one of the rarest accomplishments among after-dinner speakers. I rejoice that I have lived to see this day; to have lived more than a dozen years beyond the span of life allotted by the benighted psalmist who didn't know what he was talking about. I rejoice particularly that I have lived to take part in the celebration by the New York County Lawyers' Association, the great democratic Bar Association of America, which does fairly represent the whole American Bar and may claim to speak with the tongues of the whole one hundred and forty thousand members, male and female, of our profession in America, assembled here tonight to welcome back to the ranks of the profession one whom we all honor and love, one who has bestowed credit and glory upon his country and has lived after attaining the leadership of the American Bar, to give fifteen unbroken years of solid service to the cause of the country seldom equalled by any public man. He speaks of the Constitution that we had a hand in framing twenty-one years ago. I remember it very well, for we lived together that long, hot summer of 1894 in Bishop Doane's house in Albany and we framed the successive clauses of this existing Constitution word by word, letter by letter, laboring over it every night in the small hours of the morning sustained by the consciousness of duty done and an occasional drop of old Scotch whiskey. I shall not be there this time except occasionally but Mr. Root will be there in my place as I hope for all the four months and I hope he will not go without that essential stimulant. Great lawyers do great serv-

ices in the Courts, which are forgotten, but there are things that they do that are not in the Courts, that are not in their offices; that are great services to mankind and which are never forgotten. Will the American people ever for a moment forget Hamilton; how he carried, by the pure force of intellect and the strength of his own personality and the vigor of his eloquence, the New York Convention that met to consider and reject the Constitution of the United States? Its delegates were elected for that purpose, but Hamilton carried them all over from a majority of two-thirds against it to an actual working majority that carried it for New York and for the whole Union. The people of the United States will never forget that. They will never forget either how he labored for the success of that Constitution before the people, and with what wonderful and triumphant vigor he carried it through, and they will never forget—and here is a point in which what Mr. Root has done very strongly resembles what Hamilton did and which cannot be forgotten; how with his wonderful power of organization he set the Government of the United States in actual operation under that Constitution and restored the broken credit of the country and made it a great nation before the world. They will never forget what Webster did, not in Court, not by virtue of his opinions, but because he labored in season and out of season for two entire generations to instill into the young men of America, the young men of two generations, an ardent and unswerving faith in the value of the Union, and when they marched in serried ranks to defend that starry flag and the integrity of the Union many and many of them were inspired by his all-controlling eloquence, although he had been in his grave then for some ten years. I don't think the people of New York will ever forget the service of Mr. Evarts, to whom your Chairman has referred. How magnificent he was always at the Bar; how he set an example for all arbitrations in that great work at Geneva; how he saved the executive office when a party besotted by success were determined to destroy it for the time being at least and saved it for the perpetual benefit of the people. Now Mr. Root has done things something like these. As Secretary of War he organized the army and he made an instrument in the hands of the people which, if they are willing to use it, will suffice always for the defense of the nation, not for aggression against any other people, but always ready and fit to perform the great and sacred duty of the defense of the Nation against all attacks. And then, as Secretary of State, he did other great things to inaugurate, as we then believed, the reign of peace, the reign of arbitration as the only mode of settling international disputes,

and although what he did, although the countless treaties that he signed on behalf of the United States, and which still remain upon the Statute Book, seem for the moment to be mere scraps of paper, they will live again when this accursed war is over, and peace will reign once more throughout the world. And then as Senator he had a splendid opportunity which he nobly improved. He maintained there the Constitution and the Union and the law. He had tremendous fights, which he always conducted with great dignity. I always was delighted to read the accounts of the controversies that he had with Brother O'Gorman, perfectly delightful, and they are both here tonight to recall or forget them. When Mr. Root came back to New York he said, "I belong to the Bar Association up town." Some consider that perhaps rather an aristocratic affair. "What does O'Gorman belong to?" Why, he belongs to the New York County Lawyers' Association. "Put me down at once for that," and he is not only an honorary member, but he is the latest and youngest active member.

No, the people are not going to forget what Mr. Root has done. He says, "Who is to speak; who is to think; who is to argue; who is to persuade the people to maintain the high standard which he held out to us?" I know. The nation surrendered him last Thursday to the people of the State and City of New York, and he is to do that heavy job. I don't think it is quite so serious as he forebodes. I think he gave one illustration that rather was an answer to a part of his own argument. He said in the Constitutional Convention twenty-six years ago, I decided every question without the least regard to the rules of parliamentary law. Well, that is a fact. And I commend my example to him as the President of the coming Convention. When such a question came up I didn't stop to see what Caleb Cushing in his Manual had said about it. I didn't stop to ask how Tom Reed had decided that question. I decided exactly as I thought was right, and if every judge will decide as he thinks is right, and every lawyer will speak always what he thinks is right, and every citizen will do what he thinks is right, I think you may give your forebodings farewell and have hope for the people still. I want to say one serious word. It may be that this is my last word to you. Nobody knows. Metchnikoff is keeping us alive beyond all previous belief, and I hope to live to be a hundred or more. I am delighted to hear that you share my confident hope. But I want to say a word. I was admitted to the Bar sixty years ago; sixty years ago in Boston, fifty-nine years ago in New York, and I have studied the Bar and been a part of it ever since. I have studied the Bench, although I never had the honor of a

seat upon that exalted tribunal, upon any tribunal, and I want to say that I believe, I know, that the Bench and the Bar of New York, whom I have got tired of hearing decried, have as great ability, as fine quality, as great character as the men who preceded them in the same places twenty and forty and sixty years ago. Of course change is going on all the time. Even Mr. Root must not forget that. He will find a very different body up at Albany next month from those who surrounded him there in 1894, but the longer you live the more you will find that perpetual change is the only absolutely unchangeable thing in all the course of human life. Now he and the other members of the Convention who are going to make the fundamental law to rule over this people for twenty or forty years have got to bear that in mind. Time and change are busy ever and there is need of the same ability and care and courage to adapt themselves to these changes that there ever has been. Finally I have no doubts nor misgivings for the future of the people and the Bar and the Bench of the State of New York.

HARVARD CLUB

SPEECH AT THE CELEBRATION OF THE FIFTIETH ANNIVERSARY OF THE
HARVARD CLUB OF NEW YORK, NOVEMBER 3, 1915

Mr. President and Gentlemen: When Mr. Secretary Marvin—may I call him “the inevitable Marvin?”—called upon me and said I must come here tonight and recite from memory the whole history of the Harvard Club from the beginning to the end, not only things past, but things present and things to come, I told him I couldn’t do it. In the first place, I could not remember much of it, and if I should undertake to recite all that I did remember, nobody else would have any chance at all.

When I was in College, we had a very charming professor—many charming professors, but one that exceeded them all. We called him “Pater” Channing. I find on reference to the catalogue that his real name was Edward Tyrrel Channing, but no one ever called him that. He was the father of Harvard English, the best English that I have ever heard spoken on either side of the water.

He was very quaint himself, and was very fond of giving us very quaint subjects for our semi-monthly forensics, and one he gave us, that I have never failed to remember, and which comes to me very strongly tonight, was: “He who has lived history despises the gownsmen who sit in cloistered ease and write about what they know not.”

Now, in preparation for this evening, I asked for a copy of the last publication of the Harvard Club catalogue, and so far as I could see from scanning its pages, the whole history of the club, as known to those writers who “sat in cloistered ease” and got it up, was from the incorporation of the club in 1887, but there was a long period of existence before that to which no allusion is made in the pages of the last catalogue, for it was 1866, as I remember, that I attended the first dinner of the Harvard Club at Delmonico’s, the club having itself been organized a few weeks before.

There were present, as distinguished guests, two ex-Presidents now, but one of them the acting, real President of Harvard College at that time, the Reverend Thomas Hill, and his predecessor, the Reverend Jared Sparks, the best President in my opinion that Harvard has ever had,—the present company only excepted.

He was a wonderful President; he knew how to manage boys, as we were at that time. If any complaint was brought to him about the

boys, he always said, "Let the boys alone, they'll take care of themselves."

One little incident shows the difference between the President of the time when I entered College in 1848 and the Presidents that we have known since. Mr. Edward Everett was the President, and after I had been in College about a week—I came from the antiquated city of Salem, which was not remarkable for its knowledge of etiquette—I received a message from Mr. Alexander Everett, the President's secretary: "Wouldn't I please come to his office." I went there in great apprehension; I did not know but what I had committed the unpardonable sin. He looked very solemn, and he said, "Mr. Choate, the President has directed me to say to you that you passed him in Harvard Square yesterday without touching your hat. I trust that this offense will never be repeated."

It has made me think of Eliot—Eliot, stalking through Harvard Square, through the whole College Yard, and no notice taken of him. And I have thought what a wonderful change had come over the manners of the University.

Well, looking back to those distant days reminds me of several other things in which the College then differed from the College now. I remember that it was the last year of the College Commons. We fed then, or were fed, in the basement of University Hall. There were two sections, one at \$2.50 a week, and one, to which I resorted, at \$2.00 a week, called "Starvation Hollow," and it was not quite worthy of the name. It was meat one day, and pudding the next, and I really think it was better for our health than some of the feasts to which you now resort. The alleviating part of it was that we fed with the College silver, which bore the ancient arms of Harvard, decorated since 1638 with that magic word "Veritas" upon them, which has carried Harvard through nearly three centuries, from honor to honor, and from glory to glory.

I wondered where those wonderful spoons were, with the College arms, and I asked President Eliot tonight, and he said, "Why I've got a dozen of them *myself*!"

I do not wish to cast any reflection upon the distinguished President-Emeritus of the College; he deserved all the spoons that he could carry away. But he did not really carry these away. He told me how he got them; that there was an auction sale in 1863 of those wonderful spoons. (How each one of us wishes that he had been at that sale!) Well, the purchaser of the spoons presented them to the President of Harvard, in recognition of his wonderful service.

I have said that I boarded in "Starvation Hollow" at \$2.00 a week. It was the best that my father could possibly do. He was a very proud Harvard man. He had graduated in 1818, and thirty years afterwards, in 1848, he had four sons in the annual catalogue of Harvard College. I have often seen him pay out what I believe was his last dollar in payment of the College bills, but he had graduated himself thirty years before, and he was determined that if he failed in everything else, those four boys of his should be educated at Harvard, and there we were, that year, 1848, one medical student, one senior, and two freshmen; and I have always carried the memory of that fact with the supreme conviction in my mind and heart that he was one of the fathers worth having.

In 1855, when I came to New York, there was no relation at all existing between New York and Harvard College, Harvard was looked upon, as perhaps it was, as a provincial, heretical concern, hardly worthy of recognition by the great dignitaries of the metropolis of New York. Nobody ever then thought, in New York State, of sending a boy to Harvard, and very few people ever thought of coming to settle in New York after graduating from Harvard College. There were not, I think, over twenty or thirty graduates of Harvard in New York at that time, not more than that. They never thought of a club. There were not enough of them to form a club, but great events were coming on, and great events were happening.

Reference has been made to my brother William. I am very sorry he is not here tonight. He was the real founder of the Harvard Club. You ask me how that could be, when there were so many others. Well, he was the real founder of the Harvard Club in the same sense that the gentlemen who sat in the Federal Convention of 1787 and framed the Constitution were the founders of our Republic. It was he who in 1866 prepared alone, out of his own brain, the Constitution of the Harvard Club, one of the few relics of antiquity preserved in your catalogue. It consisted of two articles:

"Article First: The Harvard Club shall be perpetual.

"Article Second: Whatever changes shall be made in respect to the conduct of the club, no change shall ever be made in this first article."

That is the way it stands today, as it was when the Harvard Club was founded.

Then, men were beginning to crowd to New York who never in previous decades had thought of coming here before. New York was sending its sons to Harvard, fathers who never had thought of sending them there before, and a great event occurred in the history of Harvard

which is worth recalling tonight in this presence, and that was in 1869—the election of Charles W. Eliot as the President of Harvard College. That event transformed, in a few years, the little, provincial, out-of-the-way College of Harvard into a great, national university, as it stands today.

I went to Cambridge last month, and refreshed there my recollection, or tried to refresh my recollection of the College as it had been in my time, but I could not recall anything. There was nothing as it appeared to me to have been, but there were two great things presented to my view. One was the Widener Library, and the other were the Freshman Dormitories, on what we used to call the banks of the river, down by the Brighton coal-yards. Now, those in themselves are wonderful events. A great library is the true signal of a great university. I know it dwarfs everything else that is there about it, but it is the sign that Harvard still holds its lead as the great university of the United States.

Under the guidance of President Lowell, I visited the Freshman Dormitories, another tremendous step forward in the history of Harvard. As I went through them, and gazed at those quadrangles that need only time and ivy to challenge comparison with the quadrangles of Oxford and of Cambridge, I said to myself: "Well, this really is something worth having lived for, to have seen the freshmen to the number of 700 housed in these wonderful buildings, set aside by themselves from contagion with the older and more questionable students." And I thought to myself, "Here are two of the great events that mark the administration of President Lowell's work, **forever** mark it."

I want to say a word more about my father, how he managed to send these four boys to Harvard, and get them all in one class, and get them through. He was an old-fashioned doctor in the antiquated city of Salem, where the witches held their sway two hundred years before; and to show what a wonderful achievement it was for him, I tell you that his ordinary fee for a professional visit was seventy-five cents, and for bringing a new child into the world, it was just ten times that, or seven dollars and a half. I understand that the modern, present charge by the faculty for such an event as that is \$1,000. So you see, I have everything to be grateful for in my connection with the College; in my derivation of descent from previous graduates, and from my immense veneration for the institution itself and for everybody connected with it. I thank you, gentlemen, very heartily.

RETROSPECT

SPEECH AT A DINNER GIVEN IN HIS HONOR BY THE PILGRIMS AT THE
UNION LEAGUE CLUB, NEW YORK, JANUARY 27, 1917

Mr. Chairman and Brethren: It is impossible for me, by any words that I can utter, to do justice to this occasion. The beauty of it, the love of it, the honor of it, never have been surpassed in my personal experience. What a magical demonstration of love and affection this wonderful scene is! Truly I am not sure but that I am already in heaven. This overhanging canopy, spangled with the stars of our national banner; these walls, all around us, on every side, studded with stars; and looking down upon these eighty-five lights, sparkling before the same number of my warm and devoted friends—one for each year of my life—whose beaming faces show their good-will, why may I not accept this as final, and believe that I have already reached the heavenly goal. At any rate, it will never vanish from my memory, and when my time comes to “wrap the drapery of my couch about me and lie down to pleasant dreams,” this scene will linger in my last thoughts as one of the pleasantest of them all. It is impossible for me to find language to express my gratitude for your unfailing kindness.

I can only say concerning my eighty-five years of life, about which so much has been said already, that from the beginning until now I have had a great deal more than I deserved. On my real birthday, on Wednesday last, my little grandchildren came to see the flowers. They could find nothing else but flowers; there was no vacant spot that was not covered with flowers. One of the little girls said, “Grandpa, I should think you would feel almost ashamed to be so popular.” (Laughter.) Now, that little girl struck the very idea that I had been struggling with all that day and had found it impossible to express. So much more than I deserved! It is truly wonderful how the clear brain of a little child of ten can catch at a thought which even grandfathers find it hard to express.

Of time I have had an extension of fifteen years beyond the allotted span, but since the days of Carnaro and Pasteur and Metchnikoff I think the Psalmist is all out of date. Of friends, why, I have been making them from the day I was born until now. I shall not undertake to tell the story of my life, for it seems to be perfectly familiar to Mr. Wilson and Mr. Depew, and also to Mr. Murphy. (Laughter.) I appreciate their delightful compliments and their deep knowledge of all

the events of my life which they have so touchingly and lovingly displayed, and some of which I had already forgotten.

I will confine myself to three incidents which are not so familiar to you, and limit the fifteen minutes of the remainder of this banquet (for I am to measure the time!) to a narration of three stories with which you are not quite so familiar.

First, my birth—how I came to be born (laughter); second, my first lawsuit—how I came to enter the profession; third, my first appearance in public life, which now dates back a little more than sixty years.

As to my birth: in the first place, as you may well believe, there was no money in it. (Laughter.) And I came very near slipping up at the very outset of life. There was no "limitation" applying in those days, such as is now familiarly discussed. (Laughter.) My father and mother had five children of whom I was the fifth, and the oldest was not yet five years old when I appeared in the world. They all had the whooping-cough, and it was supposed at that time, and I believe still is, that whooping-cough would be fatal to a newborn child. So my father, who was a doctor, wrapped me up in a blanket and carried me over to the bank of the river. I wonder that he stopped at the bank (laughter), for I was altogether *de trop*. There was no sign "Boy Wanted" on the front door of the house. My father placed me in the hands of a nurse, where I remained for eighteen months, and then came back and had to fight for my place in the family. (Laughter.) In fact, there has always been a tradition in the household that while out at nurse I somehow became a changeling; I differed so much from the other children. But you have only to look upon my dear mother's features, so identical with my own, to refute the charge. (Laughter.)

I have never had my horoscope cast, but I have no doubt there was a happy conjunction of constellations and stars at the moment of my birth, because I got one thing—by inheritance, by the gift of God, or by some other means—I cannot tell how; it was greater than any fortune, and it has accompanied me from that day to this, and that was *a cheerful spirit* (loud applause); a determination always to look upon the bright side, and, as a cardinal maxim, never to say "Die!" (Renewed applause.) That spirit, that temperament, has stood me well in hand in every emergency from that day until this, and is, I hope, not yet exhausted. It has enabled me to make friends wherever I went, and seldom to find myself among people that were in the least hostile.

Well, I was born in Salem, Massachusetts, and lived there about twenty years, and I will tell you about my first effort in the legal profession. I was a student; I had graduated at the law school; I had

gotten my degree of Bachelor of Laws at Harvard Law School, and thought myself ready for anything that might arise in the way of a lawsuit. For some time I read law in Boston in the office of my friend, Mr. Leverett Saltonstall, one of the prominent lawyers in Massachusetts and the most delightful of men. Many of you, I think, may have known him. He was very spirited, very noble, justly proud of his pedigree that had come down to him from Colonial days when Sir Richard Saltonstall was its first representative in New England, and he was always a most devoted son of Harvard.

I was in Mr. Saltonstall's office one Winter day when two farmers came in from Vermont with a law case, and they appealed to Mr. Saltonstall. They said they had a case—two cases in fact. Each of them had a carload of potatoes which had come down from Vermont to Boston the previous week, and on arrival they were found frozen absolutely solid, and they had commenced a suit against the railroad company which had brought them. Nobody knows better than Mr. Depew how open to attack railroad companies were in those days, and the question raised in the lawsuit was whether the destruction of the potatoes was owing to an act of God, or to the negligence of the railroad company.

Mr. Saltonstall went into the matter, but finally said, "I don't think I can take that case—two carloads of rotten potatoes. No. But here's Choate; perhaps he'll take it." I was perfectly delighted to get it; I had never had a case before and I seized upon it at once. An arrangement was made whereby on the next day but one I should appear before a magistrate and take the evidence in that wonderfully important case. As it happened, on the intervening day my cousin, Mr. Rufus Choate, then the acknowledged head of the American Bar, who happened to be laid up with a lame knee, took me out in his carriage for a drive 'round through Cambridge and Brookline. I told him of my first retainer. He was tickled to death. He told me a great deal as to how to examine witnesses. But unhappily I forgot to ask him what the fee should be. I went to the magistrate's office at the time appointed, conscious that after consultation with the greatest lawyer in the country I was at least fully qualified for the service. I spent the day taking the evidence, protected the Deity against the charge made by the railroad company, demonstrated by the evidence that it could not possibly have been the act of God, and that necessarily it must have been the negligence of the carrier; and the success of the suit seemed assured.

On our way back from the place where the evidence was taken, to the office of Mr. Saltonstall, the question arose about my fee, and I was taken quite aback. "Well," I said, "I never had a fee; I don't know anything about fees. It has taken all day. The case seems to have been of a good deal of importance to you, and it seems to me that three dollars would not be excessive. (Laughter.) "Well," they said, "but there were only two carloads of potatoes; there were only two cases! We talked it over on our way down from Vermont, and we concluded that a dollar a case would be about right." (Laughter.) I told them that I didn't wish to get up a reputation for excessive charges at the outset of my professional life and that I would take the two dollars. So they gave me two little gold dollars—you remember those of that day, very common then, but very difficult to find now—and I took them with great delight. I think I must have spent one, and the other I gave to my class-mate, Darwin Ware, who was in the same position as myself and had never had a fee.

I dismissed the subject from my mind, but a delightful bit of romance grew out of it, for forty-two years afterwards when Mr. Ware died, his widow, looking over his papers in his desk, found a little package marked on the outside, "Half of Joe Choate's first fee." (Laughter.) And there was the other gold dollar which I had not spent, returned to me after so many years. Truly it was like bread cast upon the waters. And the romance of it is that Mr. Ware's widow had the grace to present the coin to my daughter, who wears it as a trophy or charm upon her watch guard to this day. (Applause.) At any rate, this, my first experience in actual practice, fixed in my mind an indelible standard of moderate charging, from which those who will, may believe that I never departed.

Now, as to my first entrance into public life. I always had a taste for it and had never, up to that time, had a chance to gratify it. I lived in a great caravansary of a boarding-house in Bleecker Street when the campaign of Fremont and Dayton and of Buchanan and Breckinridge came on in 1856—sixty-one years ago. Of course, I was for Fremont and Dayton, and we held a meeting on the roof of the boarding-house, composed of the boarders in the establishment, and I made a speech and attracted so much attention, that shortly afterwards I was invited to another occasion which was perpetuated in this remarkable placard which you see before you (indicating printed poster at guests' table). Let me read it:

"MEETING TO BE HELD OF THE REPUBLICAN PARTY

"The Twentieth Ward Republican Club will meet at Continental Hall, corner Thirty-fourth Street and Eighth Avenue, on Thursday evening, October 23, at 7½ o'clock. The meeting will be addressed by Joseph H. Choate, Esq., and others."

You see it is as fresh as if run this morning from the press. In looking over old papers I happened to find it where it had lain unopened for nearly sixty years. I had it framed and presented it to the Club, who will perhaps preserve it for sixty years more as a choice historical morsel. It is the only copy now in existence.

I can remember perfectly well who the other speakers were. I have often found that the best speeches were made by "the others," and so it must have been on that occasion. I have been put in that category myself so often that I can visualize them. The two others were the famous James C. Carter, who lived to be one of the great leaders of the Bar of the United States, and one of its foremost citizens, and who never will be forgotten (applause); and, to lend a sort of religious tone to the meeting, the Rev. Octavius Brooks Frothingham, the most progressive Unitarian divine of that day, also made a vigorous speech.

Now, you will notice, as the placard says: "Music by the Rocky Mountain Glee Club! The skies brighten! Front seats reserved for the ladies! Victory certain!" (Laughter.) Well, we didn't get a victory, but we had peace without victory. (Laughter.) Our glorious candidates, "The Pathfinder" and his associate, were defeated, and the administration of Buchanan and Breckinridge came in for the next four years, and plunged the country deeper and deeper in the mire of despair and the shame of submission to the slave power.

Now, I think it is worth remembering. "Peace without victory" ended in this calamitous way, and the only mode of recovering it was four years afterward, when the same party, having done its best in 1856, had a great victory in 1860 which brought in the immortal Lincoln (applause), and laid the foundation of peace between North and South which will last forever. (Renewed applause.) Truly in all such contests, then and now, a final and decisive victory of the right over the wrong is the only way to a real peace that will endure. (Applause.)

Those are three little incidents in my career. I like to hear myself described by such master artists as Wilson, Depew and Murphy. I couldn't exactly recognize myself in all that Mr. Depew said, or that Mr. Murphy said; I thought for the moment they were talking about

somebody else. But I do not like to address an audience on a subject with which it is already absolutely familiar, and, having thus informed you of certain unknown incidents which led up to the future, I now thank you with all my heart for the glory and honor and love of this occasion. I wish particularly to express my gratitude to Mr. Wilson for its original conception and for his exquisite skill and good taste in carrying it out, and I bid you all an affectionate farewell. (Loud applause.)

*

INDEX

[The figures refer to pages]

Abbott, Lyman, 798.
Abolitionists, 50.
Adam, 1040.
Adams, Charles Francis, 49, 51, 1053.
Adams, Herbert B., 905.
Adams, John, 386, 387, 1081.
Adams, John Quincy, 78, 531, 1017.

Addresses.

After-dinner, 1039-1177.

Arguments.

Burden v. Burden, 324-371.
Fitz John Porter case, 198-323.
Goff contempt case, 397-418.
Income tax cases, 419-526.
Massachusetts Fisheries case, 372-396.

Biographical.

Bourgeois, Léon, 586-588.
Bryce, James, 1149-1154, 1159-1163.
Carter, James C., 22-34.
Choate, Joseph H., 1172-1177.
Choate, Rufus, 35-46.
Dana, Richard H., 47-61.
Dillon, John F., 62-77.
Eliot, Charles W., 781-785.
Emerson, Ralph W., 886-893.
Endicott, William C., 78-95.
Farragut, David G., 769-780.
Franklin, Benjamin, 911-937, 1144-1148.
Grey, *Earl*, 1144-1148.
Hamilton, Alexander, 938-960.
Harvard, John, 967-969.
Houghton, *Lord*, 750-753.
Hughes, Charles E., 1155-1158.
Jay, John, 1085-1088.

Addresses—Continued.

Biographical—Continued.

Lincoln, Abraham, 834-856.
Lowell, James R., 1080-1084.
McKim, Charles F., 985-992.
Nightingale, Florence, 1003-1013.
Parsons, John E., 96-112.
Potter, Henry C., 980-984.
Root, Elihu, 1164-1167.
Saltonstall, Leverett, 113-138.
Scott, *Sir* Walter, 828-833.
Southmayd, Charles F., 139-155.

British Isles, Delivered in.

Abraham Lincoln, 834-856.
Alexander Hamilton, 938-960.
Anglo-American Relations, 1102-1106.
Benjamin Franklin, 911-937.
City of London College, 857-863.
Education in America, 894-910.
English Bible, 961-966.
Farewell to England, 1114-1120.
Farewell to the English Bar, 1107-1113.
John Harvard, 967-969.
Ralph Waldo Emerson, 886-893.
Sir Walter Scott, 828-833.
Supreme Court of the United States, 864-885.

Court-martial.

Fitz John Porter case, 198-323.

European War.

[The figures refer to pages]

- Addresses—Continued.
- European War—Continued.
- Defense and National Service, 1029-1032.
- Impetuous Youth, 1036-1038.
- National Preparedness for Defense, 1024-1028.
- National Security, 1019-1023.
- War for Free Government, 1033-1035.
- Forensic, 157-526.
- Hague Court speeches, 528-588.
- International affairs, 527-645.
- Anglo-American Relations, 1102-1106.
- Earl Grey and Benjamin Franklin, 1144-1148.
- England and America, 1125-1130.
- European war speeches, 1019-1038.
- Farewell to England, 1114-1120.
- Farewell to James Bryce, 1159-1163.
- Panama Canal tolls, 1014-1018.
- Welcome to America, 1121-1124.
- Welcome to James Bryce, 1149-1154.
- Jury.
- Martinez v. Del Valle, 166-177.
- Paran Stevens case, 178-197.
- Occasional, 729-1038.
- Political, 647-727.
- After-dinner speeches, 7.
- See, also, Addresses, After-dinner.
- Agassiz, Louis, 993.
- Airplanes, 59.
- Alabama claims, 579, 976, 1016.
- Alaskan boundary, 15.
- Alcohol-in-the-Arts case, 162.
- Alexander I, 605.
- Alexandra* (ship), 751.
- Allen, Charles, 89.
- Allston, Washington, 48.
- American Bar Association, 1, 804.
- American Bible Society, 961.
- "American Commonwealth," 1150, 1162.
- American Museum of Natural History, 6, 160, 993-1002.
- American Society of Civil Engineers, 786-792.
- American Sugar Refining Co., 108.
- American Unitarian Association, 730-736.
- Ames, Fisher, 387.
- Ames, Frederick Lothrop, 113.
- Anderson, Ellery, 694.
- André, John, 941, 1146.
- Andrews, Charles, 1096.
- Angelo, Michael, 887.
- Anglo-American relations, 1102-1106.
- Arbella* (ship), 114.
- Arbitration, International, *see* International arbitration.
- Architects, 178.
- Arguments, *see* Addresses, Arguments.
- Aristophanes, 737.
- Arnold, Matthew, 152, 889.
- "Art of Cross-examination," 166.
- Arthur, Chester A., 1072.
- Arts, John L., 324.
- Aspasia, 738.
- Associated Chambers of Commerce (London), 1102.
- Associated Nurses of the United States, 1003.
- Associated Press, 1033.
- Associated Societies of the University of Edinburgh, 938.
- Association of the Bar (N. Y.), 1, 22, 62, 96, 104, 139, 155.
- Assumed names, 169, 171.
- Astor, John Jacob, 143, 145.
- Astor, William B., 143.
- Austin, John, 33.
- Automobiles, 152.
- Bacon, Francis, 38, 41, 791, 822, 1051.
- Bacon, Robert, 1019, 1030.
- Bailey, Isaac H., 1055, 1057.
- Balaam's ass, 709.
- Balfour, Arthur J., 19, 1034, 1038, 1116, 1121.
- Bangs, Francis N., 104, 159.
- Barlow, Joel, 1094.
- Barnard College, 983.
- Barnes, W. H. L., 1.
- Barrett, George C., 652, 672.
- Bartlett, Sidney, 1138.
- Bartlett, William F., 1070.
- Bays, 376.

[The figures refer to pages]

- Beach, William A., 166.
 Beamman, Charles C., 1137, 1139, 1140.
 Beebe, Welcome R., 101.
 Beecher, Henry Ward, 166, 1074, 1099, 1138.
 Behring Sea seal fisheries, 31, 162.
 Bell telephone case, 162, 164.
 Bench and bar, 1060-1062.
 Benedict, Erastus C., 654.
 Benedict, James W., 100.
 Bentham, Jeremy, 817.
 Berdan Arms case, 164.
 Beresford, Lord Charles, 1103.
 Bergson, Henri, 1031.
 Berrian, Samuel W., 98.
 Bible, 17, 37, 243, 961-966.
 Bickmore, A. S., 994.
 Binney, Horace, 75, 1093, 1138.
 Biographical addresses, *see* Addresses, Biographical.
 Birmingham and Midland Institute, 911.
 Black, Hugh, 915.
 Black Hawk War, 837.
 Blackstone, William, 66, 142, 817.
 Blackwell, Elizabeth, 748, 1012.
 Blarney stone, 1043.
 Bliss, George, 684.
 Bliss, Henry C., 372.
 Blockade, 528, 551.
 Blodgett, William T., 762.
 Boardman, James W., 100.
 Boccaccio, 170.
 Bonaparte, Charles J., 108.
 Books, 67, 751, 859, 906.
 Boston Tea Party, 929.
 Bounties, 391.
 Bourgeois, Léon, 586-588, 608.
Bourgogne (ship), 76.
 Bourne, Augustus O., 1072.
 Bowers, John M., 675.
 Boxer rebellion, 16.
 Boyd v. United States, 471.
 Bradley, John J., 656.
 Breach of promise of marriage, 166.
 Bridge, Samuel J., 1069.
 British and Foreign Bible Society, 961.
 British lion and American eagle, 1125-1130.
 Brooklyn Bridge case, 161.
 Brooks, Phillips, 963, 1080, 1095.
 Brown, John, 50, 843, 985.
 Browne, Causten, 89.
 Bryan, William J., 1021, 1121.
 Bryce, James, 1118, 1149-1154, 1159-1163.
 Buckley, Thomas T. C., 100.
 Buffalo v. Le Conteulx, 479.
 Bull Run, 284.
 Buller, *Justice*, 403-404.
 Bullitt, John C., 199.
 Burden, Henry, 324.
 Burden, Isaiah Townsend, 324.
 Burden, James A., 324.
 Burden, William, 324.
 Burden Iron Company, 324-371.
 Burden v. Burden, 324-371.
 Burke, Edmund, 38, 925, 1046, 1077.
 Burns, Anthony (slave), 53, 54.
 Burns, Robert, 1152.
 Butler, Benjamin F., 59, 127, 143, 1066, 1072.
 Butler, Evarts and Southmayd, 1, 144.
 Buzzard's Bay, 372, 395.
 Byng, *Admiral*, 210.
 Cabot, George, 117.
 Cadwalader, John, 589.
 Calder v. Bull, 458.
 California Irrigation cases, 162.
 Calvin, John, 731.
 Cambridge Historical Society, 47.
 Campbell, Lord, 404.
 Canal tolls, 1014-1018.
 Cancemi case, 809.
 Cancer Hospital (N. Y.), 111.
 Carlton, Oliver, 118.
 Carnegie Endowment for International Peace, 6.
 Carter, James Coolidge, 22-34, 104, 145, 325, 419, 973, 984, 1082, 1094, 1096, 1137, 1176.
 Case method, 68, 140.
 Centennial Exposition (1876), 128.
 Century Association, 980.
 Cesnola case, 159, 761, 1072.
 Cesnola collection, 766, 1072.
 Chamber of Commerce (N. Y.), 659, 1014, 1024, 1060, 1072, 1125.
 Channing, Edward Tyrrel, 1168.
 Channing, William E., 731, 888, 1095.
 Character, 168.
 Chase, Salmon P., 852.

[The figures refer to pages]

- Chicago Bar Association, 793.
 Chicago Railway Co. v. Minnesota, 460.
 Chinese Exclusion cases, 162.
 Choate, Joseph Hodges, 1-19, 62, 1172-1177.
 Choate, Rufus, 3, 9-10, 23, 35-46, 55, 56, 91, 115, 1137, 1174.
 Choate, William, 62, 1170.
 Church, Sanford E., 1101.
 Church and State, 13.
 City of London College, 857-863.
 Civil engineers, 786-792.
 Civil service, 133-136, 1088.
 Civil War (U. S.) 57, 128, 164, 198-323, 752, 1029.
 Clark, Ebenezer, 96.
 Clarke, James Freeman, 1082.
 Clay, Henry, 531.
 Clayton-Bulwer Treaty, 15.
 Cleveland, Grover, 14, 91, 92, 93, 132, 673, 705, 1027, 1072.
 Clinton, *Sir* Henry, 941, 1146.
 Coastwise shipping, 1014.
 Cochran, Bourke, 715.
 Cochrane, *Admiral*, 323.
 Codification, 32, 974.
 Cohen, William N., 715.
 Coke, *Lord* Edward, 142, 483.
 Colonial Society of Massachusetts, 78, 113.
 Columbia Law School, 71, 754.
 Columbia University, 939, 1001, 1068.
 Columbus, Christopher, 1152.
 Commissions of Inquiry, 616.
 Committee of Seventy, 648, 668.
 Committee of Thirty, 668.
 Conkling, Roscoe, 74, 159.
 Connolly, Richard B., 648, 653.
 Constitutional law, 2, 372, 419.
 Contempt of court, 163, 397-418.
 Contraband of war, 528.
 Contract debts, 630.
 Cooper, Edward, 101.
 Cooper, Peter, 101.
 Cooper Union, 111, 648, 668, 691.
 Corbin, Austin, 67.
 Corning, Jasper E., 98.
 Corporations, 324.
 Coudert, Frederic R., 31.
 Court-martial, 198-323.
 Credit Mobilier, 159.
 Criminal conversation, 172.
 Croker, Richard, 670, 709-714, 715-727.
 Cromwell, Oliver, 854.
 Cross-examination, 160, 166, 397, 401, 405.
 Crowninshield, Benjamin W., 79.
 Crowninshield, Jacob, 79.
 Crozier, William, 607.
 Customs duties, 427.
 Cutting, Francis B., 24, 101, 104.
 Dabney, Lewis S., 89.
 Dalton, John Call, 120.
 Dalton case, 56.
 Daly, Joseph F., 715.
 Dana, Charles A., 993.
 Dana, Richard H., 36, 42, 47-61, 378.
 Dane Law School, 24, 54, 141.
 Dartmouth College case, 40, 162, 876.
 Davenport, ^{*}Iowa, 62.
 Davenport Free Public Library, 66.
 Davies, Henry E., 23.
 Davis, Charles G., 52.
 Davis, Cushman K., 1015.
 Davis, Jefferson, 853.
 DeKay, Drake, 234.
 Del Valle, Juan, 166.
 Depew, Chauncey M., 1087, 1089, 1174.
 DeWitt, Thomas, 98.
 Dexter, Wirt, 796.
 Dickens, Charles, 832, 1042.
 Dillon, John F., 62-77, 96, 102.
 Dillon, Timothy, 64.
 Dillon's Iowa Digest, 68.
 Dillon's Laws and Jurisprudence of England and America, 75, 76.
 Dillon's Municipal Corporations, 69, 70.
 Dillon's Reports, 71.
 Direct taxes, 149, 419.
 Dobbins v. Commissioners, 437.
 Douglas, Stephen A., 842.
 Downing, George, 118.
 Draft riots, 164.
 Dred Scott case, 843.
 Dreyfus, Alfred, 723, 807.
 Dunham v. Lamphere, 376, 388.
 Dunraven, *Lord*.
 Durant, Henry F., 56.
 Dwight, Theodore W., 759.
 Eames, Charles, 198.
 Eaton, Dorman B., 133.
 Edinburgh Philosophical Institution, 834.

[The figures refer to pages]

- Edmunds, George F., 419.
 Education in America, 17, 894-910.
 Education in England, 857-863.
 Edwards, Passmore, 892.
 Ejectment, 378.
 Eldon, *Lord*, 215, 795.
 Elevated Railroad cases, 161.
 Eliot, Charles W., 82, 781-785, 890, 904, 1066, 1080, 1169.
 Eliot, George, 169, 832.
 Elliot, Daniel G., 994.
 Elliot, John, 966.
 Eloquence, 167.
 Emancipation Proclamation, 848.
 Emerson, Ralph Waldo, 17, 40, 750, 886-893, 906, 990, 1070, 1074, 1117.
 Endicott, William Crowninshield, 78-95, 113, 133.
 English addresses, *see* Addresses, British Isles, Delivered in.
 English Bar, 970-979, 1097, 1107-1113.
 Englishman's dinner, 1040-1042.
 Epitaph, 914.
 Equality of states, 566.
 Erskine, *Lord*, 215, 403-404, 757.
 Essex Institute, 116.
 Etiquette, Judicial, 62.
 European War, 18-19, 1019, 1038.
 European War speeches, *see* Addresses, European War.
 Evacuation day, 1072-1079.
 Everts, Jeremiah, 971, 1098.
 Everts, Southmayd and Choate, 1, 178.
 Everts, William M., 9, 24, 60, 104, 144, 146, 152, 161, 976, 1137, 1140.
 Everett, Alexander, 1169.
 Everett, Edward, 46, 1169.
 Fairbanks, Charles W., 14.
 Fancy farming, 325.
 Farewell to England, 1114-1120.
 Farmington, Iowa, 65.
 Farnsworth v. W. U. T. Co., 73.
 Farragut, David G., 769-780, 1036.
Federalist, 387, 949.
 Fees, 28, 420, 1175.
 Field, David Dudley, 1100.
 Field, Stephen J., 162, 419.
 Fisheries, 372.
 Fisheries Award Commission (Hall-fax), 378.
 Fitz John Porter case, 158, 198-323.
 Fliedner, Theodore, 1005.
 Folger, Charles J., 1101.
 Forensic addresses, *see* Addresses, Forensic.
 Forrest, John, 64.
 Forrest divorce case, 100.
 Franklin, Benjamin, 17, 139, 386, 424, 531, 726, 911-937, 1019, 1144-1148.
 Fraunces' Tavern, 1074.
 Free Soil, 50.
 Freedom of the seas, 31.
 Freeport, Illinois, 62.
 Frelinghuysen, Theodore, 99.
 Frémont, John C., 6, 1175.
 Friendly Sons of St. Patrick, 1043, 1048, 1089.
 Frothingham, Octavius Brooks, 1176.
 Fry, *Sir* Edward, 634.
 Frye, Elizabeth, 1005.
 Fufetius, Mettius, 209.
 Fugitive slave law, 51, 1132.
 Fuller, Melville W., 419, 800, 1104.
 Fullerton, William, 100.
 Fulton, Robert, 878.
 Gardiner, Asa B., 198.
 Garrison, Lindley M., 1020.
 Garrison, William Lloyd, 623, 849, 1160.
 Genesee Chief case, 503.
 Geography, 860.
 Gerard, James W., 100, 103.
 Gerard and Buckley, 100.
 Gerard and Platt, 99.
 Geronimo, 92.
 Gerry, Elbridge, 387.
 Gettysburg address (Lincoln), 855, 1033.
 Gibbons v. Ogden, 392, 481.
 Gibraltar, 1057.
 Gilman, Daniel C., 962.
 Gilroy, Thomas F., 1090.
 Gladstone, William E., 944, 981, 1019, 1080, 1089.
 Goff, John W., 163, 397.
 Goff contempt proceedings, 397-418, 1089.
 Good Samaritan, 171.
 Goodhue, Benjamin, 117.
 Gould, Benjamin Apthorp, 120.
 Gould, Jay, 164.
 Graham v. Schuchardt, 100.
 Grant, Ulysses S., 848, 1027, 1055, 1076.
 Greeley, Horace, 652.

[The figures refer to pages]

- Grey, *Earl*, 1144-1148.
 Grey, *Sir Charles*, 1146.
 Grimm, Herman, 890.
 Grover, Martin, 1100.
 Guthrie, William D., 419.
 Guyot, Arnold, 994.
 Habeas corpus, 52.
 Hague Conference (First), 59, 600, 605-624.
 Hague Conference (Second), 2, 17, 18, 158, 164, 528, 549, 555, 560, 566, 574, 596, 601, 624-645.
 Hale, *Sir Matthew*, 798.
 Hale, Samuel W., 1072.
 Hall, A. Oakey, 648, 653.
 Hamilton, Alexander, 17, 387, 432, 804, 876, 938-960.
 Hamilton, William T., 1072.
 Hammeken, Edward F., 139.
 Harlan, John M., 419, 800.
Harper's Weekly, 648, 718.
 Harrison, Benjamin, 1104.
 Hartley, David, 934.
 Harvard, John, 17, 895, 967-969, 1069.
 Harvard Club (N. Y.), 6, 1054, 1168-1171.
 Harvard College, 22, 80, 81, 82, 115, 118, 781-785, 964, 967-969, 1051-1054, 1066-1071, 1080, 1169.
 Harvard examinations, 1051-1054.
 Harvard Law School, 6, 82, 120, 141, 901.
 Hasty Pudding Club, 1092-1095.
 Havemeyer, William F., 1049.
 Hay, John, 14, 626, 1014, 1115, 1122.
 Hay-Pauncefote treaty, 1015.
 Hayes, Rutherford B., 131, 198, 206, 421, 761.
 Head Money cases, 455.
 Health, 758.
 Henry, C. S., 99.
 Henry, Patrick, 804, 841.
 Herbert, Sydney, 1006.
 Hewitt, Abram S., 101.
 Hewitt, James, 96.
 Hickory v. United States, 512.
 Higginson, Stephen, 117.
 High seas, 376, 379.
 Hill, David B., 12, 694, 709-714.
 Hill, *Rev. Thomas*, 1168.
 Holls, Frederick W., 607, 615.
 Holmes, Oliver Wendell, 839, 888, 1082, 1133, 1150.
 Home rule speech, 12, 1089-1091.
 Hopkins, Mark, 159.
 Horns of a dilemma, 1066-1071.
 Hostilius, Tullus, 209.
 Houghton, *Lord*, 750-753.
 "The House that Jack Built," 158, 178, 193.
 Hudson, Hendrick, 1075.
 Hudson River Ore Company, 325.
 Hughes, Charles Evans, 6, 1029, 1155-1158.
 Hunt, Richard M., 158, 178.
 Hunt, Ward, 140.
 Hunt, William Morris, 120.
 "Hunt for My Captain," 1134.
 Huntington, Collis P., 159.
 Hurlbut, Elisha P., 139.
 Hutchinson v. New York Stock Exchange, 163.
 Hyde v. Continental Trust Company, 419.
 Hylton v. United States, 429, 443, 506.
 Iddings v. Bruen, 144.
 Impetuous youth, 1036-1038.
 Income Tax cases, 31, 142, 148, 158, 419-526, 879.
 Indians, 92, 162.
 Indictments, Forms of, 67.
 Inflation, 1055.
 Informers, 659.
 Ingersoll, Robert J., 74.
 Inns of Court, 56, 74, 971, 1097.
 International arbitration, 131, 555-585, 600, 1017.
 International Court of Justice, 17.
 International law, 2, 59, 529, 630.
 International Prize Court, 549-554, 598, 633.
 Inter-Parliamentary Union, 626.
 Iowa, 62.
 Iowa Blue Book of Laws, 66.
 Iowa State Medical Society, 65.
 Ireland, 1044, 1089-1091.
 Irish in America, 12, 1089-1091.
 Irish in New York, 1048-1050, 1089-1091.
 Irvin, Richard, 325.
 Irvin, William, 325.
 Irving, Washington, 1075.
 Jackson, James F., 372.
 Jay, *Chief Justice John*, 722, 800, 1086, 1156.
 Jay, John, 1030, 1085-1088.

[The figures refer to pages]

- Jefferson, Thomas, 79.
 Jerome, William Travers, 397.
 Jesup, Morris K., 993.
 Jesup, Mrs. Morris K., 98.
 Joffre, *General*, 19, 1034, 1038.
 Johnson, Alexander S., 140.
 Johnson, Edward A., 99.
 Johnson, Reverdy, 198.
 Joint High Commission (1898), 14.
 Jonah, 798, 1064.
 Jones, John Paul, 769.
 Judges, Appointment of, 55.
 Judges, Selection for international courts, 566.
 Judges' pensions, 678-681.
 Judicial arbitration court, 560-573.
 Judicial tenure, 91, 715-727.
 Judiciary (N. Y.), 13.
 Jumel will case, 29.
 Jupiter, 420.
 Jurisdiction, 382.
 Jury speeches, *see* Addresses, Jury.
 Jury trials, *see* Trial by Jury.
 Keller, Helen, 984.
 Kensett, John F., 762.
 Kent, James, 151, 722.
 Kent, William, 24.
 Kent's Commentaries, 142.
 King v. Bailey, 403.
 Kipling, Rudyard, 1106.
 Laidlaw v. Sage, 146, 160.
 Lang, Andrew, 833.
 Langdell, Christopher C., 68, 140, 783.
 Langdon v. City of New York, 145.
 Langdon v. Mayor, 30.
 Lansdowne, *Lord*, 1014.
 Laurier, *Sir* Wilfrid, 1146.
 Law reports, 142.
 Lawyers, *see* Addresses, Biographical.
 Ledwith, Thomas A., 653.
 Lee, Charles, 208.
 Lee, Henry, 1070.
 Lee, Robert E., 589.
 Legal profession, 3-4, 21-155, 754-760, 793-803, 970-979, 1061, 1140-1143.
 Leland Stanford University case, 161.
 Lennox library, 178.
 "Levelers," 423.
 Leverett, John, 114.
 Leverett and Saltonstall, 1.
 Lewis, Taylor, 99.
 Lexow Committee, 694.
 Lieber, Francis, 609.
 Lincoln, Abraham, 17, 57, 66, 198, 835-856, 1033.
 Lincoln, Robert, 226.
 Lincoln, Solomon, 89.
 Lincoln's Inn, 1107, 1150.
 Littleton, *Sir* Thomas, 142.
 Lockwood, *Sir* Frank, 1098.
 Lodge, Henry C., 954.
London Times, 597, 629, 643.
 Long, John D., 91.
 Loomis, Elias, 99.
 Lord, Daniel, 24, 143, 151, 1138.
 Lord, Nathaniel J., 83.
 Lord v. Steamship Co., 379, 386.
 Loubat v. Union Club, 163.
 Loughborough v. Blake, 454.
 Louis XIV, 1046.
 Low, Seth, 607, 701.
 Low-water mark, 378.
 Lowell, Abbott Lawrence, 1171.
 Lowell, James Russell, 1080-1084.
 Lowell, John, 113.
 Lucretia and Tarquin, 177.
Lusitania (ship), 1027.
 Lyman, Theodore, 1092.
 McCalla court-martial, 158.
 McCready v. Virginia, 379, 388, 393.
 McCulloch v. Maryland, 437, 502.
 Mackerel, 395.
 McKim, Charles Follen, 985-992.
 McKinley, William, 78, 530, 707, 1108, 1122.
 Madison, James, 432, 790.
 Mahan, Alfred T., 607.
 Maine, Henry, 535.
Maine (ship), 617.
 Maltby, Anson, 199.
 Man, Albon P., 102.
 Man and Parsons, 178.
 Manchester v. Massachusetts, 162 372-396.
 Mann, Horace, 49, 80, 116.
 Mansfield, *Lord*, 403.
 Maps, 221.
 Marbury v. Madison, 458.
 Marschall, *Baron*, 574, 575, 577.
 Marselis, Ann, 96.
 Marshall, Charles, 1030.
 Marshall, John, 75, 141, 151, 383.
 Martin v. Waddell, 378.
 Martinez, Eugénie, 166.

[The figures refer to pages]

- Martinez v. Del Valle, 166-177.
 Massachusetts Constitutional Convention (1853), 54, 56.
 Massachusetts Fisheries case, 162, 372-396.
 Massachusetts Historical Society, 121.
 Mather, Cotton, 80, 1084.
 Maynard Election Fraud cases, 163.
 Mediation, 615.
 Medicine, 737-749.
 Melcher, John L., 178.
 Menhaden, 372.
 Mercantile Bank case, 471.
 Merchant Marine, 79.
 Mercury, 420, 1047.
 MÉRIMÉE, Prosper, 764.
 Metropolitan Museum of Art, 6, 159, 761-768.
 Mexican War, 198.
 Middle Temple (London), 2, 1143.
 "Midsummer Night's Dream," 160.
 Military commission, 198.
 Mill, John Stuart, 535, 872.
 Milnes, Monckton, 750.
 Milton, John, 38, 967, 1094, 1098.
 Missouri Compromise, 842.
 Moieties, 659, 1048.
 Monroe, James, 531.
 Monroe doctrine, 595, 632, 1025.
 Monroe Edwards case, 24.
 Montgomery County, N. Y., 63.
 Moody, William H., 107.
 Moore v. Miller, 419.
 More, Sir Thomas, 1051.
 Morris, Gouverneur, 387, 440.
 Morton, Levi P., 693.
 Mouravieff, Count, 606.
 Murray, Eli H., 1072.
 Nantucket, 377.
 National Defence League, 6.
 National preparedness, 1024-1028.
 National Security League, 1019-1023, 1024.
 Neagle case, 162.
 Nebraska rate case, 30.
 Nebuchadnezzar, 799, 1099.
 Nelson, Lord, 769, 778.
 Nelson, Samuel, 722.
 New England Society, 6, 1040, 1050, 1055, 1063, 1131-1139.
 New York Central cases, 160.
 New York City, 97, 1040, 1072.
 New York Constitutional Convention (1867), 13.
 New York Constitutional Convention (1894), 1, 12-14, 163, 675-699, 820, 1166.
 New York Constitutional Convention (1915), 1164.
 New York County Lawyers' Association, 1, 1155, 1164.
 New York Indians case, 162.
 New York Infirmary for Women and Children, 737.
 New York Law Institute, 155.
 New York State Bar Association, 1, 970, 1096-1101, 1140.
New York Times, 648.
 New York University, 99.
 New York Yacht Club, 160.
 Newell, Stanford, 607.
 Newspapers, 26.
 Nicaragua Canal, 100.
 Nicholas II, 605.
 Nightingale, Florence, 1003-1013.
North American Review, 117.
 Northcote, Sir Stafford, 1102.
 Norton, Michael, 654.
 Noyes, William Curtis, 24, 104, 151.
 Nurses, 1003.
 O'Brien, James, 648, 656.
 Occasional addresses, *see* Addresses, Occasional.
 O'Connell's case, 215.
 O'Connor, Charles, 24, 28-29, 68, 100, 102, 104, 140, 143, 151, 241, 1138.
 Ogden, Nicholas G., 139, 143.
 Ogden v. Astor, 143.
 Olney, Richard, 89, 419.
 Osborn, Henry Fairfield, 1002.
 Otis, James, 664, 802, 804.
 Owen, Edward H., 101, 140.
 Oxford University, 894.
 Oysters, 378, 379, 389.
 Pacific Insurance Co. v. Soule, 445.
 Page, Walter Hines, 1160.
 Palmer, Sir Roundell, 976.
 Panama Canal, 15, 1014-1018.
Paquette Habana (ship), 544.
 Paran Stevens case, 106, 158, 163, 178-197.
 Paris, Comte de, 198, 307.
 Parker, Alton B., 1096.
 Parkman, Francis, 120.

[The figures refer to pages]

- Parsons, John E., 96-112, 178.
 Parsons, Theophilus, 117.
 Parsons' spool cotton, 98.
 Partnership, 143, 324.
 Paul, Herbert, 1119.
 Pauncefote, *Lord*, 1014.
 Peabody, Joseph, 115.
 Peary, Robert E., 1002.
 Peckham, Rufus W., 1156.
 Peninsula campaign, 198.
 Pennsylvania, University of, 589.
Pennsylvania Gazette, 915.
 People v. Charles W. Gardner, 397.
 Pericles, 738.
 Perjury, 180.
 Permanent Court of Arbitration, 560-573, 618.
 Perry, Bliss, 47.
 Phelps, Edward J., 31, 75.
 Phi Beta Kappa, 81.
 Phillips, Wendell, 1095.
 Phillips, Willard, 23.
 Philomathean Literary Society, 99.
 Pickard v. Pullman, 444.
 Pierpont, John, 1133.
 Pilgrim mothers, 1063-1065.
 Pilgrims, 1055, 1134.
 Pilgrims Society (N. Y.), 1121, 1144, 1149, 1159.
 Pioneers, 739.
 Pitt, William, 211.
 Pity, 167.
 Plato, 738.
 Platt, James A., 99.
 Platt, Thomas C., 164, 712.
 Playfair, *Sir* Lyon, 131.
 Plymouth Rock, 1043, 1056, 1092.
 Political addresses, *see* Addresses, Political.
 Political economy, 424.
 Pollock v. Farmers' Loan & Trust Company, 419.
 Poole, Franklin O., 142.
 Poor Richard's Almanac, 915.
 Pope, John, 198.
 Porter, *Commodore* David, 770.
 Porter, Fitz John, 158, 198.
 Porter, Horace, 599, 632, 1129, 1142.
 Potter, Henry Codman, 980-984, 1019, 1099.
 Princeton University, 605.
 Pringle, *Sir* John, 928.
 Private property at sea, 528.
 Privateering, 536.
 Prize cases (Civil War), 57.
 Prize courts, 549-554.
 Prize money, 530.
 Prizes, Competitive, 857.
 Property, 378, 421, 424, 816.
 Public schools, 13.
 Puritans, 45.
 Queen Caroline's case, 215.
 Queen v. Keyn, 377.
 Quincy, Josiah, 119.
 Rantoul, Robert, 51, 52.
 Rawle, William Henry, 75.
 Reagan v. Trust Co., 459.
 Red Cross, 611, 1012.
Register and Gazette (Salem), 117.
 Reid, Whitelaw, 1119.
Republic (ship), 162.
 Reputation, 204.
 Restraint of trade, 110.
 Revenue laws, 659.
 Rhodes, Cecil, 908.
 Robbins v. Shelby Taxing District, 384.
 Roberts, *Lord*, 1020.
 Roberts, Benjamin S., 198.
 Robie, Frederick, 1072.
 Roosevelt, James I., 1157.
 Roosevelt, Theodore, 530, 536, 560, 592, 700-708, 762, 982, 993, 1025, 1029, 1036, 1108.
 Root, Elihu, 1, 626, 637, 675, 720, 1014, 1017, 1029, 1164-1167.
 Rossa, O'Donovan, 654.
 Rowe, William V., 158.
 Royal Infirmary (Edinburgh), 747.
 Ruggles, George D., 227.
 Russell, William H., 1007.
 Russo-Japanese War, 625.
 St. Andrew, 1044.
 St. Asaph, Dean of, 403.
 St. Claire Canal, 1016.
 St. Gaudens, Augustus, 769, 989.
 St. George's Society, 1040.
 St. Nicholas, 1040.
 St. Patrick, 1040, 1043-1047, 1048, 1089.
 St. Patrick's Society, 12.
 St. Saviour's Church, 967.
 Salem, Mass., 78, 79, 80, 113, 139.
 Salem Latin School, 117, 118.
 Salem Light Infantry, 84.
 Saltonstall, Leverett, 113-138, 1174.

[The figures refer to pages]

- Saltonstall, *Sir* Richard, 114, 137.
 Sanders, Charles, 122.
 Sanford, Charles F., 178.
 Savage, James, 63.
 Savings banks, 465.
 Scape-goat, 243.
 Scholey v. Rew, 445.
 Schools, 682-686.
 Schultz, Jackson S., 1030.
 Scott, James Brown, 528, 605.
 Scott, *Sir* Walter, 169, 828-833.
 Scudder, Henry J., 24.
 Scudder and Carter, 1.
 Seal fishing, *see* Behring Sea seal fisheries.
 Sectarian schools, 682-686.
 Seward, Clarence A., 419.
 Seward, William H., 790, 852.
 Sewell, Robert, 398.
 Seymour, Horatio, 101.
 Shadrach (slave), 52, 53.
 Shakespeare, William, 38, 159, 203, 801, 929, 1044, 1055.
 Shaw, Lemuel, 40, 52, 120.
 Shaw v. Worcester R. R. Co., 820.
 Sheldon case, 809, 813.
 Shepard, Lorenzo B., 101, 102.
 Sherman, William T., 421, 1046, 1055, 1065.
 Sherman Anti-trust Act, 74, 107, 161.
 Sigma Phi, 99.
 Sims (slave), 52, 53.
 Sims v. Jackson, 453.
 Slavery, 51, 97, 127, 623, 841, 937, 1033.
 Sloane, *Sir* Hans, 913.
 Smith, Adam, 444, 919.
 Smith, Goldwin, 1119.
 Smith, Sidney, 742, 890.
 Smith, Thomas C. H., 198.
 Smith v. Maryland, 378, 392.
 Smyth, Frederick, 397, 1089.
 Social and Political Education League, 864.
 Sociology, 424.
 Solari's restaurant, 169, 172.
 South African War, 624.
 Southmayd, Charles F., 10, 68, 102, 139-155.
 Southwark Cathedral, 967.
 Sovereignty, 373, 377, 380, 381.
 Sparks, Jared, 1052, 1163.
 Speeches, *see* Addresses.
 Spencer, Herbert, 1052.
 Springer v. United States, 445, 509.
 Stafford Little Lectures, 605.
 Stamp Act, 864, 924.
 Standard Oil case, 161, 1157.
 Stanford, Leland, 159.
 Stanton, Edwin M., 220, 852.
 Stare decisis, 514.
 Statue of Liberty, 178.
 Steam navigation, 141, 481, 878.
 Stephenson, Robert, 791.
 Sterling, Caroline Dutcher, 1.
 Stevens, Charles G., 178.
 Stevens, Marietta R., 178.
 Stevens, Paran, 178.
 Stickney, Albert, 105.
 Stockbridge, Mass., 96.
 Storey, Moorfield, 47.
 Storrs, Richard S., 23.
 Story, Joseph, 40, 75, 409.
 Strong, Theron G., 166, 179, 420.
 Suffrage, 738.
 Suicide, 146.
 Sumner, Charles, 38, 49, 51, 53, 55, 1095.
 Sumpter, Fort, 45.
 Supreme Court (U. S.), 5, 17, 550, 864-885, 1155-1158.
 Sweeny, Peter B., 653, 656.
 Taft, William Howard, 1017, 1158.
 Tammany Hall, 648, 668-674.
 Telford, Thomas, 791.
 Temperance, 1044, 1050.
 Territorial waters, 372-396.
 Terry, David S., 162.
 Thackeray, William M., 832.
 Three-mile limit, 374.
 Tichborne case, 823.
 Tiemann, Daniel F., 656.
 Tilden, Samuel J., 29, 130.
 Tilden will case, 31, 161, 165.
 Tillou, Francis R., 101.
 Treason, 198.
 Trevelyan, *Sir* George, 1150.
 Trial by jury, 43, 52, 146, 804-827.
 Trumbull, Lyman, 796.
 Twain, Mark, 725.
 Tweed, William Marcy, 648, 995.
 "Two Years before the Mast," 47, 49, 57.
 "Uncle Tom's Cabin," 843.

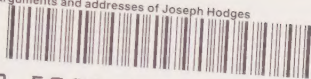
[The figures refer to pages]

- Underground railroad, 50, 1087.
 Union League Club, 6, 750, 1029, 1085, 1172.
 Union Pacific Railroad, 159.
 Unitarian Church, 80, 730-736.
 United States Fish Commission, 390.
 United States Supreme Court, *see* Supreme Court (U. S.)
 United States v. Bevans, 383.
 United States v. Singer, 454.
 Universal Postal Union, 622.
 "*Valkyrie III*" (yacht), 160.
 Van Buren, Martin, 51.
 Van Tromp, *Admiral*, 778.
 Van Wyck, Augustus, 700, 709-714.
 Van Wyck, Robert, 700, 709-714.
 Vaux, Calvert, 997.
 Veazie Bank v. Fenno, 445.
 Viviani, René, 19, 1034, 1036, 1038.
 Voltaire, 1019, 1068.
 Vose, John Gorham, 101.
 Walker, Thomas M., 1072.
 Walpole, Horace, 1043.
 Walworth, Reuben H., 154.
 Ward, Mrs. Humphry, 892.
 Ware, Darwin, 1175.
 Warren, James, 590.
 Warren, John Collins, 1093.
 Warren, Joseph, 1076.
 Warren v. Charlestown, 523.
 Washington, George, 424, 432, 589-604, 1072, 1078.
 Washington, Treaty of (1871), 374.
 Waterman, Andrew J., 372.
 Webster, Daniel, 22, 41, 44, 46, 49, 757, 802, 804, 1157.
 Welland Canal, 1016.
 Wellman, Francis, 166.
 West Point Military Academy, 93, 198, 222.
Western Medico-Chirurgical Journal, 65.
 Western Union Telegraph Co., 73.
 Westminster Hall, 56, 74.
 Wheaton, Henry, 58.
 Whig Party (U. S.), 117.
 White, Andrew D., 607, 622, 1061.
 White, Edward D., 419.
 Whitridge, F. W., 807.
 Whittmore, Williams H., 97.
 Widener Library, 1171.
 Williams, Roger, 866.
 Wills, 155, 161.
 Wilson, Henry, 44.
 Wilson, Woodrow, 1020, 1037.
 Winthrop, John, 1111.
 Winthrop, Robert C., 114, 1095.
 Wirt, William, 40.
 Wolfe, John David, 995.
 Woman's Medical College, 737.
 Women, 737-749, 983, 1063, 1068.
 Women lawyers, 739, 1156.
 Wood, George, 104, 143, 151.
 Wood, Leonard, 1026.
 Wren, *Sir* Christopher, 987.
 Wright, Elizur, 53.
 Wyndham, *Sir* William, 913.
 Yale University, 1081.
 Zola, Emile, 725, 806-808.

[illegible]

Richter E660.C54

Arguments and addresses of Joseph Hodges



3 5051 00443 1112

